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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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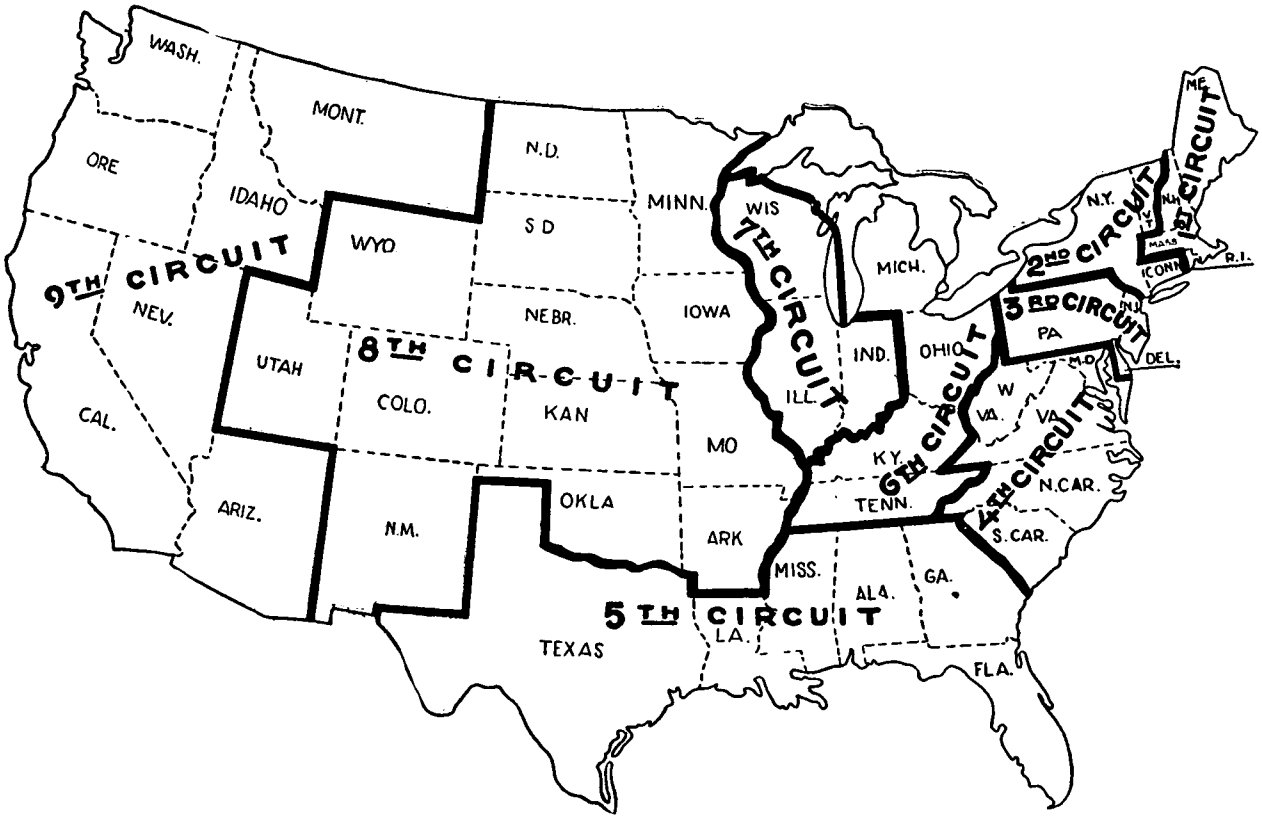

Map Showing States included in each of the nine Federal Judicial Circuits.

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.*

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

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*Retired under Act Feb. 25, 1919. [1] Died May 16, 1922. [2] Appointed July 24, 1922.

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[3] Died May 7, 1922.

[4] Appointed June 22, 1922.

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COURT OF APPEALS OF DISTRICT OF COLUMBIA

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Hon. CHARLES H. ROBB, Associate Justice.....Washington, D. C.
Hon. JOSIAH A. VAN ORSDEL, Associate Justice.....Washington, D. C.

*Retired under Act Feb. 25, 1919.

[5] Appointed May 16, 1922.

CASES REPORTED

CASES REPORTED

ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND CIRCUIT.

THIRD CIRCUIT.

FOURTH 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

REYNOLDS v. UNITED STATES.*

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

No. 3639.

1. **Criminal law ⊜29—Separate and distinct offenses may be created out of the same transaction.**

   It is competent for Congress to create separate and distinct offenses growing out of the same transaction; the test of identity of offenses being whether the same evidence is required to sustain each.

2. **Criminal law ⊜984—Defendant cannot be punished for manufacturing intoxicating liquors and also for having implements and materials for manufacture.**

   Defendant could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors, and the other the possession of implements and materials designed for manufacture of such liquor, where the manufacture was the dominant feature of the first count, and though she did not ask that the government be required to elect, she was entitled to be relieved from punishment under the second count, on motions for a new trial and in arrest of judgment asserting double punishment.

3. **Criminal law ⊜1215—Both fine and imprisonment not permissible punishment on first conviction for manufacture of liquor.**

   Under National Prohibition Act, § 29, authorizing punishment by fine or imprisonment on a first conviction for manufacturing liquor, both fine and imprisonment are not permissible.

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

Mrs. Bessie Reynolds was convicted of offenses, and she brings error. Reversed in part, and affirmed in part, and remanded, with directions.

John E. Bell, of Memphis, Tenn. (Bell, Phillips & Lyons, of Memphis, Tenn., on the brief), for plaintiff in error.

Geo. C. Taylor, U. S. Atty., of Greeneville, Tenn. (Thos. J. Walsh, Asst. U. S. Atty., of Humboldt, Tenn., and W. H. Fisher, Asst. U. S. Atty., of Jackson, Tenn., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

PER CURIAM. Plaintiff in error was convicted upon each of two counts of an indictment under the National Prohibition Act (41 Stat. 305); the first count charging the unlawful manufacture and possession of intoxicating liquors, and the second charging the possession of certain implements and materials designed for the manufacture of intoxicating liquors for unlawful use. The judgment covered conviction under both counts. The charges contained in the respective counts grow out of substantially the same transaction. In each the charge is laid as on or about May 25th.

[1] The testimony principally relied upon for conviction as to each count related to the finding in the basement of the residence of plaintiff in error, on May 25th, of certain manufactured liquors and certain utensils and materials for such manufacture. The sole contention of plaintiff in error made here (although stated in two forms) is that she has been twice punished for a single offense, invoking in support of that contention divers holdings of state courts under what is called the "same transaction" rule. This broad rule, however, does not prevail in the courts of the United States, wherein it is well settled that it is competent for Congress to create separate and distinct offenses growing out of the same transaction; the test of identity of offense being whether the same evidence is required to sustain each.

In Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236 (habeas corpus to review conviction by court-martial), it was held that a charge of conspiracy to defraud and a charge of causing false and fraudulent claims to be made were separate and distinct offenses, and separately punishable; "one requiring certain evidence, which the other did not." The court said:

"The fact that both charges related to and grew out of one transaction made no difference." 183 U. S. 394, 395, 22 Sup. Ct. 193, 46 L. Ed. 236.

In Burton v. United States, 202 U. S. 344, 380, 381, 26 Sup. Ct. 688, 698 (50 L. Ed. 1057, 6 Ann. Cas. 392), it was held that a plea of former jeopardy is bad "if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact," quoting with approval the statement in Bishop's Criminal Law that "the jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both." It was held that an agreement to receive compensation, whether received or not, for prohibited services, and the receiving of such compensation whether in pursuance of a previous agreement or not, are separate and distinct offenses, and punishable accordingly.

In Gavieres v. United States, 220 U. S. 338, 342, 31 Sup. Ct. 421, 55 L. Ed. 489, it was again held that a single act may be an offense against two statutes, and that, if each requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other. It was accordingly held that one convicted and punished under an ordinance prohibiting drunkenness and rude and boisterous language was not put in second jeopardy by being subsequently tried under an-

other ordinance for insulting a public officer, although the latter charge was based on the same conduct and language as the former, and for the reason that the two offenses were separate and required separate proof to convict.

In Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710; 59 L. Ed. 1151, the rule that the same course of conduct and upon the same occasion may amount to separate offenses and be separately punished was applied in holding that successive cuttings of different mail bags with criminal intent, although parts of one continuous transaction, constituted separate offenses, and for the reason that it was the intention of Congress to protect each mail bag from felonious injury and mutilation, and that the offense is complete when one mail bag is so cut or injured, and that, notwithstanding the "transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, and with the intent charged."

On the other hand, in the case of Nielsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118, it was held that a conviction (under a federal statute for the suppression of polygamy in Utah) of unlawful cohabitation was a bar to prosecution for adultery with the woman with whom such cohabitation was had, for the reason that the statute, as construed by the Supreme Court, required, in order to conviction of unlawful cohabitation, that the parties should live together as husband and wife, and that such living together implied sexual intercourse, which was the adulterous conduct charged in the second prosecution. As there stated (131 U. S. 188, 9 Sup. Ct. 676, 33 L. Ed. 118):

"Where * * * a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

[2] In applying these principles to the case before us, we think the first count should be treated as charging the manufacture of intoxicating liquor, and whether or not the words "and possess" should be regarded as surplusage. Manufacture is at least the dominant feature of that count. It was so treated by the court below; it is so treated by the government here. Certainly the charge of manufacturing cannot be rejected as surplusage. The question of double punishment may not improperly be tested by imagining the separate counts as separate indictments, separately tried. It would seem clear that, had plaintiff in error first been tried and convicted upon the charge contained in the second count before us—that is to say, of having in her possession implements and supplies designed for the unlawful manufacture of intoxicating liquors—such conviction would not have been a bar to a subsequent prosecution for the offense of unlawfully manufacturing such liquor, and because the evidence required for conviction upon the charge of possessing implements and materials designed for manufacture would not be sufficient to convict of the charge of actual manufacture. On the other hand, had she been first convicted under an indictment charging the unlawful manufacture of intoxicating liquor, it is difficult to escape the conclusion that such conviction would bar

prosecution under a later indictment for the offense of having in possession implements and materials designed for such manufacture.

The evidence required for conviction of manufacturing would be sufficient to convict of having in possession implements and materials therefor, and for the reason that such manufacture would be impossible without implements and materials for the purpose. We do not understand it necessary to double punishment that each offense contain an element not found in the other. To our minds there is nothing illogical in the fact that the question of double punishment, in the contingencies stated, is made to depend upon the accidental order of prosecution. Indeed, as a practical proposition, a court, in punishing under the later conviction, would naturally take into account the prior punishment for an offense which was but an incident of the subject of the later prosecution.

Where, as here, trial is had simultaneously upon more than one count, the court has ample power, by requiring election or otherwise, to protect a defendant against double conviction. Although in the instant case it does not affirmatively appear that plaintiff in error asked that the government be required to elect between the two counts, we think she was entitled to be relieved from punishment under the second count under her motions for new trial and in arrest of judgment, each of which asserts double punishment.

[3] The court, however, imposed punishment by both fine and imprisonment. The journal entry does not show which of these punishments was imposed upon the conviction under the first count, and counsel sharply disagree on that subject. Under the act (section 29) both fine *and* imprisonment were not permissible upon conviction for a first offense, as this was charged to be. The statute imposes fine or imprisonment. Under the second count fine alone was imposable.

It results, from these views, that the conviction under the second count should be reversed and set aside, the conviction under the first count affirmed, the entire sentence reversed and set aside, and the record remanded to the District Court, with directions to enter appropriate judgment upon the conviction under the first count. Williams v. United States, 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509; Wechsler v. United States (C. C. A. 2) 158 Fed. 579, 583, 86 C. C. A. 37; Johnson v. United States (C. C. A. 7) 215 Fed. 679, 687, 131 C. C. A. 613, L. R. A. 1915A, 862; Ulmer v. United States (C. C. A. 6) 219 Fed. 641, 647, 134 C. C. A. 127; Gray v. United States (C. C. A. 6) 276 Fed. 395, 397.

LEWIS v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1922.)

No. 3589.

Internal revenue ⊂⊃2—Statute as to forfeiture of conveyance used to avoid tax repealed by Prohibition Act as to transportation of liquors.

Rev. St. § 3450 (Comp. St. § 6352), providing for the forfeiture of any conveyance used in removing or concealing any goods in respect whereof any tax shall be imposed, with intent to defraud the United States, is impliedly repealed, so far as vehicles used in transporting or concealing intoxicating liquor manufactured and intended for beverage purposes are concerned, by National Prohibition Act, § 26, providing for the condemnation of vehicles so used, and section 35 repealing inconsistent acts.

In Error to the District Court for the Eastern District of Tennessee; E. T. Sanford, Judge.

Proceeding by the United States to condemn one Buick automobile, claimed by D. A. Lewis. Judgment of condemnation, and claimant brings error. Reversed, and libel dismissed.

S. G. Heiskell, of Knoxville, Tenn., for plaintiff in error.

Geo. C. Taylor, U. S. Atty., of Greeneville, Tenn. (Fred H. Parvin, Asst. U. S. Atty., of Rogersville, Tenn., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The United States filed a libel against one Buick automobile, and alleged that it was entitled to condemnation because the automobile had been seized by the deputy collector of internal revenue while it was being used for concealing or removing whisky upon which the internal revenue tax had not been paid and for the purpose of defrauding the United States of such tax; such removal and concealing being a violation of R. S. § 3450 (Comp. Stat. § 6352). There was a judgment of condemnation, and the claimant brings error.

Without discussing details, we conclude that there was no reversible error upon the trial, save as to one question necessarily involved. It is claimed that the forfeiture of the statute (R. S. § 3450), under which law condemnation is sought to be supported, has been, so far as it is invoked in this particular case, impliedly repealed by the National Prohibition Act (41 Stat. 305), and this question must be decided. The argument in favor of the implied repeal rests upon the principles adopted by the Supreme Court in U. S. v. Yuginovich, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043, and the controlling consideration is whether there is such inconsistency, between a forfeiture of this automobile, under these circumstances, pursuant to section 3450 and that forfeiture which is provided for under section 26 of the National Prohibition Act, as to indicate that Congress did not intend a forfeiture under either section which the prosecutor might select.

It is not necessary to repeat what is said in the Yuginovich Case. The act now charged against Lewis was the transportation in his au-

tomobile of intoxicating liquor upon which no tax had been paid under the internal revenue law. Concededly this liquor had been manufactured for and was being concealed and transported for beverage purposes. The primary act, the removing and concealing, was the same when involved under one statute as under the other. The punishment provided under section 3450, as it has been construed (Goldsmith v. U. S., 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed. 376), was the confiscation of the automobile wholly without regard to the question whether the owner or lienholder was in any degree at fault; the punishment provided by the National Prohibition Act (section 26) was a forfeiture of the machine to the extent only of the interests of those persons who were connected with the offense in some degree of responsibility, guilt or negligence. Here, then, is, in its superficial aspect, a plain case of a later statute which provides another or lesser punishment for the same offense reached by the earlier statute and which therefore impliedly repeals the earlier statute, as far as necessary to prevent this inconsistency. It remains to consider those aspects of the matter which are alleged to take the case out of this general principle.

Obviously the repeal is not complete. Section 3450 extends to all internal revenue laws and would reach a great variety of condemnations which cannot be brought about under section 26. This is not a controlling consideration. Since the repeal is only by implication there is no necessity that it should be complete. It will be effective to the extent of the inconsistency, and the remainder of the earlier statute will remain in full force. Section 35 expressly so declares. Wood v. U. S., 16 Pet. 342, 363; 25 R. C. L. 916, note 15. For this reason a holding that this libel cannot be maintained will not impair the efficiency of section 3450 with reference to articles smuggled to avoid import duty or to the various other objects covered by it, including the concealing of nonbeverage liquor.

An apparent differentiation between the statutes is found in the intent with which the act is done. There is no violation of section 3450, unless the transportation is with intent to defraud the revenue law; there is complete violation of section 26 without any such intent. This differentiation cannot be accepted as vital. Confining the application of the two statutes to this particular transaction, and under the principles discussed and affirmed by us in our opinion in Reynolds v. U. S., 280 Fed. 1, filed April 4, 1922, it might be forcefully claimed that since the evidence which would show transportation with intent to defraud the revenue would necessarily and always also show transportation, a trial under the first charge would bar a later trial under the second, and simultaneous prosecution would raise the question of double punishment, and analogy thereto might support the theory of implied repeal. However that might be, the specific claim now presented, viz. that the presence in the one case and the absence in the other of the intent to defraud the revenue, as a necessary element of the offense, prevents an implied repeal, is ruled by the Yuginovich Case. R. S. § 3257 (Comp. Stat. § 5993), was held to be repealed. That section provided punishment for a distiller who attempted to defraud the revenue law. The comparable section of the National Prohibition Act punished

a distiller regardless of his intent, and provided a lesser punishment. We see no possible distinction, in this respect, between the comparison made by the Supreme Court of a statute directed against those distillers who attempted to defraud the revenue law with a later statute against all distillers, and the comparison here to be made of a statute against those who transport with intent to defraud the revenue law and a later statute against all who transport. This distinction, as to the intent to defraud the revenue law, did not preserve section 3257, and it cannot preserve section 3450, in that extent as to which 3450 is subject to the same fatal comparison. Counsel for the United States now say, and with great plausibility:

"The Volstead Act has no forfeiture provision resting upon the offense of attempting to defraud the United States of taxes. The case at bar is based upon that one offense. The act relied upon in the present case was a concealment of an untaxpaid commodity in an attempt to defraud the United States of a tax. There is no later enactment covering this offense."

This argument might convince, but it proves too much. It equally applies to section 3257, and equally proves that this section was not repealed; but the Supreme Court says it was.

It is next contended, in order to escape the rule of the Yuginovich Case, that section 3450 punishes by forfeiture in all cases and section 26 punishes only in case there is a specific arrest and conviction for an underlying offense. This is a distinction, but we think not a difference. The fact that a second statute covers the same act and provides a smaller penalty leads to the conclusion of an implied repeal; so when the second statute covers the same act as a reason for confiscation, but provides some exemptions from the condemnation, we have complete analogy to a lesser penalty. Even if this reason were imperfect, the necessary scope of the Yuginovich decision includes this contention. Section 3450 forfeits all automobiles (used with intent, etc.), and section 26 reaches only those in the possession of a man convicted; but section 3257 punished all distillers (with intent, etc.), and the Volstead Act only those who had no permit. In each case, the later act made exceptions from the class. Again the analogy is perfect.

We are not advised of any other supposed distinctions between the question now presented and that which has been decided by the Supreme Court, and our views concerning those which we have now considered make it necessary to hold that section 3450 is so far repealed that there cannot be a forfeiture thereunder of the means used in transporting or concealing intoxicating liquor manufactured and intended for beverage purposes. However, this result would be sustained as well by the broader proposition that under the circumstances here existing, there could not have been the intent—necessary under section 3450—to defraud the United States of the tax, and the validity of this broader proposition should be considered. The intent in that section specified is that to defraud of "such tax," and this reference is to "any tax" which "is or shall be imposed" in respect of "any goods or commodities." By the system existing when section 3450 was adopted, it was contemplated that a specified tax was levied by the law upon all distilled spirits and that this tax must be paid by attaching to

the container advance paid revenue stamps, with which it was the duty of every manufacturer to provide himself. This whole system, the automatic imposition of the tax and the advance or simultaneous payment therefor, was abolished by the new law. Stamps were expressly forbidden and—so far as we observe—no other method of payment was provided, if the liquor was for beverage purposes.

It is not easy to see how a duty to pay a tax can arise, if there is no way in which it can be paid and no officer authorized to receive it; nor how, lacking any law which makes it a duty to pay, there can be an intent to defraud the law by not paying, or by acts which would be in aid of an intent not to pay. The only tax which now is ever imposed against such liquor, and is also made payable, is that double tax which the collector specifically assesses in any case where evidence of an unlawful manufacture comes to his notice. The very provision that he shall assess a double tax may be said to imply that one-half of it is in place of that original tax which would have accrued under the old law, but which never had accrued under the new, and which therefore must be specifically levied. Of course, after such assessment, there could be an intent to defraud the United States out of such tax; but that case is not before us. Without doubt the power to tax illicit liquor, in spite of the absolute prohibition against manufacture, continues unimpaired; but the actual existence of any such tax until it is specifically assessed may well be thought to be inconsistent with the abolition of all existing methods of payment and the substitution of no other method.

This question, whether there can be the intent to defraud here alleged, has recently been decided by the Circuit Court of Appeals of the Second Circuit (U. S. v. Two Thousand Cases, etc., 277 Fed. 410), and it concluded that section 3453, R. S. (Comp. St. § 6355), relating to possession of liquor for the purpose of defrauding the internal revenue laws and to avoid payment of the tax, was so far repealed that it could not be applied to the possession of liquor intended for beverage purposes. Its reasoning necessarily leads, we think, to the same conclusion as to section 3450. The court said:

"The Congress, if it had so desired, could have taxed prohibited liquor, and the Supreme Court has so stated. * * * The question here, therefore, is not one of the power, but of legislative intent. * * * 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."

This was doubtless the view taken by the Circuit Court of Appeals of the Fifth Circuit in U. S. v. One Haynes Automobile, 274 Fed. 926, when it said that it was evident that the tax which it was claimed had not been paid was the double tax and penalty directed by section 35. This case involved precisely the same question now before us, and R. S. § 3450 was held to be pro tanto repealed. The court said:

"It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under section 26 of the Volstead Act, with its provisions for preserving the rights of third persons, and still leave them subject to be forfeited under the more drastic provisions of Revised Statutes, § 3450."

The Fourth Circuit Court of Appeals has taken the same general position. In Reed v. Thurmond, 269 Fed. 252, that court held that R. S. § 3296 (Comp. St. § 6038), was repealed, and said (page 254):

"To our minds 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 same substantial question, though not directly involving section 3450, was decided at about the same time by the Circuit Courts of Appeals of the Eighth and Ninth Circuits. The latter was reported in Farley v. U. S., 269 Fed. 721. It held that the National Prohibition Act covered the whole field of acting as a retail liquor dealer, and therefore repealed the earlier internal revenue law, punishing for carrying on this business without paying the tax, and this in spite of the provisions of section 35. The substantial reason for this conclusion was that the entire subject-matter of criminal liability for manufacture or traffic in intoxicants was covered by a later statute, with penalties different from those obtaining under the old statute.

The decision in the Eighth Circuit was in Ketchum v. U. S. (C. C. A.) 270 Fed. 416. The same result was reached as to some of the same sections as by the Supreme Court in the Yuginovich Case; but the Eighth Circuit Court of Appeals plants its decision largely, if not mainly, upon the theory that the old taxes are no longer possible of payment, and hence there can be no intent to defraud by not paying them. Speaking of distillers, the court said (pages 417, 418):

"As the Eighteenth Amendment and the act absolutely prohibited the manufacture and sale of spirituous liquors, except for certain purposes mentioned in the act, the procedure for which is provided for therein, there could have been in force at the date charged no law which would have permitted the defendants to be in possession of a distillery such as is described in the record in this case, whether registered or not. The defendants could have in no way obtained a register of their distillery for the purpose for which they were using it. They could not have carried on the business of a distiller of spirituous liquors, even if they had given a bond, and there was no way by which they could give such bond. The laws in force absolutely prohibited such business, bond or no bond. *They could not have carried on the business of a distiller in spirituous liquors with intent to defraud the United States of the tax on the spirits distilled by them, for the reason that at the time the offense charged was committed it would have been impossible for the defendants to pay any tax, or to receive any protection even if it had been paid.* [Italics ours.] There was no tax to be paid. To absolutely prohibit the manufacture and sale of spirituous liquors, and then to send persons engaged in such business to the penitentiary because they had not paid a tax on the spirits distilled, involves such a contradiction of purpose that there would seem to be no escape from the conclusion that the law requiring the payment of a tax is inconsistent beyond all reasonable doubt with the act."

This comment is plainly applicable to section 3450, and in view of the consensus of opinion in all the Circuit Courts of Appeal which have passed upon the question, and in view of the inherent strength of the argument, we should be inclined to say that the underlying duty to pay the old tax did not so persist, after the Volstead Act became effective, as to furnish the necessary basis for an intent to defraud by not paying it. This inference would be fortified by a closer study of the "existing

laws" to which section 35 refers than has been made in the reported cases. R. S. § 3251 (Comp. St. § 5985), said:

"There shall be levied * * * on all distilled spirits * * * a tax * * * to be paid by the distiller * * * before removal from the distillery warehouse. * * * The tax shall be a first lien on the spirits distilled * * *" from the time such spirits are in existence until they are paid.

This was pro tanto superseded by section 48 of the Act of August 27, 1894 (Comp. St. § 5986), providing that—

"On and after the passage of this act there shall be levied and collected on all distilled spirits * * * that may be * * * thereafter produced, a tax," etc. "The tax herein imposed shall be paid by the distiller of the spirits, on or before their removal," etc.

Before January, 1920, this in turn, had been replaced by section 600 of the Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, § 5986e), in the language of the act of 1894, except that the tax of $6.40 per gallon is "in lieu of the internal revenue tax now imposed thereon by law," and the tax is "to be paid by the distiller * * * when withdrawn, and collected under the provisions of existing laws." R. S. § 3253 (Comp. St. § 5988), also has a bearing. It is given in the margin.[1]

While it might be assumed that the lien given by section 3251 continued under the act of 1919, which gave a tax "in lieu of" all former ones, yet the tax which "shall be levied and collected" seems to be not so much a tax in rem upon the spirits as in personam against the distiller. No other person except the distiller is permitted to pay. Collection is to be made from him. It is not clear how a tax on beverage liquor that was created only as one to be levied against and paid by the distiller can exist after payment has been prohibited as to beverage liquor.

While these considerations are persuasive, we hesitate to rest our conclusion in this case upon these views. We say this because the opinion in the Yuginovich Case to some extent assumes that the liquor there involved was subject to the old taxes, without assessment under section 35. However, that question was not particularly considered and was not involved. The court was discussing and combating the broad claim that since the National Prohibition Act beverage liquor was not taxable. To this claim the inclusive language of the act, and the specific provision in section 35 for assessment of taxes, formed a complete answer, and the new statute, providing a smaller penalty for what the court considered the same act, was held to repeal the former statute. This result would follow just the same whether or not the old tax still existed. The fact that under the new law it has become impossible to pay the old tax was not considered by the Supreme Court,

[1] Sec. 3253. (Tax on Spirits Removed Without Deposit in Warehouse.) The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall at any time, when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

and its decision is not necessarily inconsistent with the reasoning and conclusion of the Courts of Appeals of the Second and Eighth Circuits, above cited; but, being satisfied that the forfeiture of section 26 has been substituted for that of section 3450, we find it unnecessary to decide what we have called the broader question.

Another element in this case should be mentioned as also tending to support the conclusion which we reach: Lewis and his associates were neither manufacturers nor dealers. The tendency of the evidence is that they had bought the liquor from someone and were intending to drink it. Section 35 of the Volstead Act is the one which is relied upon to preserve or to create the untaxpaid status of the liquor; but this section says:

"This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount," etc.

The first sentence of this extract only purports to maintain a personal liability imposed upon the one who manufactures or traffics (even if "such" liquor is not defined so restrictively as in the Second Circuit). The tax is to be assessed against and collected from the "person responsible for * * * manufacture or sale." It is not clear in this state of the law how a mere purchaser can be guilty of an intent to defraud the revenue.

The order of condemnation should be reversed, and the libel dismissed.

HERBRAND CO. v. LACKAWANNA STEEL CO.

(Circuit Court of Appeal, Sixth Circuit. April 4, 1922.)

No. 3612.

1. **Sales ⟸445(6)—Action for breach of warranty not barred as matter of law by payment of price.**

   Retention of goods and payment of purchase price, or suffering judgment therefor without defense, and with knowledge of breach of warranty, does not as matter of law bar action for the breach; the question of waiver being at the most one of fact.

2. **Sales ⟸288(6)—Payment for goods held not to bar action for breach of warranty under Ohio statute.**

   Retention of goods and payment of purchase price with knowledge of breach of warranty did not bar an action for the breach, under the Uniform Sales Act of Ohio (Gen. Code, § 8395), in view of Gen. Code, §§ 8429, 8449.

3. **Sales ⟸445(6)—Extension of time for payment does not show waiver of breach of warranty under Ohio statute.**

   While the extension of time for payment for goods would furnish a good consideration for the waiver of action for breach of warranty, an extension does not as matter of law show such a waiver, under the Uniform Sales Act of Ohio (Gen. Code, § 8395, subd. 1), in view of Gen. Code, §§ 8429, 8449.

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4. Sales ⊜445(6)—Waiver of action for breach of warranty held for jury under Ohio statute.

In action for purchase price of steel, wherein defendant counterclaimed for damages for breach of implied warranty of fitness of steel previously purchased and paid for, whether defendant waived its right to damages *held* for the jury, under the Uniform Sales Act of Ohio (Gen. Code, § 8395, subd. 1) and Gen. Code, §§ 8429, 8449.

5. Customs and usages ⊜19(3)—Testimony as to custom held not conflicting.

Cross-examination of witness, testifying to custom of replacement of defective steel or credit for its value, *held* not to create a conflict in the testimony, so that trial court would have been justified in instructing the jury that the custom was established by uncontradicted evidence; the cross-examination affecting only the weight of the testimony of the witness, other witnesses testifying to the custom.

6. Customs and usages ⊜7—Custom as to replacement of defective steel held not unreasonable.

A custom in the steel trade, under which the buyer's only remedy for defective steel was replacement or credit for its value, at the buyer's option, the seller not being liable for cost of labor or other consequential damages, was not unreasonable.

7. Customs and usages ⊜10—Custom as to remedies of buyer held not to forbid recovery for failure to replace defective steel.

A custom in the steel trade, under which buyer's only remedy for defective steel is replacement or credit for its value, at the buyer's option, the seller not being liable for cost of labor or other consequential damages, does not forbid recovery for failure to replace defective and unused steel, whose purchase price was greatly in excess of its scrap value; buyer having asked replacement, and seller having failed to make replacement.

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Action by the Lackawanna Steel Company against the Herbrand Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition of remittitur.

Gustav Ohlinger and Alexander L. Smith, both of Toledo, Ohio (Smith, Beckwith & Ohlinger, of Toledo, Ohio, on the brief), for plaintiff in error.

C. M. Horn, of Cleveland, Ohio (Dustin, McKeehan, Merrick, Arter & Stewart and W. B. Stewart, all of Cleveland, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff sued defendant for the price of a large quantity of steel bars sold to defendant in the year 1919. Defendant admitted liability therefor, but counterclaimed for alleged damages for an asserted breach of implied warranty of fitness of a large amount of steel bars purchased by defendant from plaintiff in the previous year (October 10, 1917) for use in the manufacture of elbow joints for Liberty motors. The damages claimed consisted of the difference between the invoice value of the defective steel and its scrap value ($4,605.15), together with expenses incurred by plaintiff ($16,927.50) in manufacturing the defective forgings.

Plaintiff denied generally the merits of defendant's claim, asserting

two affirmative defenses: First, payment by defendant in full for the steel after it knew or should have known of the alleged defects therein; and, second, that under a general custom existing in the steel trade, during and long prior to October, 1917, the manufacturer was not liable for the cost of labor or other expense incurred by the buyer in working defective steel, but that the latter's remedy with respect to reimbursement was limited to the replacement of the steel; that this custom was known to both plaintiff and defendant, and that the contract was made pursuant thereto and in recognition thereof.[1] At the close of the evidence verdict was directed for plaintiff.

It appeared by defendant's testimony that not exceeding 2 per cent. of the steel used by it during January, February and March, 1918 (and which had been shipped by plaintiff in the previous November and December to apply on the 1917 contract), was so seamy and unfit for defendant's purposes as to cause its discarding, either before or during the process of forging; that during the latter part of April or the first of May, 1918, from 8 per cent. to 12 per cent. of the steel used was likewise found to be seamy and unfit, and was so discarded by defendant; that in May as high as 30 per cent. to 40 per cent. was likewise found in the same unfit condition, and was likewise discarded by defendant, which used in the manufacture of its forgings steel not disclosing such unfitness during the forging process; that in the early part of May, 1918, defendant notified plaintiff that the steel was seamy and unfit for its purposes. It further appeared, without dispute, that after defendant discovered the seamy and unfit condition of the steel it paid plaintiff in full therefor, having during the latter part of May and early in June, 1918, asked plaintiff for an extension of time of payment for the steel received, on June 4, 1918, giving plaintiff trade acceptances for about three-quarters of the invoice value of the steel (which trade acceptances it later paid in full without complaint), and on or about June 21, 1918, paying in cash the remaining one-quarter of the price.

Verdict was directed upon the sole ground that defendant's right to complain of the defective steel was barred by its voluntary payment of the purchase price in full, with knowledge of the defects. The learned trial judge based this conclusion largely upon the decision of this court in Marmet Coal Co. v. People's Coal Co., 226 Fed. 646, 651, 141 C. C. A. 402, 407, wherein it was said:

"It is clear that defendant cannot be heard to complain of alleged misrepresentations with respect to barges for which it has paid with full knowledge of the alleged breach."

But the Marmet Case is not authority for the all-embracing proposition that, as matter of law, a purchaser waives right to complain of breach of warranty of fitness by the mere fact of payment with knowledge of the breach. The statement in the Marmet Case must be in-

[1] The statement of the second defense included an allegation that the contract contained an express agreement to replace and an express rejection of liability to claim for labor or damage. The record does not show that this allegation was established. The contract does not seem to have been produced, and it may have been by correspondence.

terpreted in connection with the peculiar facts stated in the opinion, including the considerations that until the suit was begun defendant had purposely refrained from complaining to the plaintiff of the condition of the barges purchased, and that its failure to pay in full was due only to lack of funds therefor. The question of notice of breach of warranty within a reasonable time after knowledge thereof was involved generally in the case. The headnote upon that subject manifestly relates to the concrete case.

Nor are the other decisions of this court relied upon by plaintiff authority for the general proposition invoked. Taylor v. Bank, 212 Fed. 898, 129 C. C. A. 418, did not involve a breach of warranty. The defense of failure of consideration was held waived by a voluntary promise to pay a purchase money note in consideration of a given extension thereof. In Birds-Eye Veneer Co. v. Franck-Philipson Co., 259 Fed. 266, 170 C. C. A. 334, a warranty of commercial utility was originally involved, but the pertinent holding was that such warranty was waived by the making of a new contract fixing the several rights of the parties. Lazarus v. Kessler (C. C. A.) 269 Fed. 520, involved no question of breach of warranty. The pertinent decision there was that a party who, under contract for the purchase of whisky at a stated price, received and paid for, without protest, successive shipments made after an additional war tax had been imposed, with knowledge that such tax was added to the price, was estopped from recovering the amount paid on the ground that the payments were compulsory. This holding was based on the familiar proposition that money voluntarily paid, with full knowledge of the facts cannot be recovered back.

[1-3] The instant case, however, is one of implied warranty within the Uniform Sales Act of Ohio (General Code Ohio, § 8395, subd. 1). Section 8429 provides that, in the absence of express or implied agreement acceptance of goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy, for breach of any promise or warranty in the contract of sale,[2] but that "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor." In the instant case no question of due notice of breach is involved, for previous to the giving of the acceptances plaintiff had been notified that the steel was seamy and unfit for defendant's purposes. Moreover, the act (section 8449) expressly gives to the buyer, in case of breach of warranty, an election of any one of four courses, two of which are pertinent here, viz.: First, to accept or keep the goods and set up against the seller the breach of warranty by way of recoupment against action for the price; and, second, accept or keep the goods and maintain an action against the seller for damages for breach of warranty. At the common law, as recognized by this court, the choice of remedies in case of breach of warranty given a buyer who does not disaffirm and rescind the contract are substantially (if not identically) the same as under section 8449 of the Ohio Code (Dods-

[2] Such was the common-law rule, recognized by this court. Carleton v. Jenks, 80 Fed. 937, 941, 26 C. C. A. 265.

worth v. Hercules Iron Works, 66 Fed. 483, 488, 13 C. C. A. 552); and previous to the enactment of the Uniform Sales Act it was the general, and we think the better, rule that retention of the goods and payment of the purchase price, or suffering judgment therefor without defense, and with knowledge of breach of warranty, did not, as matter of law, bar action for the breach—the question of waiver being, at the most, one of fact. Mechem on Sales, § 1836;[3] 24 R. C. L. § 515;[4] 35 Cyc. 433.[5] Upon the subject of waiver generally, see Williston on Sales, § 488, pp. 850–853. These propositions are amply supported by authorities. We cite in the margin a few of the many illustrative cases.[6] No reason is apparent why the same construction should not be put upon the code provision in question. Indeed, there is even greater reason for applying the rule of nonwaiver by payment under a statute expressly declaring that the warranty survives acceptance, and in connection with section 8449, expressly giving right to accept after knowledge.

We are cited to no controlling authority, and we know of none, which, as applied to the facts of this case, would forbid recovery from the mere fact of payment with knowledge of breach. While the extension of time of payment would furnish a good consideration for the waiver of action for breach of warranty, the record does not show, as matter of law, that such waiver was within the contemplation of either party. It would have been open to the jury to find the contrary. As already said, there was evidence that previous to giving the notes defendant had notified plaintiff of the seamy and unfit condition of the steel. It appears by plaintiff's evidence that on June 17, 1918 (which was subsequent to the giving by defendant of its trade acceptances, but prior to the payment in cash of the remainder of the purchase price), defendant, by letter to plaintiff's district sales manager, called attention to the seamy and unfit condition of portions of the steel, saying:

"In view of the fact that this will cause a shortage of steel when we are nearing completion of these orders, trust you will take this matter up immediately with us, and see what can be done in regard to replacing same."

This manager answered, asking for a statement as to when the steel was shipped, "so that this matter may be taken up and adjusted at once"; to which defendant replied, giving the numbers of the cars which contained the shipments in question.[7] It further appeared that

[3] "So the fact that the buyer may have paid the price, or given his note for it, however much it may bear upon the credibility of his complaints, does not debar him from recovering for a breach of warranty."

[4] "According to the better view, the fact that the buyer pays the price after notice of defects in the goods, constituting a breach of the seller's warranty, does not constitute a waiver of the breach so as to preclude him from maintaining an action therefor."

[5] "According to the weight of authority, payment, part payment, or the giving of notes for the purchase price, is not a waiver of a breach of warranty unless an intent to waive such breach is proven. * * *"

[6] Aultman v. Wheeler, 49 Iowa, 647, 649; Taylor v. Cole, 111 Mass. 363, 365; Gilmore v. Williams, 162 Mass. 351, 352, 38 N. E. 976; Osborne v. Marks, 33 Minn. 56, 60, 22 N. W. 1; Park v. Richardson, 81 Wis. 399, 403, 51 N. W. 572; Johnson v. Roy (C. C. A. 3) 112 Fed. 256, 257, 50 C. C. A. 237.

[7] The last shipment seems to have been made in May.

on July 1, 1918, the representatives of plaintiff and defendant met at the latter's plant, where plaintiff was shown some bars which defendant claimed to be seamy, also a pile of rejected forgings, which, there was evidence tending to show, was the steel which defendant did not use because defective, after which plaintiff's representative took up the matter with plaintiff, telling it that in his opinion some of the steel in question was seamy. There was also testimony tending to show that on or about that date plaintiff requested defendant to use such of the steel as it was able to use, and that defendant thereafter continued to do so. It also appeared, by defendant's testimony, that on August 21, 1918, defendant advised plaintiff that it had "some 20 tons of seamy bars, and 40 tons of forgings that were seamy, and wanted to know what we were going to do about it, and said that the Herbrand Company wanted it replaced" (there was testimony that this steel was the same shown plaintiff's representative in July); that defendant "said nothing about any claim for damages," or that plaintiff ought to stand the expenses of labor on the rejected forgings; that defendant was told (at what seems to have been the interview of August 21, 1918) that plaintiff's representative would take up the matter with his home office, which he at once did; that about September 1st thereafter defendant presented to plaintiff's representative a statement claiming damages, including "cost of defective material, labor cost, etc."; that this representative took up the matter with plaintiff, and wrote defendant that, on being advised of the tonnage of steel on hand claimed to be seamy and nonusable, the subject would be again taken up with plaintiff "with the idea of securing, if possible, replacement of the steel, but nothing farther."

[4] We think it clear that it was error to direct verdict for plaintiff because of defendant's payment of the purchase price.

The defense of custom remains. Its consideration by the trial judge became unnecessary, in view of the conclusion otherwise reached. Plaintiff presented testimony of the existence for the last 13 years of a custom in the steel trade under which the buyer's only remedy for defective steel is replacement or credit for its value, at the buyer's option; the seller not being liable for cost of labor or other consequential damages. Defendant presented no testimony to the contrary. It appeared, however, upon cross-examination of plaintiff's agent and witness that he learned of the existence of the custom about 13 years before "by getting around among the trade and from hearsay evidence in the steel business. I observed it; * * * it was in the air"; that it was always in the plaintiff's contracts; that his knowledge of this custom was not based solely on the fact that he always saw it in plaintiff's contracts, although that fact "would have something to do with it," although "not a very important part." Defendant insists that this cross-examination created a conflict of testimony, thus not leaving the testimony as to custom undisputed.

[5, 6] In our opinion, however, this cross-examination did not create a conflict of testimony; at the most it affected only the weight of the testimony of this one witness. It did not affect the testimony of other witnesses already referred to. Not only did plaintiff's agent testify

that the same custom prevailed, whether the contract of sale was written or verbal, but the record states, in that connection, that "other witnesses called by plaintiff testified that the same custom prevailed, whether or not the contract was written or verbal, or contained any provision limiting the buyer's remedy to replacement." In the absence of evidence contradicting the express, and presumably competent, testimony offered by plaintiff (indeed, the competency of plaintiff's witnesses is not questioned), we think the trial judge would have been justified in instructing the jury that the custom was established by uncontradicted evidence, even if reference thereto was not contained in the contract here in question.

We cannot say that such custom is unreasonable. See Sloan v. Wolf (C. C. A. 8) 124 Fed. 196, 59 C. C. A. 612. This conclusion is fortified, not only by defendant's failure to present testimony disputing the asserted custom, but by the fact, as indicated by the history already set out herein, that when the defective steel was first discovered defendant seems practically to have construed its remedy as limited to a replacement of the defective steel. So far as the record shows, it was not until about September 1, 1918, that defendant claimed damages for the cost of handling and working the defective steel.

[7] But the custom in question did not forbid recovery for failure to replace defective and unused steel, whose purchase price was, according to the tendency of the testimony, $4,605.15 in excess of its scrap value. The record is express that no replacement of the steel was in fact ever made, nor was any credit given defendant on that account. It does not conclusively appear that plaintiff itself was willing to make replacement, or that defendant was in fault for failing to obtain it. It had distinctly asked replacement, and the record would support a finding that plaintiff had at least unreasonably delayed making it. But for his conclusion that the entire action was barred by payment of the purchase price, presumably the trial judge would have allowed (as he should) whatever amendment of the cross-petition might be thought necessary to meet the proofs.

For the error in directing verdict for plaintiff in full of its claim, the judgment of the District Court must be reversed, and a new trial had, unless plaintiff shall, within 30 days after the filing of this opinion (or within such further time as may be given by the district court), duly enter its remittitur of the judgment rendered to the extent of $4,605.15, with interest thereon from the date of judgment, and within such time file in this court due certificate of the fact of such remittitur. In case such action is taken, the judgment of the District Court, as so reduced, will be affirmed. Plaintiff in error will recover the costs of this court.

MUTUAL LIFE INS. CO. OF NEW YORK v. HURNI PACKING CO.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1922.)

No. 5790.

1. **Insurance ⟹400—Death within time specified in incontestable clause does not fix right to contest.**
   Under a provision of a life policy that it shall be incontestable, except for nonpayment of premiums after two years from its date of issue, insured's death within the two years does not fix the right to contest the policy.

2. **Insurance ⟹400—Right to contest within two years may be waived.**
   Under a provision of a life policy that it shall be incontestable after two years from its date of issue, the right reserved to contest it within two years may be waived.

3. **Insurance ⟹400—Affirmative action necessary under incontestable clause.**
   Under a provision of a life policy that it shall be incontestable after two years from its date of issue, affirmative action is necessary to consummation of the inchoate right to contest within the two years.

4. **Insurance ⟹400—Letter refusing to pay held sufficient contest within incontestable clause.**
   Under a provision of a life policy that it should be incontestable after two years from its date of issue, a letter written by the insurer to the beneficiary's attorney declining to pay on the ground of misrepresentation was a sufficient act of contest.

5. **Insurance ⟹400—Provisions as to delivery while in good health, etc., did not make date of delivery "date of issue," within incontestable clause.**
   Provisions of a life policy that it should not take effect until the first premium should be paid, and the policy should be delivered during insured's continuance in good health, did not make the date of delivery the "date of issue" within a provision making the policy incontestable after two years from the date of issue.

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

6. **Insurance ⟹400—Date of antedated policy held "date of issue" within incontestable clause.**
   Where a life policy provided that the applicant might have the policy antedated for a period not exceeding six months and it was dated August 23, though not executed until September 7, and not delivered until September 13, August 23 was the conventional date of execution, and hence of issue, within the provision making the policy incontestable after two years from the "date of issue."

7. **Insurance ⟹175—Date agreed on must be taken as date of policy for all purposes.**
   Where a policy provides that it may be antedated for a period not exceeding six months on the applicant's request, without any restriction of the effect of such date, the date agreed on must be taken as the date of the policy for all purposes thereby affected.

Sanborn, Circuit Judge, dissenting.

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

Action by the Hurni Packing Company against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

G. T. Struble, of Sioux City, Iowa, and Ralph L. Read, of Des Moines, Iowa (Sargent, Gamble & Read, of Des Moines, Iowa, and Jepson, Struble & Anderson, of Sioux City, Iowa, on the brief, and Frederick L. Allen, of New York City, of counsel), for plaintiff in error.

Edwin J. Stason, of Sioux City, Iowa (Charles M. Stilwill, of Sioux City, Iowa, on the brief), for defendant in error.

Before SANBORN and LEWIS, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. This case comes before this court for the second time. 260 Fed. 641, 171 C. C. A. 405. On the first appeal the judgment of the trial court, which was in favor of defendant in error herein, was reversed, and the case was remanded for a new trial, for the reason that the statement made by the insured, in his application for life insurance, that he had not consulted nor been treated by a physician during the previous five years, when in fact he had been treated or prescribed for each year for supposedly temporary ailments, was held to be a material misrepresentation, which under the terms of his contract, invalidated the policy. In the opinion of the appellate court the trial court should have directed a verdict for the defendant.

In the court below, after the case had been redocketed, and after a second trial, the plaintiff, by leave of court, amended its reply as follows:

"The plaintiff states that the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return of the premiums paid or otherwise within the two year period in which the policy might be contested as provided by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer."

At the close of the evidence below, both parties submitted motions for a directed verdict; that of defendant in error was sustained, a verdict was directed accordingly, and judgment for defendant in error resulted.

It is already the law of the case, as held by this court on the former appeal, that the false statement complained of was made, and constitutes a sufficient defense to the collection of this insurance, in the absence of countervailing circumstances. The contention now presented is that the insurance company, under the terms of its policy, has interposed that defense too late for legal effectiveness. This is the only question in the case.

The policy, by the construction of which, coupled with the steps taken by the defendant company to avail himself of its provisions, this case must be decided, was in fact executed in the city of New York by the signatures of the president and secretary on the 7th day of September, 1915. It was then sent by mail to the office of the defendant company in Des Moines, Iowa, for delivery under the terms and conditions of the policy. Said policy was received by defendant's agent on or about September 12, 1915, and was delivered by him to the

insured on or about the 13th day of September, 1915. The policy upon its face contains the permission that "the applicant, upon request, may have policy antedated for a period not to exceed six months." In connection therewith no other qualification, limitation or explanatory matter appears. Interlined between the heading and the body of the application appear these words: "Date policy, August 23, 1915; age 47." This is taken to evidence the request of the applicant referred to, and in accordance therewith the insurance policy contains the following testimonium:

"In witness whereof, the company has caused this policy to be executed this 23d day of August, 1915. W. J. Eastman, Secretary. Charles A. Peabody, President."

It clearly appears, therefore, that the date of execution and of the policy, by contract and agreement, was fixed as the 23d day of August, 1915. It was further provided that the annual premium should be paid upon each 23d day of August thereafter until the death of the insured. In the body of the policy this clause occurs:

"Incontestability: This policy shall be incontestable except for nonpayment of premiums, provided two years shall have elapsed from its date of issue."

The insured died on the 4th day of July, 1917, less than two years from the time the policy was issued under any theory of the case. Proofs of death were duly submitted. Replying to the claim thereby made, on the 24th day of August the attorney for the insurance company, conceded by stipulation to have been clothed with full authority to act in that behalf, wrote to the attorney for the beneficiary, conceded to have like authority, that the company declined to pay the policy upon the ground of the misrepresentation hereinabove referred to. This was the first action of any nature taken by the company to avail itself of the defense reserved in the two-year clause above quoted.

[1-4] It is contended by the insurance company that the policy must have been in effect two years during the life of the insured; otherwise, the right of the insurance company to contest became fixed by death within the period of limitation. We cannot agree with this view. The reservation for the benefit of the company was one that might be waived. Affirmative action was necessary to the consummation of the inchoate right created by the terms of the policy. We are equally of opinion that a repudiation of the claim of defendant in error, such as that made in the letter of August 24th, was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant in error contend.

[5, 6] This being true, there remains only to consider whether the defendant company acted in time. We do not think it did. It is conceded that its letter of repudiation was not written nor mailed until the date it bears, which is August 24th, one full day beyond the two-year period, as evidenced by the date of the policy; but plaintiff in error insists that the date of application, the actual date of execution, the date of delivery, and a provision in the application that the proposed policy shall not take effect "unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy

shall have been delivered to and received by me during my continuance in good health," extend the two-year period of contestability at least to the 7th day of September, if not to the 13th day of September, and that, therefore, its said affirmative act of contest was in good time.

The clause last quoted cannot aid the insurer. Its objective was the good health of the insured at the time of paying the first premium and the delivery of the policy. Conceding that the first premium may not have been paid until the policy was delivered, there is nothing in the record to indicate that the insured was not in good health within the meaning of the instrument on that date. He was found by the examiner for the insurance company to be in good health on the date the examination in connection with the application was made, and there is no intimation that his physical condition had changed in the meantime; but, more than this, the period of contestability was not made to depend upon the payment of the premium nor the delivery of the policy. The language is "two years from its date of issue"; and by agreement the conventional date of execution, and hence of issue, was the 23d day of August, 1915. In the absence of any qualifying language, the date of a policy is always taken to mean the date of its issue; and the language of an insurance policy, when uncertain and ambiguous, has always been construed in favor of the insured and more strongly against the insurance company. So the courts have uniformly held. Mass. Benefit Life Ins. Co. v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261–269; 14 Ruling Case Law, 1201–1233; Anderson v. Mutual Life Ins. Co., 164 Cal. 712, 130 Pac. 726, Ann. Cas. 1914B, 903; Harrington v. Mutual Life Ins. Co., 21 N. D. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373; Wood v American Yeomen, 148 Iowa, 402–404, 126 N. W. 949; Monahan v. Fidelity Mut. Life Ins. Co., 242 Ill. 488, 90 N. E. 213, 134 Am St. Rep. 337.

[7] It was stated in argument, based upon the testimony of the witness Spencer for the company, that this concession that the policy might be antedated had reference only to the payment of premiums and to the privileges attaching to age. While this may have been the chief object in the mind of the company, nothing appears which restricts the effect of the date of the policy to these special objects. We must take the date agreed upon as the date of the policy for all purposes affected thereby.

It is a matter of common knowledge that no policy bears a date identical with that of its delivery, or of conditions and happenings governing the time when it becomes effective. These incidents are rarely regarded as conditioning the date of the issue or execution, as evidenced by the date appearing upon the face of the policy. If it had been the purpose of the insurer to depart from the customary rule of construction and interpretation in this respect, it could, and would, have adopted language expressive of that purpose. Instead of "date of issue," it would naturally have provided that the two years should elapse "from date of delivery," or "from the date the policy becomes effective," or from the "time," instead of "date," of issue. It may be further noted that the language used is *its* date of issue, thereby referring more obviously to the date borne by the policy itself.

We do not feel at liberty to read into this contract terms which it does not contain, nor to vary the natural and customary meaning of the terms employed. In the absence of any qualifying and binding language to the contrary, it may be conceded that an insurance policy would not be conceived to exist prior to the date of the application upon which, in part, it is based; but it was entirely within the contracting power of the parties to stipulate that the issuance of the policy, for all purposes contingent upon such issue, should antedate the actual physical fact, and this, in our opinion, is what they did.

For the reasons above stated, the judgment should be affirmed; and it is so ordered.

SANBORN, Circuit Judge (dissenting). The real question in this case is whether the parties to the insurance policy in controversy agreed thereby that it should be contestable for 2 years from the date of the policy, or for 2 years from the date of the issue of the policy. The clause of contestability, which contains the answer to this question, reads:

"This policy shall be incontestable, except for nonpayment of premiums, provided two years shall have elapsed from its date of issue."

It cannot be successfully denied that this clause in itself expresses an unambiguous agreement that the policy shall be contestable by the company for 2 years from its date of issue. The date of a policy is not generally the date of its issue. Normally and usually the date of a policy is the date of the signature thereto of the officers of the corporation, and that date is almost universally, as it was in this case, a different date from the date of the issue of the policy.

Issue means "To deliver for use." A policy is not issued when it is dated and signed by the officers of the company, nor until it has been delivered to and accepted by the insured. The application for it is a request for a policy; the policy is a proposal of the company to insure on the terms specified therein; the receipt and acceptance of such a policy by the insured first closes the contract. Until that acceptance there may be negotiations, but no contract. Upon such receipt and acceptance on September 13, 1915, and not before, was there a contract in this case, and then, and not until then, was this policy issued. Then was it first "delivered for use," 4 Words and Phrases, First Series, p. 3780; Jefferson Standard Life Ins. Co. v. Wilson, 260 Fed. 593, 171 C. C. A. 357; Logsdon v. Supreme Lodge of Fraternal Union of America, 34 Wash. 666, 76 Pac. 292, 293; Paine v. Pacific Mutual Life Ins. Co., 51 Fed. 689, 693, 2 C. C. A. 459; Equitable Life Assurance Co. v. McElroy, 83 Fed. 631, 642, 28 C. C. A. 365. The date of this policy, therefore, differed from the date of its issue. The former was August 23, 1915, and the latter was September 13, 1915.

Not only this, but the parties to this policy expressly agreed, when this policy was issued, that the date of the policy and its date of issue should be at different times. They agreed that the policy should not take effect, and that was an agreement that its date of issue should not be, until it was delivered to and received by the insured during his con-

tinuance in good health, and that was not until the 13th day of September, 1915.

Nor was this all of their clear agreement upon this subject. They further expressly agreed that the date of the policy should be a date different from and earlier than the date of its issue. They agreed that "the applicant, upon request, may have policy antedated for a period not to exceed 6 months." Pursuant to that provision the applicant requested, and the insurance company granted, its request to antedate the policy to August 23, 1915. Here was an agreement that the date of the policy should be anterior to—that it should be before—some date. What date was the date of the policy to be before? The unavoidable answer is that it was to be before, to be anterior to "its date of issue." So it is that the incontestability clause without ambiguity provides that the policy shall be contestable, not for 2 years from its date, but for 2 years from "its date of issue." Its date was August 23, 1915. Its date of issue was September 13, 1915. The clear purpose and intention of the parties to this policy by the use of this incontestability clause was to give to the company 2 full years from the closing of the contract to contest the policy. It could not contest it before the policy contract was closed, before there was a contract. By the clear terms of the policy this term of contestability extends 2 years from the date the policy contract came into existence—2 years "from its date of issue."

If that clause be interpreted and enforced as it reads in the policy, the antedating clause is perfectly consistent with it, leaves the contestability clause unmodified, and the company's 2 years of contestability intact. But if, by construction, a substitution in the incontestability clause of the term "from the date of the policy" for the term "from its date of issue" be made, then the antedating clause which permits the insured to have the policy dated back not more than 6 months anterior to the date of its issue, gives to the insured the option to reduce the company's period of contestability not exceeding 6 months, to make it 18 months, instead of two years, and the antedating clause thus conflicts with the incontestability clause as the latter is written in the policy, modifies the latter, and cuts down the 2 years of contestability 6 months at the option of the insured. In this state of the case, since the clauses as they read are rational, effective, and consistent, a modification of the incontestability clause by the substitution of "from the date of the policy" for "from its date of issue," does not seem to be required or permissible, nor am I able to believe that the parties to this contract ever intended to make the contract which such a modification would create.

General rules of construction are that all the words and terms of a contract should have effect, if possible, and none should perish by construction, and that where a contract is susceptible of two constructions—one of which makes the different parts of it accordant and another which makes them discordant—the former should be preferred, because it cannot be assumed that the parties intended to insert inconsistent provisions. Burdon Central Sugar Refining Co. v. Payne, 167 U. S. 127, 142, 17 Sup. Ct. 754, 42 L. Ed. 105; Miller et al. v.

Hannibal & St. Joe R. Co., 90 N. Y. 430, 433, 43 Am. Rep. 179; Barhydt v. Ellis, 45 N. Y. 107, 110. If the contestability clause and the antedating clause be enforced as the parties wrote them, without the change of the former "from its date of issue" to "from the date of the policy," that clause and the antedating clause are consistent. Every word of each of the clauses has its normal effect, without impairing or modifying any of the terms of the other, and none of the words or terms of either perish by construction. If, by construction, the term "from its date of issue" be changed to "from the date of the policy," the two clauses conflict, the two years of contestability the parties undoubtedly intended to secure to the company are reduced to 23 months and 10 days, and some of the clear terms of the contestability clause perish by construction.

Again, when the parties to this policy came to make this contract they had the perfect right to agree that the 2 years of contestability should run from the date of the policy or from "its date of issue." The two dates were not the same, they knew these facts, the insurance company had adopted a policy which permitted the insured to have that policy dated not exceeding 6 months earlier than "its date of issue," and had expressly agreed that the company should have the right to contest its policy for fraud for 2 years after "its date of issue." The permission to date back the policy, by the clear terms of the contract as it then read, did not and could not modify or impair the right of the company to the full 2 years of contestability from the date of the issue of the policy, from the time when the contract was first made. The insured accepted the policy contract so reading, and in my opinion the parties to that contract are legally bound by, and should be held to, its terms.

For the reasons which have now been stated, the contract and the facts of this case have failed to satisfy my mind that this court should substitute by construction, for the words "from its date of issue" in this policy, the words "from the date of the policy," reduce the 2 years of contestability from the date of the making of the contract which the policy seems to me to have been intended to secure, and which. it seems to me, it did secure to the company to 23 months and 10 days, and thereby deprive the company of the defense of fraud in the procurement of this policy, which it has if its period of contestability under the policy was 2 years from "its date of issue," which was the date the contract was made.

MAYES, Collector of Internal Revenue, v. UNITED STATES TRUST CO.

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

No. 3549.

1. **Appeal and error ⟸997(3)—Trial ⟸177—Motion by both parties for directed verdict submits determination of facts to court, and its conclusion must stand, if supported by substantial evidence.**
   Where each party moved for a directed verdict, and the motion of the party against whom verdict was directed was unaccompanied by a request for specific instructions in case the request was denied, the parties thereby submitted to the judge the determination of the inferences to be drawn from the facts, and his conclusion of fact must stand, if supported by any substantial evidence.
2. **Internal revenue ⟸9—That amount equal to capital, surplus, and undivided profits invested in building and securities does not show capital wholly withdrawn from banking business.**
   Under War Revenue Act Oct. 22, 1914, § 3, subd. 1, imposing a tax on bankers, measured by the capital used or employed, the fact that an amount equal to a trust company's capital, surplus, and undivided profits was permanently invested in its office building and public securities had no tendency to show that its capital was wholly withdrawn from its banking business, as such permanent investments secured its creditors in its trust business and banking business.
3. **Internal revenue ⟸9—Capital employed in banking business properly measured by ratio of banking assets to total assets.**
   In the absence of proof of a more satisfactory method, the capital employed by a trust company in its banking business was properly measured for the purpose of determining the tax under War Revenue Act Oct. 22, 1914, § 3, subd. 1, by the ratio which the assets in the banking business bore to the assets employed in the aggregate business.
4. **Internal revenue ⟸38—Evidence held to warrant inference that not more than one-half of trust company's capital was employed in banking business.**
   In a trust company's action to recover a tax paid under protest, under War Revenue Act Oct. 22, 1914 subd. 1, evidence as to the amount of its average capital, surplus, and undivided profits, the average amount of its trust funds and the average deposits, loans, and discounts, etc., *held* to warrant the inference by the court, on motion by each party for a directed verdict, that not more than one-half of its capital was employed in its banking business.

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action by the United States Trust Company against T. Scott Mayes, Collecter of Internal Revenue. Judgment for plaintiff, and defendant brings error. Affirmed.

W. V. Gregory, U. S. Atty., of Louisville, Ky. (Gordon Auchincloss, Sp. Asst. Atty. Gen., on the brief), for plaintiff in error.

Percy N. Booth, of Louisville, Ky. (Booth, McDowell & Conner, of Louisville, Ky., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Subdivision 1 of section 3 of the War Revenue Act of October 22, 1914 (38 Stat. c. 331, p. 750), imposed upon bankers an annual tax of $1 for each $1,000 of capital used or em-

ployed, including surplus and undivided profits. The term "banker" was made to include "every person, firm, or company * * * having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid * * * upon draft, check, or order, or where money is * * * loaned on * * * bonds, * * * bills of exchange, or promissory notes. * * *" Plaintiff was incorporated in the year 1902 under the laws of Kentucky, with authority, not only to carry on a "general trust and finance business," but also (among other things) to receive money on deposit and pay interest thereon, and to loan money upon such securities as it may approve. The trust company, which was plaintiff below, not only carried on a general trust business, but received deposits subject to check, as well as on certificates, and made loans secured by collateral or mortgage. For the fiscal year 1915 plaintiff was assessed $312, being two-thirds of what would be the annual tax upon its entire capital, surplus, and undivided profits.[1] For the first half of the fiscal year 1916 it was assessed $230.50, being one-half of the annual tax. This suit against the collector is to recover (with interest) the amount of these taxes, paid under protest. At the close of the testimony each party moved for a directed verdict in its favor. Verdict was thereupon rendered for plaintiff, under the direction of the court, for one-half the amount sued for, and judgment was entered accordingly.

[1] Defendant alone seeks review. The record indicates that its motion for directed verdict was unaccompanied by request for specific instructions in case the request for directed verdict was denied. By these mutual requests for directed verdict the parties submitted to the trial judge the determination of the inferences proper to be drawn from the facts submitted, and upon this review the court's conclusion of fact must stand, if the record discloses any substantial evidence to support it. Williams v. Vreeland, 250 U. S. 295, 298, 39 Sup. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038, and cases there cited, including American National Bank v. Miller (C. C. A. 6) 185 Fed. 338, 341, 342, 107 C. C. A. 456. And see Moore v. Fain (C. C. A. 6) 251 Fed. 573, 574, 163 C. C. A. 567; and La Crosse Co. v. Pagenstecher (C. C. A. 8) 253 Fed. 46,[2] 165 C. C. A. 644.

[2, 3] It clearly appears from what has already been said that plaintiff was engaged in banking, and so was subject to the tax upon its capital employed in that business. (We shall use the term "capital"

[1] Only two-thirds of a fiscal year remained after November 1, 1914, when liability to tax accrued.

[2] After verdict had been directed for plaintiff, but before the jury had retired, defendant presented further requests to charge, which were denied, as coming too late. This ruling was proper. After the court, upon a valid submission for the purpose, had announced its conclusion upon the facts, it was too late to insist upon submission to the jury. Had defendant accompanied its motion to direct verdict with request for specific instructions in case its motion to direct were denied, or had plaintiff not also simultaneously presented motion to direct verdict in its favor, the situation would have been different. Breakwater Co. v. Donovan (C. C. A. 6) 218 Fed. 340, 343, 134 C. C. A. 148; Michigan Co. v. Chicago Co. (C. C. A. 6) 269 Fed. 502, 504.

as including surplus and undivided profits.) That plaintiff had some amount of capital employed in banking is equally clear. The fact, as asserted by plaintiff, that an amount equal to its capital, surplus, and undivided profits was permanently invested in its office building and in public securities has no tendency to show that its capital was wholly withdrawn from the banking business. These permanent investments equally secure plaintiff's creditors in the trust business and the banking business. Plaintiff was thus liable to taxation on the amount of capital employed in the banking business; and, at least in the absence of proof of a more satisfactory method, the capital so employed was properly measured by the ratio which the assets employed in the banking business bore to the assets employed in the aggregate business. Anderson v. Farmers' Loan & Trust Co. (C. C. A. 2) 241 Fed. 322, 327, 328, 154 C. C. A. 202; Real Estate, etc., Co. v. Lederer (C. C. A. 3) 263 Fed. 667; Germantown Co. v. Lederer (C. C. A. 3) 263 Fed. 672. The difficulty lies in apportioning the assets between the trust and the banking businesses. The assessment was presumptive evidence of its correctness. It was open to the plaintiff, however, to show the contrary; but the burden rested upon it to do so, and, if it failed, it was not entitled to recover.

[4] Upon this record, it is obvious that less than plaintiff's entire capital was employed in banking. To show with absolute mathematical exactness the amount so employed is manifestly difficult, if not practically impossible; but it should, we think, be reasonably possible to show facts from which reasonable inferences may fairly be drawn. We are disposed to think that plaintiff has presented such data. It appeared that during the first taxation period plaintiff's average capital (which includes surplus and undivided profits, and of course is the difference between its assets and liabilities) was $486,000,[3] and during the second period, $461,000; that during both the first and second periods the average amount of trust funds was upwards of $4,000,000; that during the first taxation period the average deposits were $692,000, and during the second, $675,000; that its loans and discounts, which were made from deposits, averaged during the first period, $389,000 and during the second, $365,000; that during the first period the trust cash amounted to $203,000, and during the second, to nearly $109,000. The amount of the trust funds was thus between six and seven times the amount of the deposits. A portion at least of the office building was used for both the trust and the banking business, and it does not definitely appear what proportion of the office space was devoted to banking alone. But plaintiff's president (who was the only witness in the case), replying to a request to give (based on the figures he had submitted) the amount of the trust business during the two fiscal years as compared with the amount of the banking business, stated that the trust business was about six-sevenths and the banking end one-seventh.

This estimate was apparently based largely, if not entirely, upon the moneys employed in the respective branches of the business; but, in

[3] Throughout these figures we use only round numbers.

the absence of a better method of determining the ratio of capital employed in each business, we are unable to say that the testimony had no substantial tendency in that direction, having in mind the knowledge presumably possessed by the president of the relative earnings in the two departments and of their relative importance, and having in mind that apportionment of overhead expenses (such as rental use, upkeep, supervision, and perhaps to some extent clerk hire) would be largely a matter of estimate, and perhaps in some respects more or less arbitrary, unless on the basis of business transacted. We therefore think the evidence would fairly enable an inference to be drawn, within reasonable limitations, of the amount of capital employed in banking. If it would support an inference by the jury, it would equally support an inference by the judge upon a submission such as was made here. The trial judge, for some reason which is not apparent, determined that one-half plaintiff's capital was employed in the banking business. We need not determine whether that conclusion would be sustainable against complaint by plaintiff. It seems enough to say that, in our opinion, there was substantial evidence tending to support the conclusion that not more than one-half plaintiff's capital was employed in banking, and thus that defendant is not prejudiced by the finding.

This being so, the judgment should be affirmed.

GIBSON COAL & COKE CO. et al. v. ALLEN et al.

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

No. 3622.

1. **Removal of causes ⇐114—In a suit to vacate purchase under state decree subsequently reversed, federal court cannot restore decree.**

In a suit, removed to the federal court, to vacate a sale by guardian of plaintiffs to defendants, where order for sale had been reversed by the state court on appeal by the minors, but the sale was not then vacated, because it did not appear that the defendants were not bona fide purchasers, the federal court cannot restore the decree for sale after eliminating from the decree and from the contract of sale the provisions which made it erroneous.

2. **Infants ⇐111—Plea held not to raise issue that suit to attack judgment confirming sale was not brought witnin time limitation by special statute.**

An answer alleging that the petition was not filed within 5 years after a sale of infants' property was confirmed, and pleading "the statute of limitations in such cases made and provided," does not raise the issue that the suit to attack the judgment confirming the sale was not instituted within 12 months after they attained their majority, as required by Civ. Code Prac. Ky. § 391.

3. **Time ⇐5—Suit held instituted within 12 months after minority.**

Where the birthday of twin sisters was on January 8, an action commenced January 7 in the year they would be 22 was brought within 12 months after they attained the age of 21, as required by Civ. Code Prac. Ky. § 391, in view of the decisions of the Court of Appeals of that state, construing section 681 and holding that, when the computation is to be made from the day itself, and not from the act done, then the day in which

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

the act was done must be excluded, notwithstanding the rule established in that state that a minor attains majority on the day before the twenty-first birthday.

4. **Infants ⟸111—Where girls marry within time limited by statute after majority for attacking judgment, exception as to a married woman does not apply.**

Under Civ. Code Prac. Ky. § 391, providing that an infant other than a married woman may, within 12 months after attaining majority, show cause against a judgment, the exception as to married women was evidently based on the presumption their husbands would protect their rights, and does not apply where the marriage occurred after girls attained their majority, but within the 12 months allowed for instituting the proceedings.

5. **Guardian and ward ⟸108—Evidence held to show subsequent purchaser had notice of facts and did not purchase in usual course of business.**

Evidence that the corporation which made an original contract for the purchase of lands of a minor, the corporation which purchased such lands at the sale after order of the court, and the corporation to which the lands were subsequently transferred were all under the same officers, the ultimate purchaser having caused the formation of the other corporations to acquire the lands, *held* to sustain a finding that the ultimate purchaser had notice of all facts known to its predecessors, and that the purchase was not for value without notice in the ordinary course of business, but was a transaction in the nature of a merger or consolidation, so that the ultimate purchaser took only the rights which the predecessor had in the land.

6. **Guardian and ward ⟸108—Evidence held to show purchaser at guardian sale was not bona fide.**

Evidence that a corporation affiliated with the purchaser at guardian sale had made a contract for the purchase of mineral rights in the land of minors with the mother of the minors before she was appointed guardian, that an attorney representing the two corporations conducted the proceedings for the appointment of the guardian and the sale of the rights, and that the officers of the companies informed the guardian, when she attempted to withdraw from her bargain, that she could be held to it and could not sell to another, and made an additional payment to her to permit the sale to go on, *held* to show that the purchaser at the sale was not a bona fide purchaser, entitled to retain the property after the decree for sale was reversed on appeal by the minors.

7. **Guardian and ward ⟸108—Purchaser cannot make written contract before appointment of guardian for purchase of infants' lands.**

Though a prospective purchaser may make a proposition to a guardian to buy the lands of the infants, and may offer fair arguments to show the advisability of the sale, a bona fide purchaser may not enter into a written contract for the sale of the property with the mother of the minors before she is appointed guardian to take charge of the proceedings, and pay to guardian a sum of money for her own use to induce her to consent to the sale.

8. **Courts ⟸365—Dictum of state court, followed by later state decisions as determining the question, is accepted by the federal court.**

Even though a declaration by the state court was a dictum in the case in which it was made, it must be accepted by the federal court as final, where it was cited and approved by subsequent decisions of the state court as dispositive of the question in that state.

9. **Guardian and ward ⟸105(1)—Fraud unnecessary to authorize setting aside guardian's sale under erroneous decree to purchaser not bona fide.**

Where the land of minors was sold, under a decree which was subsequently reversed for error, to a purchaser who was not bona fide, it is unnecessary to show actual fraud by the purchaser to justify setting aside the sale.

10. Guardian and ward ⇐108—Purchaser under erroneous decree, which he had secured by controlling proceedings therefor, is not bona fide.

A purchaser of the land of minors, who had procured the erroneous decree under which the lands were sold by intermeddling in the proceedings and taking charge thereof, is not a bona fide purchaser.

Appeal from the District Court of the United States for the Eastern District of Kentucky, at Catlettsburg; Andrew M. J. Cochran, Judge.

Suit by Maggie Allen and others against the Gibson Coal & Coke Company and another, to vacate a sale made by plaintiffs' guardian to defendants. Decree for plaintiffs, and defendants appeal. Affirmed.

On July 11, 1906, A. P. Webb died intestate, seized in fee simple of the land described in the plaintiffs' petition, leaving a widow and six minor children surviving him. The name and date of the birth of each of these children are as follows: Oliver Webb, born November 15, 1891; Mary and Maggie Webb, born January 8, 1896; Troy Webb, born May 10, 1899; Londa Webb, born June 24, 1901; and Willie Webb, born November 3, 1903.

In the spring of 1909 Lizzie Webb, the widow of A. P. Webb and mother of these children, entered into a written contract with the Laclede Coal Company for the sale of the minerals underlying these premises and certain mining rights in the surface, at an agreed price of $10 per acre, and at that time the Laclede Coal Company paid to Lizzie Webb $500 on the purchase price. On July 26, 1909, Lizzie Webb was appointed guardian of her minor children, and on August 25th of that year brought an action in the circuit court of Floyd county, Ky., to sell the minerals and mining rights which she had before her appointment contracted to sell to the Laclede Coal Company, averring in her petition, filed in that action, that the proceeds of this sale were necessary for the maintenance and education of her children. On November 10, 1909, a judgment was entered by the Floyd circuit court, ordering and directing the sale of these minerals and mining rights, and in pursuance of this judgment, a sale of the same was made in due form of law to the Gibson Coal & Coke Company. This sale was confirmed on March 17, 1910. In April, 1913, the Gibson Coal & Coke Company sold and conveyed these minerals and mining rights to the Beaver Creek Consolidated Coal Company for stock in that company, two for one, which stock was distributed by the Gibson Coal & Coke Company among its stockholders.

Evidence was offered tending to prove that W. F. Hite and his associates incorporated, or caused to be incorporated, all of these companies, the two last named being incorporated on the same date; that these companies were incorporated and controlled by the same interests, for the purpose of purchasing coal and mining rights in this locality, and that the Beaver Creek Consolidated Coal Company was incorporated for the further purpose of taking over all the properties purchased and owned by the Laclede and the Gibson Coal & Coke Companies; that after these properties were taken over by the Consolidated Company, and stock in that company issued in payment therefor, that this stock was distributed to the stockholders of the Laclede and Gibson Coal & Coke Companies, and thereupon these corporations were dissolved. It further appears from the evidence that W. F. Hite was general manager, director, secretary, and treasurer of both the Laclede Coal Company and the Gibson Coal & Coke Company from the time of their organization until their dissolution, and that during this time he personally supervised and managed the buying of land, minerals, and mining rights by these companies, and particularly the minerals and mining rights in question; that W. F. Hite has also been the general manager, director, secretary, and treasurer of the Beaver Creek Consolidated Coal Company from the date of its organization, and that he still retained such official relation to that company at the time of the trial of this cause in the district court. There is also evidence tending to prove that W. F. Hite and his associates promoted and incorporated, or caused to be incorporated, other companies for the purpose of buying coal and coke lands in

this territory, all of which were eventually taken over by the Beaver Creek Consolidated Coal Company in pursuance of the original plan, purpose, and intention, in furtherance of which the corporation last above named was created.

Early in 1917 the children above named of A. P. Webb, defendants in the action brought by their guardian in the Floyd circuit court, perfected an appeal in accordance with the statutes of Kentucky from the judgment, orders, and decrees entered by the circuit court of Floyd county in that action, in reference to tract 776, containing 377.40 acres to the Court of Appeals of Kentucky, which court dismissed that appeal as to Oliver Webb for the reason that it had not been taken within 12 months next after he had reached the age of 21 years, and reversed, as to the other appellants, the decree of the circuit court ordering and directing the sale of these minerals and mining rights, but refused to reverse the decree confirming the sale of same to the Gibson Coal & Coke Company, for the reason that the record did not disclose that that company was not a bona fide purchaser, and further held, by a majority of the court, that the decree reversing the judgment ordering and directing the sale of these minerals and mining rights did not ipso facto reverse the judgment confirming the sale.

Thereupon the children of A. P. Webb on the 7th day of January, 1918, filed the petition in this action in the circuit court of Floyd county, for the purpose of reversing the order and judgment of the circuit court of that county, confirming the sale entered in the original action brought by their guardian, and to set aside that sale, for the reason that the Gibson Coal & Coke Company was not a bona fide purchaser for value, but, on the contrary had unlawfully, wrongfully, and fraudulently procured, by fraudulent collusion with their guardian, the institution of the suit by her to sell these minerals and mining rights, and conspired to bring about a sale of the infants' property at less than its fair value, when there was not the necessity for it, as required by such statute, as a prerequisite to such suit, and that after having procured their mother, before she was appointed guardian, to enter into a written contract to sell this property for $10 per acre, and having induced her to be appointed guardian and file a petition as guardian to obtain an order for the sale thereof, the said Gibson Coal & Coke Company, through its agents and attorney, took absolute control and management of said cause, to the exclusion of said guardian, and fraudulently procured the erroneous order of sale to be entered, that was reversed by the Kentucky Court of Appeals, and procured said sale to be made to itself and confirmed by the court at a wholly inadequate and unfair price.

Upon petition of the Gibson Coal & Coke Company this cause was removed to the United States District Court for the Eastern District of Kentucky, in which court the Beaver Creek Consolidated Coal Company was made a party defendant. Issues were joined by separate answers of the Gibson Coal & Coke Company and the Beaver Creek Consolidated Coal Company, denying all the material allegations of plaintiff's petition and amendment thereto. The Gibson Coal & Coke Company also pleaded the 5-year statute of limitation and laches of the plaintiffs in failing and neglecting to bring this suit for more than 8 years after the date of the decree confirming the sale, and until the property had largely increased in value and other parties had become interested therein.

Upon the issues so joined, the District Court found for the plaintiffs other than Oliver Webb, and entered a judgment and decree setting aside the order of confirmation and the sale of their interest in the minerals and mining rights, and further ordering and directing that the portion of the purchase price paid by the coal company for the five-sixths interests therein be returned to it, with interest from the date of its receipt, subject, however, to an accounting, upon a royalty basis, for the coal mined therefrom by the defendant coal companies, or either of them.

B. F. Combs, of Prestonsburg, Ky., and Edward C. O'Rear, of Frankfort, Ky. (W. T. Fowler, of Frankfort, Ky., on the brief), for appellants.

Geo. B. Martin, of Catlettsburg, Ky., and A. J. May, of Prestonsburg, Ky. (J. P. Hobson, of Frankfort, Ky., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] It appears from the certified copy of the opinion of the Kentucky Court of Appeals in Webb v. Webb's Gdn., 178 Ky. 152, 198 S. W. 736, introduced in evidence upon the trial of this case in the District Court, that the Kentucky Court of Appeals reversed as erroneous the decree of the Floyd circuit court, ordering the sale of the minerals and mining rights belonging to the infant children of A. P. Webb, deceased, in and underlying the 377.40 acres described in the petition as tract No. 776, for the reason that "the provisions attached to the minerals and rights adjudged to be sold are unreasonable, and are calculated to greatly impair the value of the surface of the land for any purpose which the infant or any one to whom he might sell it, could subject it," citing in support of its judgment Hays v. Wicker, 161 Ky. 706, 171 S. W. 447.

It is now insisted, however, that this court should permit the defendant coal companies to release and reconvey to plaintiffs these excessive and unreasonable mining rights in the surface, so as to cure the error in the decree ordering the sale, and permit it to stand as to the minerals and reasonable mining rights in the surface. As the record comes to this court, that judgment and decree was reversed in its entirety by the court of last resort in Kentucky. Before this action was commenced that decree had passed into the "limbo of things that were but are not." It was to all intents and purposes the same as if no such judgment had ever been made or entered by the Floyd circuit court. This court has no power to reinstate or revive that decree, either in whole or in part. The judgment of reversal entered by the Kentucky Court of Appeals is conclusive, not only upon the parties to that appeal, but also upon this court, and the rights of the respective parties to this action must be determined in accordance therewith and in obedience to the statute of Kentucky under favor of which this action is brought.

[2] It is also claimed by the appellants that this action was not brought by the twin sisters Maggie and Mary Webb within 12 months after they had attained the age of 21 years. No such statute of limitation is pleaded by either of these defendants in bar of the right of these plaintiffs to maintain this suit. It is true that the answer of the Gibson Coal & Coke Company does aver that this petition was not filed within 5 years after the making and entering of the decree confirming the sale, and "pleads and relies upon the statute of limitations in such cases made and provided in bar of plaintiffs' right to recover herein"; but "the statute of limitations in such cases made and provided" has no application whatever to the commencement of a suit by infants under section 391 of the Civil Code of Kentucky to reverse, vacate, or modify a judgment of the circuit court within 12 months after they have reached the age of 21 years. Section 391 is a separate and distinct statute of limitation, or rather a statute exempting infants from other statutes of limitations that would bar an action by a person of

full age at the time the judgment or decree was entered, and granting to infants a full 12 months after reaching their majority in which to attack a judgment prejudicial to their interests and secured during their minority.

[3] If, however, the defendants, or either of them, had pleaded this statute of limitation as to infants in bar of this action, there is no evidence in this record that would sustain such an averment. These twin sisters were born January 8, 1896; this action was commenced January 7, 1918. Under the decision of the Court of Appeals of Kentucky, in Erwin v. Benton, 120 Ky. 536, 87 S. W. 291, 9 Ann. Cas. 264, these twin sisters became 21 years of age on the day preceding their twenty-first birthday. The statute provides that they shall have 12 months after that time in which to bring this action. Certainly it would do violence to the language of this statute if this 12 monhs were reckoned from the 6th of January, 1917, for they had not arrived at 21 years of age until the 7th of January of that year, and by the express terms of the statute the time must be reckoned after the time they arrive at the age of 21 years.

The usual rule for the computation of time is to exclude the first day and count the last. Section 681 of the Kentucky Civil Code would seem to declare the same rule in that state. However, since that statute was passed the Kentucky Court of Appeals has decided in several cases that, when the computation is to be made from the act done, the day in which the act is done must be included, but when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded. Chiles v. Smith's Heirs, 13 B. Mon. (Ky.) 460; Board of Councilmen v. Farmers' Bank, 105 Ky. 811, 49 S. W. 811; Mooar v. Covington City National Bank, 80 Ky. 305.

Arriving at the age of 21 years was not an act done or performed by these infants or by any one else, like the entering of a decree or the serving of a notice, but, on the contrary, was a day or date in their lives, which without action on the part of any one, and by operation of law only, marked their transition from infancy to adult and responsible age. Applying, then, the rule as above stated to the facts in this case, it necessarily follows that the 12 months allowed by this statute for the commencement of this suit must be reckoned after the day or date upon which these infants became 21 years of age.

[4] It is also insisted that, notwithstanding they were infants and unmarried at the time this decree confirming the sale was entered against them, these two plaintiffs cannot maintain this action under the provisions of section 391, because they are now married women. That section in part reads as follows:

"An infant—other than a married woman—may, within twelve months after attaining the age of twenty-one years, show cause against a judgment."

This record conclusively establishes the fact that they did perfect an appeal to the Kentucky Court of Appeals and procure a reversal of the judgment and decree ordering the sale of their property; that court, however, refused to set aside the sale to the Gibson Coal & Coke Company, for the reason that it did not affirmatively appear from the

record of that case, which was all that was before the Court of Appeals, that the Gibson Coal & Coke Company was not a bona fide purchaser. It is doubtful, therefore, if it is necessary to have recourse to this statute in order to sustain the right of these plaintiffs to bring and maintain this action. However that may be, this section is not subject to the construction contended for by counsel for appellant. It is clear that the statute has reference to a particular status existing at the time the judgment is rendered.

In the case of Eversole v. First Nat. Bank, 136 Ky. 362, 124 S. W. 360, the infant was a married woman at the time she signed the mortgage upon which the suit was brought and was also a married woman at the time the judgment was rendered upon that mortgage. Therefore that case has no application to the facts in this case. Maggie and Mary Webb were infants at the time this judgment, confirming the sale of their lands, was obtained against them. They were not married until perhaps 6 months before they arrived at 21 years of age. The purpose and intent of this statute was to protect the rights of infants, other than married women. Married women were no doubt excluded from the provision of the statute upon the theory that their husbands could and would protect their rights, by preventing the obtaining of unjust judgment, or by appealing therefrom; but if the rights of an infant under this statute cease the moment of her marriage, then her husband would have no opportunity whatever to protect the rights of his wife, and the purpose of the exception would wholly fail. To construe this statute as meaning that the marriage of the infant ipso facto deprives her of its benefit and protection, without affording her a day in court after she arrives at majority, or affording her husband a day in court, after the marriage, for the protection of her rights, would not only do violence to the language of the statute itself, but would ignore the basic reason for the exception therein as to married women.

[5] It is not contended in this court that the Beaver Creek Consolidated Coal Company is an innocent purchaser for value from the Gibson Coal & Coke Company, without knowledge of the defect, if any, in its title, although that issue is presented in the pleadings. It appears from the evidence, however, that the Gibson Coal & Coke Company and the Laclede Coal Company were but the agents or instrumentalities employed by the Beaver Creek Consolidated Coal Company for the purpose of purchasing these minerals and mining rights; that the same individuals in control of the Beaver Creek Consolidated Coal Company controlled and managed the affairs of the Laclede Coal Company and the Gibson Coal & Coke Company, and in fact negotiated this purchase. The Beaver Creek Consolidated Coal Company, its officers and agents, were therefore fully advised of all facts in relation thereto. It also fully appears from the record of the proceedings in the circuit court upon which the title of the Gibson Coal & Coke Company was based, that these plaintiffs were infants at the time that company purchased this property, and also at the time the Beaver Creek Consolidated Coal Company obtained title from the Gibson Coal Company. Therefore the Beaver Creek Consolidated Company took this title with construc-

tive, if not actual, notice of the right of these infants to attack these judgments at any time during their minority or within 12 months thereafter. The District Court also properly held upon the evidence in this case that the Beaver Creek Consolidated Coal Company was not a bona fide purchaser for value without notice in the ordinary course of business, but, on the contrary, acquired the title by a transaction in the nature of a merger or a consolidation, and therefore it took just what interest the Gibson Coal & Coke Company had in these mining rights, and no more.

[6] In support of their claim that the Gibson Coal & Coke Company was not a bona fide purchaser of this property at judicial sale, the plaintiffs offered evidence tending to prove that the agents of the Laclede Coal Company entered into a written contract of sale with their mother before she was appointed their guardian for the purchase of these mineral and mining rights at an agreed price of $10 per acre, and paid to her at that time the sum of $500 upon the purchase price; that shortly thereafter that company procured their mother's appointment as guardian, caused a survey to be made of this 370 acres without cost to her, furnished counsel in its regular employ, and also in the employ of the Gibson Coal & Coke Company, a copy of this survey, together with an enumeration of the mining rights and privileges desired in the surface, which enumeration of rights and privileges was carried into the petition of the guardian, into the decree ordering the sale, and into the deed made in pursuance thereof.

The evidence offered by the plaintiff also tends to prove that counsel for the Laclede Coal Company and the Gibson Coal & Coke Company prepared this petition for the guardian, caused the same to be filed in the circuit court of Floyd county, Ky., and conducted and controlled all the proceedings in that court resulting in the erroneous order of sale and the confirmation thereof; that pending that proceeding the guardian informed the agent of these allied companies that she was dissatisfied with the arrangement; that she had concluded she had made a mistake; that she did not want to sell, and that she thought she would stop it, if she could, and not allow the sale. Thereupon she was told by the agent of these companies that the matter was in court, and she would have to let it be sold; that they held the contract, and would not give it up, and she could not sell to another company, and that she could do nothing with it about selling, and that it would be just tied up in court, and then this agent suggested to her that he might be able to get her some more money; that she then said to him she would not let the suit go ahead for less than $1,000, for she was not satisfied to sell. Thereupon the agent said to her that he "would see the company—Mr. Hite"; that he did see Mr. Hite, and shortly thereafter told her they would give her $1,000 if she would let the suit go ahead; that in pursuance of this arrangement the company paid her $500, and permitted her to keep for herself the first $500 paid on the purchase price, in all $1,000, in addition to the contract price, taking a receipt from her for the amount so paid, which receipt further recites that this $1,000 was paid to her in full of her dower in these premises, although dower had not been assigned, no mines were opened upon this property, and

no reference to dower had been made in the original contract of purchase at $10 per acre for the entire property.

From this evidence it would appear that the infants never had the benefit of the personal judgment of their guardian in reference to the need or advisability of selling this property or the price that should be paid therefor. It is apparent, perhaps, from her evidence, that her judgment might not have been particularly advantageous to these infants; but, regardless of her business ability, they were entitled, at least, to have their guardian exercise a free, unbiased, and uninfluenced judgment in their behalf, wholly apart from any money or other benefits she might receive therefrom, and regardless of the unauthorized and void contract she had made prior to her appointment as guardian.

[7] It is true that a prospective purchaser may approach a guardian with a proposition to buy, and may offer fair and legitimate arguments tending to show the advisability of the guardian making such sale for the benefit of his ward; but it is not true that a bona fide purchaser may enter into a written contract for the sale of the property of infants with the mother of such infant children, before she is appointed guardian, and in furtherance of that contract, cause her to be appointed guardian, prepare and file a petition for her to obtain an order of court authorizing and directing such sale to be made on the terms named in the contract, and then misrepresent the binding force and effect of that contract upon her as guardian to prevent or affect individual judgment on her part after she has been appointed guardian. Neither would it seem to be fair to the infants to permit the prospective purchaser to pay, or the guardian to receive for her own use and benefit, upon any pretense whatever, the sum of $1,000 to influence her in determining the question of permitting the action for the sale of her wards' property to proceed to final judgment and sale, and especially after the guardian had reached the conclusion that the sale ought not to be made and the suit should be dismissed. At all events, the evidence in this case fully demonstrates the fact that this coal company, through its agents and attorneys, were in as full and complete control of this case as if they had been the actual plaintiffs therein, and therefore responsible for the erroneous judgment ordering the sale of this property, which erroneous judgment was the basis of the sale to itself upon the terms named in the original contract with the mother before she was appointed guardian.

It is insisted that the judgment of the Kentucky Court of Appeals in this case, holding that the reversal of the judgment ordering the sale did not ipso facto set aside a sale to a bona fide purchaser, is the law of this case, regardless of what that court may have held at other times in other cases. A decision of this question is unnecessary to the disposition of this case. If, however, it be conceded that the law as declared by the Kentucky Court of Appeals in Webb v. Webb's Guardian is the law of this case, then we need inquire no further as to the law of that state in reference to who is, and who is not, a bona fide purchaser. Upon that subject that court said in that case:

"The adjudicated cases dealing with sales of infants' real property have gone to the extent only of holding that a party to the suit, or an attorney in

the case, or the plaintiff procuring the judgment, or an assignee of such plaintiff, are not bona fide purchasers. We do not, however, mean to hold that only such persons as hold such relations to the record as a plaintiff who procures the judgment, or his assignee, or a party to the suit before the rendition of the judgment, or an attorney in the case, are not bona fide purchasers, as other facts and circumstances may exist or arise which will show that a purchaser is not a bona fide one, other than the relations above mentioned."

Upon this proposition there seems to be no conflict in the Kentucky cases. Cavanaugh v. Wilson, 108 Ky. 759, 57 S. W. 620; Eversole v. First Nat. Bank, 136 Ky. 362, 124 S. W. 360; Turner v. Hamlin, 152 Ky. 469, 153 S. W. 778; District of Clifton v. Pfirman (Ky.) 110 S. W. 406; Turner v. City of Middlesboro (Ky.) 117 S. W. 422.

[8] It is the claim of counsel for appellants that these cases are not in point; that in District of Clifton v. Pfirman, supra, the infants did not enter their appearance and were not served in the first suit, and the doctrine announced by the court in that case was merely obiter. Nevertheless this was cited and approved by the Kentucky Court of Appeals in subsequent cases as dispositive of this question in that state, and therefore must be accepted by this court as final, even though the same doctrine declared in Webb v. Webb's Guardian is not to be accepted as the law of this particular case.

[9] It is further insisted on behalf of the appellant that the District Court erred in setting aside this sale and the decree confirming the same, for the reason that it did not find the Gibson Coal & Coke Company, or the guardian, or either of them, guilty of any fraud or fraudulent collusion in procuring the sale to be made. The question whether the Gibson Coal & Coke Company was or was not a bona fide purchaser does not necessarily depend upon whether it or the guardian were guilty of any actual fraud whatever. A party to a suit, an attorney in the case, or a plaintiff procuring a judgment, or an assignee of such plaintiff is not a bona fide purchaser, regardless of whether they were or were not guilty of any actual fraud. The Kentucky Court of Appeals has also held that:

"Other facts and circumstances may exist or arise which show that a purchaser is not a bona fide owner other than the relations above mentioned."

[10] In commenting upon this statement by the Court of Appeals in Webb v. Webb's Gdn., supra, counsel for appellants say in their brief:

"It is submitted, it was meant one who acts in an honest belief, who is ignorant in fact of the error afterwards developed, who pays full market value, and who is innocent of fraud in the matter."

This statement of counsel would seem to be a fair interpretation and construction of the language used by the Kentucky Court of Appeals in Webb v. Webb's Guardian, and this court does not hesitate to accept it as such. Certainly, under the facts in this case, the individual or company who is in the absolute control of the guardian's case, to the practical exclusion of the guardian, who is responsible for the preparation of the petition, the erroneous judgment ordering the sale, and the decree confirming the sale, cannot be any less ignorant "of the error afterwards developed" than a party to the suit, or even the plaintiff in

that action. Under this state of facts, the coal company would be, regardless of the question of fraud, an "officious intermeddler, who had by its voluntary officiousness * * * brought about the erroneous judgment." Schmidt v. L. C. & L. Ry., 99 Ky. 143, 35 S. W. 135.

It is therefore unnecessary to determine whether the acts and conduct of the Laclede Coal Company or the Gibson Coal & Coke Company constituted actual fraud in the procuring of this judgment, or whether these companies and the guardian were guilty of fraudulent collusion in procuring the sale and the order confirming the same. They were to all intents and purposes the moving force and effective cause which produced the erroneous judgment ordering the sale of the infants' land, and therefore just as responsible for the results as if they had appeared of record as parties plaintiff in that suit.

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

P. R. WALSH TIE & TIMBER CO. et al. v. MISSOURI PAC. RY. CO. et al. ABELES et al. v. ST. LOUIS, I. M. & S. RY. CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. March 29, 1922.)

Nos. 5041, 5042.

1. **Railroads ⊂=30—Reorganized corporation's report to state Public Service Commission held not to show general creditors could have been paid in cash.**
Where the court found, in proceedings to foreclose a mortgage on railway properties, that the railway companies were insolvent, and were unable to raise funds to pay their current indebtedness and continue in operation, a statement to the state Public Service Commission by the reorganized corporation that its assets exceeded the amount of securities to be issued under the reorganization plan, was made on the belief that the continued operation of the railroads as reorganized would enable them to discharge their obligations, and does not show that the claims of the general creditors could have been paid in cash.

2. **Railroads ⊂=30—Offer of preferred stock in reorganized corporation to general creditors held fair.**
A plan for reorganization of railroads in the hands of receiver, whereby the general creditors were to receive preferred stock and the former stockholders of the corporation common stock, where it appeared that, if the mortgage had been forclosed, the general creditors would not have been paid, and that the common stock issued to the stockholders had a market value, which would indicate the preferred stock was worth par, less a discount because of restriction on dividends, was fair to the general creditors, and not unduly preferential to the common stockholders.

Appeal from the District Court of the United States for the Eastern District of Missouri; William C. Hook, Judge.

Separate suits by the Commonwealth Steel Company against the Missouri Pacific Railway Company and against the St. Louis, Iron Mountain & Southern Railway Company, each of which was consolidated with a suit by the Guaranty Trust Company of New York and another against the respective defendants, and in which a receiver was appointed for the defendant corporation. From orders approving the plan of reorganization, whereby a new corporation acquired the prop-

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

*Rehearing denied July 7, 1922.

erty of both defendants, P. R. Walsh Tie & Timber Company and others, as general creditors of the defendant Railway Company in the first suit, and Robert Abeles and others, as general creditors of the railway company in the second suit, appeal. Affirmed.

Clifford B. Allen, of St. Louis, Mo., for appellants.

Edward J. White, of St. Louis, Mo. (E. G. Merriam, of St. Louis, Mo., on the brief), for appellees Missouri Pac. Ry. Co., St. Louis, I. M. & S. Ry. Co., and Bush.

Robert H. Neilson, of New York City (Carl A. De Gersdorff and Cravath & Henderson, all of New York City, on the brief), for appellees Holmes, Neilson, and Missouri Pac. Ry. Co.

Allen C. Orrick, of St. Louis, Mo. (Stetson, Jennings & Russell, of New York City, Nagel & Kirby, of St. Louis, Mo., and Edwin S. S. Sunderland, of New York City, on the brief), for appellees Guaranty Trust Co. and Edwards.

Miller, King, Lane & Trafford, of New York City, for appellees Union Trust Co. and Edwards.

Before SANBORN and LEWIS, Circuit Judges, and VAN VALKENBURGH, District Judge.

LEWIS, Circuit Judge. These cases present the same questions, were argued and briefed as one, and will be disposed of together.

Commonwealth Steel Company, a creditor, for rolling stock material and supplies sold to the Missouri Pacific Railway Company, to the amount of $145,000 filed its bill against that company on August 16, 1915, alleging that the defendant's lines of railway and equipment were subject to mortgage and other liens in a very large amount, that the net income from operation had not been sufficient in the two preceding years to pay the interest on those fixed obligations, and that there was immediate danger of the holders of those securities declaring a default and taking immediate possession of the defendant's railroad, that defendant was in need of funds for capital expenditures, that suits had been brought against it to recover excess charges for transportation of freight and passengers, and that claims of that character were asserted for more than $1,000,000 and the defendant was unable to pay them, that defendant was indebted for materials and supplies furnished to it, and for traffic balances and other operating liabilities in an amount exceeding $5,000,000, and was without funds to pay the same, that all of its assets were mortgaged or pledged and it was without collateral security or other means available to effect loans with which to meet its current liabilities, that there was grave danger of other creditors bringing suits and levying executions on the defendant's properties, or some part thereof, and in that manner the defendant would be greatly crippled in the operation of its lines of railroad and would not be able to operate it as a single system, and that in this way its railroad property would be dismembered and sacrificed, that the only means whereby the company could be able to pay its floating indebtedness and discharge its current obligations was by the continued maintenance and operation of its lines as a whole and uninterruptedly, that the defendant had made diligent efforts to obtain funds to meet said liabili-

ties and those efforts had proven unsuccessful, that unless action was taken on behalf of all creditors so that the operation of the railroad and its branches would be kept intact great and severe loss would be inflicted on the public and on a large majority in number and amount of the defendant's creditors, that owing to the aforesaid condition the market value of the securities issued by the defendant had greatly decreased in value, that the European war then prevailing, which had brought about disturbed financial conditions, further rendered it difficult for the defendant to meet and provide for its financial requirements, that in the preceding month the defendant promulgated a plan for the readjustment of its capital and indebtedness and that this had caused its stock issue to depreciate from $14 per share to $3 per share in the market, that said plan was opposed by the holders of various classes of defendant's securities and was not likely to be carried out and perfected, and that unless the court took custody of the defendant's railways and properties for the protection of every interest therein there was grave danger that individual creditors would assert their rights and seek different remedies in different courts, there would result a multiplicity of suits and a race of diligence, and that levies would be made upon rolling stock materials and supplies indispensable to the operation of the road. It was alleged that the intervention of a court of equity for the protection of the complainant's rights and the rights of others, and of the public, was immediately required and that a receiver should be appointed for that purpose. The bill prayed for a receiver to hold and operate the property, that the court fix and adjudicate the rights of all creditors, including the holders of mortgages, bonds and secured obligations, that the entire property and the assets of the defendant be marshaled and that the rights of all creditors be enforced against those assets, and for other appropriate relief. On the next day the railway company filed its answer admitting all allegations of the bill and joined in the prayer; and on the 19th of August the court appointed a receiver of all of its assets with power and direction to continue the operation of the road. On September 18th following, the Guaranty Trust Company of New York and B. F. Edwards, trustees in a mortgage covering the railway lines and branches, given and delivered to them in 1910, to secure the railway company's obligations known as First and Refunding Mortgage Fifty-Year Gold Bonds, filed their bill against the Missouri Pacific Railway Company, the mortgagor, in which they alleged that $31,778,000 of said first and refunding mortgage bonds were then outstanding, that default had been made in the payment of interest on said bonds, that demand had been made for the payment of the same and payment refused, that under the terms of said mortgage the complainants had a right of entry and foreclosure of said mortgage, that the income and revenues of the railway company were wholly insufficient to pay and discharge its indebtedness then due and owing, and that it had no resources with which to provide for the payment thereof and was insolvent, that the complainants were unable to execute their trust without the aid of the court, and the rights of all parties interested therein could not be ascertained and protected otherwise than by judicial sale. They prayed

for a receiver, that the railway property be sold as an entirety and that the proceeds be applied to the payment of said first and refunding mortgage bonds and the interest thereon and other debts. On October 8th the defendant filed its answer admitting the allegations of the bill, and thereafter, on October 27th, the court by an order consolidated the two causes and extended the receivership in the creditor's bill over the consolidated cause. Appellants represented to the court that they had claims for overcharges in transportation, the respective amounts being ascertainable only by an accounting, and the court by an order referred them and all other claims, other than claims of holders of bonds or other obligations secured by mortgage or pledge, to a special master, to hear and determine them. The receiver held and operated the railroad under the direction of the court until it was sold and delivered to the purchaser.

On the same day the Commonwealth Steel Company filed its bill of complaint against the Missouri Pacific Railway Company it also filed in the same court a like bill against St. Louis, Iron Mountain & Southern Railway Company, alleging that it was a creditor of that company in the sum of $55,335 for rolling stock material and supplies sold to it. Its allegations need not be repeated; they were like those in its bill against Missouri Pacific Railway Company. The defendant answered that bill on the next day admitting its allegations, and on August 19th the court entered an order appointing as receiver for that company the same person whom it appointed as receiver for the Missouri Pacific Railway Company. On August 8th following, the Union Trust Company and B. F. Edwards, as trustees in a mortgage given by the St. Louis, Iron Mountain & Southern Railway Company in July, 1912, to secure its issue of negotiable bonds, filed their bill against that company, alleging that bonds to the amount of $31,331,500, payment of which was secured by that mortgage, had been issued and were then outstanding, that default had been made in the payment of interest thereon, that under the terms of the mortgage the principal was also due, and that the railway company was insolvent. They prayed for a receiver, that the mortgage be foreclosed, the railroad sold as an entirety, and the mortgage indebtedness paid out of the proceeds. The Iron Mountain Company answered that bill on October 27th, admitting its allegations and joined in the prayer. On October 28th the two causes against the Iron Mountain Company were consolidated and the receivership extended over the consolidated cause. Appellants' claims for overcharges, like those in the Missouri Pacific case, were referred to a special master appointed to hear and determine the same. That road was also operated by the receiver until sale and delivery. Decrees of forclosure and sale were entered in each case on December 21, 1916, in which the court found that each railway company was insolvent, that the amount due under the mortgage in suit in the Missouri Pacific case was $34,698,700, and in the Iron Mountain case $34,304,745, and ordered that the properties of the two railway companies be sold subject as to each to liens and prior mortgages on main and branch lines for large amounts. A plan of reorganization of the two companies and their properties into one had been formulated and copies thereof

had been filed in the causes; and the decrees, for the purpose of dealing with the contingency of acceptable bids being made to carry out that plan, set March 6th following as the time when objections to the plan would be heard by the court, and directed the clerk to give notice thereof by advertisements for four weeks in newspapers published in towns along the lines of both roads that objections to the plan of reorganization would be heard at that time. The notices as directed were given.

The two railroads had been operated for a long time as one, and had become known and recognized as the Missouri Pacific-Iron Mountain System. Their interests, both in operation and obligations to the public, were in large part in common. The securities of one had been used for the other. In fact, the Iron Mountain belonged to the Missouri Pacific in stock ownership, the latter holding all but $45,135 par of the issued stock of the former. Each road had branch lines on which there were underlying mortgages, and there were mortgages on each covering main and branch lines, all senior to the two mortgages set out in the foreclosure suits. Each had more than 3000 miles of operated lines in and through several States.

The special masters appointed to make the sales advertised them as directed by the court, and the two sales came on for February 21, 1917. The successful bidders for both properties were Duncan A. Holmes and Robert H. Neilson. They notified the special masters that their bids were made in behalf of a new company to be organized to take over both railroads, pursuant to the plan and agreement of reorganization that had been agreed on between the bondholders and stockholders of the two companies, and caused the masters to so report the sales to the court. On March 6th appellants came into court through their counsel and objected to the plan of reorganization. Their objection was two-fold; first, their claims are, they say, entitled to a preference and should be paid in full, and second, if they are only general creditors, they say they have not been fairly and equitably treated as against old stockholders. Their claims in large part, if not in their entirety, are for alleged overcharges in transportation rates paid under compulsion of an injunctive order against them which was vacated in Missouri Rate Cases, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. Ed. 1571. The first objection was met by an order made on March 6th that appellant-claimants should have the right to prosecute their claims to final determination on the question as to whether they were entitled to preferences, which should not prejudice their right to participate in the plan and accept preferred stock in the new company as general creditors under the terms of the plan, if they failed to establish preferences and succeeded only in having their claims allowed as general creditors. The court then approved the plan of reorganization and confirmed the sales of the properties of the two to a new company to be organized, over the objection of appellants that the plan was not fair and equitable to general creditors; which is the one issue presented by this appeal.

Enough of the situation dealt with in the reorganization plan and the offers which it held out to the classes interested in and having claims against the two old companies and their railroads, material to a determination of the one question presented here, may be stated thus:

Speaking in round sums, the total funded debt of the two old companies held by the public was $279,000,000. It was proposed to reduce that by $60,000,000, thus increasing the available income balance annually $3,500,000. Forty million dollars was required to be used in part to take up Missouri Pacific Six Per Cent. Secured Gold Notes and Iron Mountain Equipment Trust Obligations, the remainder to be applied on present current obligations, new equipment, needed improvements and reorganization expenses. It was proposed to raise this sum by voluntary assessment on 83,000,000 Missouri Pacific common stock in the hands of the public, at the rate of $50 per share, for which they were to receive new General Mortgage Four Per Cent. Bonds and also shares of common stock in the new company to be organized, equal to the shares they held in the old Missouri Pacific. The reduction in the funded debt was to be brought about by an issue of 77,000,000 Convertible Five Per Cent. preferred stock in the new company, in lieu of mortgage bonds then outstanding against its lines and branches, including therein the 45,000 Iron Mountain common stock. The holders of preferred stock were entitled to receive five per cent. thereon each year before any dividends are to be paid on the common stock, and beginning July 1, 1918, dividends on the preferred stock are cumulative, that is, if there be a deficiency in any year in those dividends, that deficiency must be made up before any dividends are paid on the common stock. The preferred shares are also given a preference against the common to the new company's assets, in event of liquidation, together with all accrued and unpaid dividends thereon from June 30, 1918. The preferred shares are also given an equal voting power with the common, and are convertible into common at the holder's option. The plan proposed to give general creditors, estimated to hold claims for $1,000,000, shares of this new convertible five per cent. preferred stock equal in face value to their claims; and this is the offer to them which appellants say is unfair and inequitable as against the common stockholders.

[1, 2] They argue the point in two ways: First, they say that the new company, in its application to the Missouri Public Service Commission for authority to issue its stocks and bonds under the reorganization plan, represented that the assets which it took over were worth approximately $400,000,000, and that inasmuch as the old companies were liable on mortgage bonds and equipment obligations for an amount not in excess of $280,000,000, there was an equity ample to pay all general creditors in full, that they were entitled to share in that equity before stockholders receive any part of it, and that they should be paid. But counsel lose sight of the fact that the two companies had been adjudged insolvent, that they were unable to raise funds to pay their current indebtedness and continue in operation, that a foreclosure of the mortgages in suit and sales of the properties independently of the reorganization plan, was threatened, and that would have swept away and taken from them the chance and opportunity that they had under the plan of realizing something on their claims, and that the representations made to the State Commission were on the belief and expectation that the railroads, as reorganized, would continue in op-

eration, receiving compensation for the services that they would render the public, and thus be enabled to ultimately meet and discharge their obligations to them as preferred stockholders. They further lose sight of the fact that the offer made to them in the plan preferred them over common stockholders, and that their relative rights as against the stockholders in the old companies were not changed by the plan, except as to 450 shares of the Iron Mountain, which was too small to seriously affect their interests as proposed by the plan. Their complaint is that they were not paid in full rather than being offered preferred stock; but they did not point out to the court any way in which ready money could be raised for that purpose, and we are not advised that that could have been done. Secondly, they say that market quotations at about the time the plan was approved by the court, on bonds given to stockholders for the ready money which they voluntarily contributed, and on the common stock, as against market quotations on preferred stock, show that old stockholders were in a better position and were able to receive a greater percentage for their investments than general creditors would receive on their claims. The quotations referred to were $30 per share for common stock. But no argument is needed to demonstrate that if the common shares were intrinsically worth anything, preferred shares were intrinsically worth par, less a possible small discount because of dividends thereon being restricted to five per cent. To require others accepting the plan to give assurance that the general creditor could convert at once the securities offered to him into money at their face value, is but restating the contention that he should be paid now the amount of his claim in full. The acceptance of the plan by holders of mortgage bonds in excess of $60,000,000 superior in right to the claims of general creditors, and the surrender of those bonds for convertible five per cent. preferred stock, par for par, is a powerful refutation of the contention that general creditors were not fairly and equitably treated. The court gave full and careful consideration to the reorganization plan and appellants' objections, and in approving the former and overruling the latter said: "The general creditor has been treated very, very fairly indeed."

The purpose of the reorganization plan was to preserve the assets of the old companies for those who were entitled to share in them, to rehabilitate them and to put them on a financial basis that would enable the new company to continue the operation of the railroads; and we also think the offer made in the plan to general creditors was all they were equitably entitled to receive. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; St. L. & S. F. Ry. Co. v. McElvain (D. C.) 253 Fed. 123; Guaranty Trust Co. v. Missouri Pacific Ry. Co. (D. C.) 238 Fed. 812.

In making the orders appealed from, approving the plan and agreement of reorganization and overruling appellants' objections, the trial court did not err.

Affirmed.

CHAMBER OF COMMERCE OF MINNEAPOLIS et al. v. FEDERAL TRADE COMMISSION OF THE UNITED STATES et al.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1922.)

No. 222.

1. Courts ⇐404—Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Circuit Court of Appeals has no jurisdiction to issue certiorari to review preliminary orders of Trade Commission.

A petition for writ of certiorari to review preliminary orders of the Trade Commission denying motions to dismiss the proceedings before the hearing seeks certiorari as an original writ, which the Circuit Court of Appeals has no jurisdiction to issue in a case where it is not in aid of appellate jurisdiction acquired or for the protection of appellate jurisdiction not yet acquired, but which otherwise might be defeated. and is not specifically authorized by the Federal Trade Commission Act (Comp. St. §§ 8836a–8836k).

2. Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Jurisdiction of Circut Court of Appeals over Trade Commission is limited to proceedings specified.

The jurisdiction of Circuit Court of Appeals under the Trade Commission Act (Comp. St. §§ 8836a–8836k) is limited to the enforcement or vacation of the final orders of the commission as stated in section 5 of the act, in view of other clauses in that section, and of section 9 giving the District Court authority to enforce obedience to subpœnas and to issue mandamus on the application of the Attorney General at the request of the commission.

3. Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—District Court cannot review preliminary orders of Trade Commission.

Though the language of Trade Commission Act, § 9 (Comp. St. § 8836i), giving the District Court jurisdiction to issue mandamus to compel compliance with the provisions of the act or any order of the commission made in pursuance thereof, is very broad, it was intended to refer only to orders of the nature involved in section 6, par. B (section 8836f), empowering the commission to require specified reports and answers under oath or otherwise, and does not give the District Court jurisdiction over orders of the commission denying motions to dismiss proceedings before the hearing.

4. Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Hearing before Trade Commission does not deny due process of law, there being a review before Circuit Court of Appeals.

Since a hearing is given before the Trade Commission before an order is entered, and ultimate review by the Circuit Court of Appeals is provided, and the commission exercises administrative powers and imposes no penalty, nor has power to make more than a finding of facts, which requires confirmation by the Circuit Court of Appeals before any burden is cast on the parties, there is no denial of due process of law.

5. Trade-marks and trade-names and unfair competition ⇐80½, New, vol. 8A Key-No. Series—Review of finding by administrative body is confined to existence of substantial evidence to support.

The review of findings by an administrative body, such as the Federal Trade Commission, which has been given authority by Congress to find facts and make orders, is limited to determination whether such findings and orders are supported by substantial legal evidence, in which case they are conclusive, and it cannot be presumed the commission will proceed erroneously and in excess of its powers, and thereby impose upon a party unnecessarily the expense incident to a hearing.

Petition to Review Order of the Federal Trade Commission of the United States of America.

Original petition for writ of certiorari by the Chamber of Commerce of Minneapolis and others against the Federal Trade Commission of the United States and others. Petition dismissed for want of jurisdiction.

David F. Simpson, of Minneapolis, Minn. (William A. Lancaster, John Junell, James E. Dorsey, Harold G. Simpson, and Leavitt R. Barker, all of Minneapolis, Minn., on the brief), for petitioners.

Adrien F. Busick and M. Markham Flannery, both of Washington, D. C. (W. H. Fuller, of Washington, D. C., on the brief), for respondents.

Before SANBORN and LEWIS, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. This is a suit filed originally in this court. The pleading is entitled "Petition for Writ of Certiorari to the Federal Trade Commission, and for Order Setting Aside Order of Federal Trade Commission Denying Motions." On or about December 7, 1920, the commission filed a complaint against the Minneapolis Chamber of Commerce, its officers and board of directors, the Manager Publishing Company, John H. Adams, and John F. Flemming, who are the petitioners herein, alleging that the commission had reason to believe, from a preliminary investigation made by it, that these petitioners were using unfair methods of competition in interstate commerce, in violation of the provisions of the act creating the Federal Trade Commission (Comp. St. §§ 8836a–8836k), and defining its powers and duties. In due time petitioners made and submitted a number of motions which, upon hearing before the commission, were denied by interlocutory order duly made and entered.

The preliminary motions referred to contained numerous specifications which, upon analysis, raise the following matters of substance: (1) The commission is without jurisdiction both of parties and of subject-matter. (2) The complaint states no cause of action. (3) The commission is biased and prejudiced against the petitioners. (4) The complaint is indefinite and uncertain in certain paragraphs. (5) The Federal Trade Commission Act is unconstitutional. Accordingly petitioners prayed that no issue of fact be joined or evidence received as to the allegations contained in certain paragraphs of the complaint and that the entire proceeding be dismissed. As an incident to this review they seek the issuance of a writ of certiorari requiring respondents to certify to this court, for review and determination, the preliminary order of which they complain.

[1] In our judgment certiorari, as such, will not lie, because this court has no power to issue the writ as original process, and because, further, we have not here presented a case where the writ is desired, as in the nature of an auxiliary process in aid of jurisdiction acquired; nor is it necessary for the protection of appellate jurisdiction before such jurisdiction is actually obtained, which otherwise might be de-

feated, nor to make the jurisdiction effectual, nor because of the absence of any other remedy. The writ, as asked, partakes largely of the nature of a writ of prohibition, but such is not justified by the circumstances in this case under any power conferred by statute upon Circuit Courts of Appeals.

What is really sought by petitioners is that this court should halt inquiry at the threshold, exercising, in effect, the powers of a court of original jurisdiction, in which a cause is pending, to rule in limine upon the propriety of the action and whether it should proceed further. The procedure invoked is similar, in effect, to that prevailing in a court of original jurisdiction, which has control of the successive steps of pleading, practice, trial, and final judgment or decree. But it must be remembered that this court has no original jurisdiction of this nature. Its functions, under the act before us, are confined to a review of certain acts of the Federal Trade Commission, which are specifically defined by the Congress. This act creates powers not otherwise conferred upon Circuit Courts of Appeals, and such courts are limited strictly to the powers thus specified. It was not intended that the Circuit Courts of Appeals should be drawn into original conduct of these investigations. If this court is to exercise plenary power and control in determining at the outset what party shall be dealt with, what investigation shall be made, and what recommendation submitted, then it has, in effect, been constituted an original trial tribunal of controversies of this nature. This was in no wise contemplated, nor would it comport with the legitimate practical functions of a court of this nature.

[2] The act itself clearly specifies when the jurisdiction of the Circuit Courts of Appeals may attach and to what extent that jurisdiction may be exercised. The power of the court is limited to the enforcement of the final orders of the commission to cease and desist, upon the application of the commission, and to review of such orders at the request of the party against whom such orders are made, and in such cases it has power to enforce, affirm, modify or set aside as it may deem proper. Immediately after these powers and duties are set forth in section 5 of the act this clause occurs:

"The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the Commission shall be exclusive."

Manifestly this refers to the specific powers just previously recited, and this is made still more apparent by the clause which next follows, wherein it is said:

"Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited."

This provision is made still more obvious by subsequent provisions of the act, because in them it clearly appears that not all orders of the commission are within the exclusive jurisdiction of the Circuit Courts of Appeals. In section 9 the District Court is given authority to enforce obedience to subpœnas, and it is further provided that:

"Upon the application of the Attorney General of the United States, at the request of the commission, the District Courts of the United States shall have

jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this act or any order of the commission made in pursuance thereof."

[3] The final language of this clause is very broad, but we are convinced that it is intended to refer only to orders of the nature of such as are involved in paragraph B of section 6, which empowers the commission to require, by general and specific orders, certain corporations to file specified reports and answers under oath or otherwise. We do not think this language was intended to give the District Court jurisdiction over orders such as that now before us. It is our judgment that neither the District Court nor this court has power under the act to interfere with the investigation and inquiry of the Commission, involving the taking of testimony and the finding of facts essential to the making of such an order as shall ultimately be passed upon by the Circuit Court of Appeals for enforcement, affirmance, modification, or setting aside.

[4] A hearing is granted before the Commission, and ultimate review by the Circuit Court of Appeals is provided; therefore there is no denial of due process. The Federal Trade Commission exercises administrative, not judicial, powers. The act provides no penalties, nor has the commission power to make more than a finding of facts, which requires confirmation by this court before any burden is cast upon the parties subjected to inquiry.

[5] Full provision for review is made, confined, of course, to the limited right of courts to review administrative or legislative acts. In cases arising under this law, injunctions to halt the taking of testimony have been uniformly denied. The powers conferred upon this commission are similar to those conferred upon the Interstate Commerce Commission, with the exception that the powers of the latter are more pronounced and potential. In all cases where Congress had lodged in administrative officers or boards power to find facts and make orders, such findings and orders are conclusive when supported by substantial legal evidence. The courts will not consider with nicety the weight of such evidence. Illustrations of this principle are to be found in many cases arising under the Land Department, the Post Office Department, and before the Interstate Commerce Commission. To halt this investigation before testimony is taken would be an invasion of the powers of the legislative and executive branches of the government.

The real gist of the complaint here is that it is claimed, and with plausibility, that the chief petitioner is not subject to the jurisdiction of the Federal Trade Commission; that the commission is proceeding erroneously and in excess of its powers; that the taking of the testimony before a final order can be made will be very expensive; and that a grievous burden is being inflicted upon petitioners, for which an ultimate setting aside of any order that may be made will not adequately compensate them. This is true in some degree of any order of the commission which may finally be set aside. The law does not contemplate that commissions of this nature will act arbitrarily nor without probable cause. It is, of course, conceivable that they may do so; but such a possibility cannot justify this court in exceeding its statutory

powers and authority. To do so would be to deny to the administrative and legislative branches of the government the powers and authority which have been conferred upon them, and which have been uniformly upheld by the courts. It may be desirable that the law should provide for a preliminary review of questions of jurisdiction either by the Circuit Courts of Appeals or by the District Courts; but, in the absence of such provision, we cannot assume that power.

The conclusion we have reached renders it both inappropriate and unnecessary to consider the other questions raised by petitioners. The petition must be dismissed for want of jurisdiction in this court to entertain it; and it is accordingly so ordered.

FORE ELECTRICAL MFG. CO. et al. v. ST. LOUIS ELECTRICAL WORKS et al.*

(Circuit Court of Appeals. Eighth Circuit. March 25, 1922.)

No. 5948.

1. **Patents ⟸328—1,239,249, for improvement in rectifiers of alternating current, not infringed.**
   The Ballman Patent, No. 1,239,249, for an improvement in rectifiers of an alternating electric current, *held* not infringed by the device covered by the Wehmeier patent, No. 1,247,759, the proof not showing that the means and manner of accomplishing the result are equivalents, or the mode of operation the same.
2. **Patents ⟸112(3), 312(1)—Presumed valid, and burden on plaintiff to show invalidity of defendant's patent claimed to infringe.**
   In a suit for infringement of a patent by a device manufactured under a subsequent patent, defendant's patent is presumptively valid and noninfringing, and the burden is on plaintiffs to overcome the presumption.

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Suit by the St. Louis Electrical Works and others against the Fore Electrical Manufacturing Company and others. From a decree for plaintiffs (267 Fed. 440), defendants appeal. Reversed, with directions.

Rodney Bedell and F. R. Cornwall, both of St. Louis, Mo., for appellants.

John H. Bruninga, of St. Louis, Mo., for appellees.

Before LEWIS, Circuit Judge, and TRIEBER and POLLOCK, District Judges.

LEWIS, Circuit Judge. [1] Each of the parties held a patent for improvement in rectifiers of an alternating electric current. Ballman's 1,239,249 belongs to appellees, plaintiff below, and is an earlier issue than Wehmeier's 1,247,759, which is owned by appellants, defendants below. Neither was a pioneer. The selection and storage of a unidirectional current from an alternating current, called rectification, was old in the electrical art. Ballman's application was first, but Weh-

meier's had been pending and under consideration by the examiner in the Patent Office for more than a year before Ballman's patent issued. The beneficial purpose of the structure is the charging of a battery, and the like, but the patented improvement in each related only to means to be employed in closing and opening the contacts with a vibratory switch, so that the selected impulse would pass through the battery and the contrary impulse would be cut out. Each made and sold rectifiers having the improvement called for in the respective patents, but the appellees claim that the improvements in the two are equivalents structurally, mechanically, electrically and functionally, that they operate in the same way and achieve the same result, and the difference between the two, if any, is only colorable. On this they sued for and obtained a decree for an injunction, on the ground of infringement; from which this appeal.

Points common to both, about which there is no controversy, are these: The means used by both to close the switch on the contacts, thus letting the selected impulse of the alternating current through the battery, is magnetism; and as this magnetic force is withdrawn or sufficiently reduced, the switch opens on its spring and the contacts through which the selected impulse passes through the battery are released, thus excluding the opposite current impulse. The switch is pivoted at one end and carries an armature intermediate its ends, positioned to complete the magnetic circuit, thus raising the switch against the tension of its spring and closing the contacts at the open end, as desired. Also, the means used by each to close the switch requires both a permanent magnet and an electro-magnet.

There is quite a difference between the patents in the physical relation of the electro-magnet to the permanent magnet, and to the switching armature. Another physical difference is in the shape of the permanent magnet. The differences are these—to make up Ballman's rectifier, take a magnet of the common horseshoe type, shorten one leg, bend the short leg at a right angle directly toward the long leg, leaving an air gap or open space between the end of the bent leg and the long leg. This is Ballman's permanent magnet. Fasten a soft iron core, placed parallel to the long leg, to the bent leg immediately under the angle, and around the core an alternating current winding. This is Ballman's electro-magnet. To make up Wehmeier's rectifier, take a magnet of the common horseshoe type, its legs of equal length and unchanged in shape. This is Wehmeier's permanent magnet. Place a soft iron core between the legs of the permanent magnet, near their ends or poles, and around the core an alternating current winding. This is Wehmeier's electro-magnet.

We pass now from differences in structure to the question as to whether there be difference in operation or function of the two devices. These accepted facts will be borne in mind. The alternating current winding around the soft iron core in each device sets up an impulse in the electro-magnet, first in one direction and then in the opposite, changing in impulse with the alternating current, and if both impulses are permitted to pass into the permanent magnet the latter

will cease to function, because magnetic flux continues in one direction, presumably from pole to pole and around the yoke of the magnet, thus closing the circuit. Ballman knew the field was narrow. He says so in his specification, and states the problem which he was attempting to solve thus:

"Vibrating rectifiers, as now constructed, utilize a magnet of constant polarity, and provided with an alternating current winding for superimposing on the constant flux an alternating flux which is in step with the current to be rectified. There are two general types of these rectifiers. In one of these types the constant flux is set up by a direct current winding in circuit with the battery to be charged, the magnet core being, in this case, of soft iron. This construction is, however, open to the objection that, where the battery to be charged has not a sufficient residual charge to effect the alternating flux sufficiently to produce synchronous operation in the proper direction the battery is liable to receive current in the wrong direction. In another type, the magnet is a permanent magnet and the constant flux is set up by the permanent magnetism. While this construction obviates the objection to the battery excited magnet construction, the passage of that component of an alternating flux which is opposite to the permanent flux, through the entire magnetic circuit of the permanent magnet will tend to demagnetize this permanent magnet and, therefore, vary the value of the constant flux and affect the permanency of the magnet.

"Some of the objects of this invention therefore are, to construct a rectifier system which is permanent and uniform in its action, which is arranged to be connected to the direct current load without liability of a reversal of current, which has a wide range of frequency, and in which the sparking is reduced to a minimum.

"Other objects are, to provide a rectifier which is simple in construction, effective in its operation, and cheap to manufacture."

With this in mind he attempted to preserve his permanent magnet and operate the switch with a small part of the main magnetic flux, plus the alternating flux in the electro-magnet. So that the theory of his patent, confirmed and fortified by expert testimony, is that the main path of the permanent magnetic flux is around the yoke of his magnet, down the long leg to and across the air gap to the short leg, but that owing to the resistance of the air gap a small part of this flux continues down the long leg, through the armature and up the electro-magnet. This he denominates a leakage or shunt path of the magnetic flux of the permanent magnet. It is not of sufficient attractive force to close the switch on the contacts until a flux passing in the same direction is set up in the electro-magnet, and thus with the alternating impulse of that flux the switch closes and then opens on its spring. It thus appears to us that the switch is chiefly operated by the electro-magnet. Whereas, the theory of Wehmeier's patent, confirmed and fortified by expert testimony, is that there is no shunt or leakage path in his device and that the switch is operated wholly by the flux of his permanent magnet, that the soft iron core between the legs of his magnet, and near their ends, is a bridge or path for the flux of the permanent magnet, although he concedes that a part of that flux passes down to the end of the leg, through the armature and up the other leg, but claims that when an impulse is set up in the electro-magnet in opposition to the flux in the permanent magnet, its resistance on the bridge to the flux of the per-

manent magnet causes the permanent magnetic flux to pass down the leg and through the armature, thus closing the switch with the flux of the permanent magnet, and that the electro-magnetic flux does not co-operate in attracting the switching armature, except as it is utilized to cause the permanent magnetic flux to perform that function. On this point Wehmeier's claims call for means (electro-magnet) for diverting the magnetic circuit of the permanent magnet or varying the path of the magnetic field of the permanent magnet relative to the vibratory switch. On the subject of equivalents and differences that are merely colorable, this court, in James Heekin Co. v. Baker, 138 Fed. 63, 70 C. C. A. 559, said:

"Identity of result is, however, not a sufficient test of infringement. There must also be substantial identity of the means and manner of its accomplishment. The appellant's invention being obviously not a pioneer, but only an improvement upon the prior art, its claims cannot be given a liberal interpretation; but there is yet a right to a reasonable range of equivalents, measured by the character and extent of the improvement, and infringement cannot be avoided by mere colorable modifications of some of its elements, not essentially varying its principle or mode of operation."

And again, this court held in Sander v. Rose, 121 Fed. 835, 58 C. C. A. 171:

"When two inventors have each adopted the substantial features or elements of an earlier invention making, respectively, but slight changes in or improvements upon the earlier device, each will be limited to his own specific form of device; and, if there are differences therein, neither device will be held to be an infringement of the other."

[2] Presumptively, appellants' patent is valid, and does not infringe, Boyd v. Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973, and the burden was on the appellees to overcome that presumption. Expert witnesses for the two parties seem equally competent and well informed,—for appellees that the two devices are in every way equivalents, for appellants that they are not so in any respect. We are not convinced that the means and manner of accomplishing the result are equivalents, nor that the mode of operation of the two does not vary in principle, under the proof adduced; but rather that there is material difference, structurally and functionally, in the two devices.

Reversed with directions to dismiss the suit at appellees' costs.

MAGNA OIL & REFINING CO. v. WHITE STAR REFINING CO.

(Circuit Court of Appeals, Third Circuit. March 7, 1922.)

No. 2749.

1. Sales ⇐173—Under contract, delay in making connections with seller's oil wells held not breach, if buyer used best endeavor to prevent delay.

Under a contract for the sale of oil, deliverable at the seller's wells in approximately equal daily quantities to a third person's pipe line, which required the purchaser to make all necessary arrangements for receiving the oil and to use their utmost endeavor to prevent delay, the purchaser was not absolutely bound to have pipe line connections made by the pre-

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

scribed time for commencing delivery, and if it used its utmost endeavor to prevent delay in having the pipe line connected with the seller's tanks, such delay did not constitute a breach, but merely increased the daily deliveries during the rest of the contract period.

2. Sales ⟸151—Seller held not ready and able to deliver oil, where its oil was mingled with that of other persons.

Under a contract for the sale of oil deliverable at the seller's wells to a third person's pipe line, the seller was not ready and able to deliver oil, where other persons owned parts of the oil in seller's tanks until the pipe line company or the buyer received authority from such other persons to take the oil, and if the buyer was ready, able, and willing to receive the oil the contract was broken by the seller.

3. Sales ⟸418(2)—Damages for nondelivery based on market value reasonable time after seller's promises to deliver overdue installments.

If a seller of oil which had failed to make delivery at times prescribed by the contract promised to make deliveries of overdue installments, and the buyer waited for a reasonable time thereafter, it was entitled to have its damages for the nondelivery of the oil ascertained on the basis of the difference between the contract price and market value of like oil on the expiration of such reasonable time.

4. Sales ⟸384(1)—Buyer of oil held not liable for seller's loss of oil by seepage from new wells, etc.

Though a buyer of oil was informed that if it did not take the oil as required by the contract, the seller would lose oil through seepage, etc., buyer *held* not liable for oil lost by seepage by reason of an increase in the number of wells in the vicinity, or in the activity of new wells, or in the greater activity of old wells on adjoining properties.

5. Corporations ⟸514(1)—Averment of corporate existence means legal existence.

An averment in a pleading that a corporation exists under and by virtue of the laws of a state by legal intendment means that it legally exists.

6. Corporations ⟸634—Have no existence beyond limits of state of creation.

A corporation, a legal entity or person which exists by force of law, can have no existence beyond the limits of the state which creates it and endows it with faculties and powers, and it is a citizen of that state.

7. Corporations ⟸634—May not migrate, but may carry on business in other states.

A corporation created in one state may not migrate from state to state, but may carry on business and exercise its charter powers in another state, by complying with the laws of that state.

8. Corporations ⟸634—Effect of special enabling act authorizing foreign corporation to do business stated.

Where the purpose of the Legislature in passing a special enabling act authorizing a particular foreign corporation to do business in the state is to make such corporation its own, it thereby creates a new corporation, with a new existence, and, though the two corporations may have the same name and powers, each exists independently by virtue of the laws of its own state; but if the purpose is not to create, but simply to enable, permit, and control, the corporation is not a citizen of the enabling state, but remains a foreign corporation.

9. Courts ⟸322(3)—Allegation that corporation was created or exists under laws of particular state imports that it was both created and existed.

Continuance, as well as creation, of corporate existence is essential to the jurisdiction of a federal court on the ground of diverse citizenship, and the proper allegation is that the corporation is a corporation created and existing under the laws of a particular state; but an allegation that it was created or that it exists under the laws of a particular state imports that it was created and is existing under such laws.

10. Courts ⟨⟩322(2)—Sufficient that requisite citizenship or facts constituting citizenship are alleged anywhere in the record.

Where jurisdiction depends on diverse citizenship, the whole record may be looked to for the purpose of curing a defective averment of citizenship, and if requisite citizenship is anywhere expressly alleged, or if facts are stated which in legal intendment constitute such averment, it is sufficient.

11. Courts ⟨⟩322(3)—Admission of corporate existence as alleged held admission that corporations were citizens created and existing under laws of states named.

Where the declaration alleged that plaintiff was a corporation existing under the laws of Michigan, and defendant a corporation existing under the laws of Delaware, an admission at the trial of the corporate existence of the parties as alleged and their citizenship was an admission that they were corporations and were citizens created and existing under the laws of the states mentioned.

12. Appeal and error ⟨⟩273(5)—Exception to the charge, without pointing out matters obbjected to, held insufficient.

An "exception to the charge" is a general exception, contrary to rule 10 of the Circuit Court of Appeals for the Third Circuit (224 Fed. vii, 137 C. C. A. vii), which provides that the party excepting shall state distinctly and separately the several matters in the charge to which he excepts, and that only such matters shall be included in the bill of exceptions.

13. Sales ⟨⟩421—In buyer's action for seller's breach, charge held full and correct.

In a buyer's action for breach of a contract for the sale of oil to be delivered at the seller's wells to a third person's pipe line, in which the seller charged the buyer with breaking the contract and filed a recoupment in damages, the charge *held* to clearly analyze the facts, fully state the issues, and correctly expound the law.

In Error to the District Court of the United States for the District of Delaware; Hugh M. Morris, Judge.

Action by the White Star Refining Company against the Magna Oil & Refining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The charge was as follows, the parts covered by the syllabus being the parts assigned as error:

Gentlemen of the jury: The plaintiff, White Star Refining Company, a Michigan corporation, seeks by this action to recover from the defendant Magna Oil & Refining Company, a Delaware corporation, damages for an alleged breach of a contract made between the plaintiff and the defendant on the 22d day of October, 1919, for the sale by the defendant and the purchase by the plaintiff of 100,000 barrels of Burkburnett crude oil, under the terms and conditions therein mentioned. That contract provides:

"That, for and in consideration of one dollar ($1.00) in hand paid, each to the other, receipt of which is hereby acknowledged the seller hereby agrees to sell, and the purchaser hereby agrees to purchase one hundred thousand (100,000) barrels of fresh Burkburnett crude oil for delivery at the seller's wells to the gathering line of the Empire Pipe Line Company, in approximately equal daily quantities during the period of ninety (90) days beginning November 1, 1919, and ending January 28, 1920, the price for said Burkburnett crude oil to be one dollar and sixty cents ($1.60) per barrel of forty-two (42) gallons each at the seller's wells. It being understood that this is a flat price and not based upon the fluctuations of the crude oil market. It being further understood that the terms of payment for such crude oil are cash upon presentation of signed delivery receipts, and time being the essence hereof, the seller may at its option, on failure of the purchaser to make prompt payment,

terminate this contract forthwith. Before this contract shall become binding, as security for the prompt payment of all amounts due the seller from the purchaser, the purchaser will deposit, in escrow, with the First National Bank in St. Louis, of St. Louis, Missouri, the sum of sixteen thousand ($16,000.00) dollars, subject to the terms of this contract, and will cause written notification by United States mail to be given by the escrow holder to the seller of such deposit for such purpose; it being understood that all current payments are to be made by the purchaser without recourse to the escrow fund, leaving the escrow fund intact for the payment of any delinquency.

"The purchaser is to make all necessary arrangements for receiving said crude oil during the period mentioned and to use their utmost endeavor to prevent delay. The seller agrees to deliver all oil promptly, but the seller shall not be liable for failures to make deliveries where such failures arise on account of fires, strikes, or any other causes beyond its control, and the purchaser agrees to accept said crude oil promptly and without delay, but will not be liable for not accepting same when inability to do so is the result of fires, strikes, or other cause beyond its reasonable control."

The making and execution of the contract is admitted, as is also the fulfillment by the plaintiff of the provision therein touching the deposit of $16,000 in the First National Bank in St. Louis, Mo. It is also admitted that of the 100,000 barrels of oil specified in the contract the plaintiff did not receive 97,972 barrels thereof. Consequently the main question for your determination is whether the fact that the plaintiff did not get the full quantity of oil to which it was entitled under the contract was due in whole or in part to its failure to observe the terms and conditions of the contract, or was, on the other hand, due to the failure of the defendant to observe in whole or in part such terms and conditions. This is the crucial question for your determination. But inasmuch as the contract provides, not only for the delivery and acceptance of 100,000 barrels of oil, but also for delivery thereof, "at the seller's wells to the gathering line of the Empire Pipe Line Company in approximately equal daily quantities during the period of 90 days beginning November 1, 1919, and ending January 28, 1920," and further that "the purchaser is to make all necessary arrangements for receiving said crude oil during the period mentioned, and to use their utmost endeavor to prevent delay," and as it is conceded by the plaintiff that the gathering lines of the Empire Pipe Line Company were not connected with any storage tanks at the defendant's wells until a few days after November 1, 1919, and that they were then connected, not with the tanks on each of the leases of the defendant company, but only with the tanks on lease No. 2, otherwise designated as the Taylor tract, or lot No. 12, in block 98, and as no further pipe line connections were made until on or about the 2d day of December when connections were made with the wooden tanks on lease No. 1, otherwise known as the Lanier tract, and as no oil was received by the pipe line company from the defendant for many days after the original pipe line connections had been made, the problem, Who broke the contract? becomes and is, even without reference to contentions of the parties not supported by admitted facts, a complex one, the solution of which depends in large measure upon the determination of subordinate problems of both law and fact.

[1] Let us first consider the effect of the nonconnection of the pipe line with the tanks of the defendant company until some days after the 1st day of November. The plaintiff asserts that the only effect thereof was to increase the amount of the daily deliveries of oil during the unexpired portion of the contract period, and bases its assertion upon that clause of the contract which provides that the "purchaser is to make all necessary arrangements for receiving said crude oil during the period mentioned, and to use their utmost endeavor to prevent delay," and upon its contention that the evidence discloses that it, the plaintiff, did use its utmost endeavors to prevent delay in the installation and connection of the pipe lines, and that such delay as did occur was beyond its reasonable control. The defendant, on the other hand, contends that each day's delay after November 1 in making the pipe line connection with the tanks of the defendant had the effect of striking a day's installment of oil out of the contract and finally discharging

the defendant from its obligation to that extent. These contentions make it necessary that the meaning of the clause of the contract relied upon by the plaintiff in this particular be stated to you for your guidance.

While it is true that the contract provides that the plaintiff should make all necessary arrangements for receiving the oil during the contract period, yet as it also provided that the plaintiff was to use its utmost endeavor to prevent delay, and as it further designated the particular pipe line to be connected and to which delivery of the oil was to be made, namely, the gathering line of the Empire Pipe Line Company, and as the Empire Pipe Line Company is an independent company, not owned or controlled by either of the parties to the contract, the plaintiff was not bound absolutely and at all events to have the connections made on the 1st day of November, but was obligated merely to use its utmost endeavor to prevent delay in the making of the pipe line connections. Any other construction would deprive the words of the contract "to use their utmost endeavor to prevent delay" of any meeting, a construction to be avoided. Consequently, if you find from the evidence that the plaintiff did use its utmost endeavor to prevent delay in having the Empire Pipe Line Company connect its lines with the tanks at the defendant's wells, you must find that the delay in making the pipe line connection did not constitute a breach of the contract by the plaintiff.

In such event the only effect of such delay was to increase the daily quantities of oil deliverable under the contract during the period of the contract remaining after the making of such connections. But, if you should find from the evidence that the plaintiff did not use its utmost endeavor to prevent delay in this respect, then you must find that there was a breach—a partial breach—by the plaintiff of the contract on each of the days of the contract period that elapsed before the first pipe line connection was made. The effect of such breach or breaches on the part of the plaintiff, if any there were, was to discharge the defendant from its obligation under the contract to make delivery of the oil that would have been deliverable during the period in question had the pipe lines been connected on the 1st day of November.

The remaining question touching the installation of the gathering lines of the pipe line company is whether adequate or sufficient connections were made with the defendant's tanks at its wells. The contract is silent as to the number of leases or the number of tanks with which the gathering lines of the Empire Line Company should be connected. Consequently, it was not incumbent upon the plaintiff to have a connection made with each tank on each of defendant's leases; but it was incumbent upon the plaintiff to have connections made only with such number of tanks upon any one or more of defendant's leases as would enable the defendant to deliver through its tanks to those lines, in the usual course of business and without unreasonable inconvenience to it, oil in the quantity and manner called for by the contract. Hence, if you find that the defendant could have made delivery of the contract quantity of oil through the tanks with which connections were in fact made, and could have made such delivery in the usual course of business without unreasonable inconvenience to it, you must also find that the connections made were proper and adequate under the contract, and that the plaintiff was without fault in this particular.

[2] It is conceded that, although the pipe lines were connected with the tanks of the defendant on the Taylor tract on or about the 6th, 7th, or 8th day of November no oil was run until on or about the 23d day of November. The plaintiff contends that it was ready, able, and willing during all of this period to receive the oil, and that its failure to receive the oil during this period was due solely to the fault of the defendant; that the fault of the defendant consisted in its failure to put itself in a position to deliver the oil, in that the oil in its tanks was to the knowledge of the plaintiff the commingled oil of the defendant and of the defendant's lessors; and that the pipe line company and the plaintiff were not justified in receiving such commingled oil without the consent in writing of those persons other than the defendant having a legal interest in such oil. If you find from the evidence that persons other than the defendant were the owners of a part of the oil in the tanks of the defendant, and that the oil of the defendant and of

such other persons was commingled, then you must find that the defendant was not ready and able to deliver oil under the contract until the pipe line company or the plaintiff received authority from such other persons to take such oil. If you so find, and if you also find that the plaintiff was during that period ready, able, and willing to receive the oil, then you must find that during each of the days that the defendant was not so ready and able to deliver the oil there was a breach of the contract on the part of the defendant.

After you shall have disposed of the issues of fact hereinbefore pointed out, touching the period from the 1st day of November to the date upon which the first pipe line connections were made, namely, on or about November 6th, 7th or 8th, and shall have disposed of the issues of fact touching the period beginning on the latter day and ending on the day on which the substitute for the division order was delivered to the plaintiff, or to the pipe line company, you will then consider the issues of fact now to be pointed out touching the remaining period of the contract. Concededly during this period the contract was broken. The plaintiff contends that it was then broken only by the defendant, while the defendant, on the other hand, contends that it was broken only by the plaintiff. Who broke the contract is a question that must be determined by you. As the contract here involved calls for delivery of the oil, not in one lot and at one time, but by daily installments, the question—by whom was the contract broken—must be determined by you as to each installment, for, though the contract is an entire contract for the whole quantity of oil, yet it is divisible in performance.[1]

When one party agrees to deliver an article at a certain time and place and another agrees then and there to receive it, in an action by the purchaser against the seller for the nonperformance of the contract, where, as in this case, the question of payment is not involved, it is sufficient for the purchaser to allege and prove that he was ready and willing, at the time and place appointed, to receive the article. In such cases the buyer's duty is to be present or have some one present at the time and place appointed, ready, and willing there to perform the contract on his part, i. e., to receive the article purchased; and, if the seller does nothing, the purchaser's right of action is thereupon complete. On the other hand, if the seller has the article ready for delivery at the time and place appointed, the buyer must show that he, or his representative, was there ready and able to receive it, before he can maintain an action for the nondelivery. But, if either party would enforce this contract against the other, he must do more than show the default of such other; he must show a performance or a readiness and willingness to perform on his part at the time and place appointed.[2]

The defendant contends that on or about the 8th, 9th, or 10th of December it elected to terminate the contract and so notified the plaintiff. If you find from the evidence in this case, when considered in the light of the principles of law governing this matter, now to be stated, that the defendant was entitled to terminate the contract, elected so to do, and notified the plaintiff of such election, the effect of such action on the part of the defendant was to discharge it from any obligation to make further deliveries of oil under the contract. But, before you may find that the defendant effectively terminated the contract, you must find that prior to the date of the alleged termination on the part of the defendant, the plaintiff had broken the contract as to one or more installments of oil, that such breach or breaches on the part of the plaintiff had not been waived by the defendant, that the defendant elected to terminate the contract, and that it notified the plaintiff of such election. You need no further instructions upon principles of law to enable you to determine whether before the 8th, 9th or 10th of December the plaintiff had broken the contract. If you find that the plaintiff had not theretofore broken the contract, then you must find that there was no effective termination of the contract on the part of the defendant; but if, on the other hand, you find that the plaintiff had broken the contract before the time at which the

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[1] Benjamin on Sales, p. 816.

[2] Neis v. Yocum (C. C.) 16 Fed. 168; Greenwood v. Watson, 171 Fed. 619, 96 C. C. A. 421.

defendant elected to terminate, if it did so elect, you must then consider whether the defendant had waived such breach or breaches of the plaintiff.

Waiver is the intentional relinquishment of a known right. It may be found in the conduct as well as in the words of the party not in default. If you find that the plaintiff broke the contract, and that after such breaches were known to the defendant the defendant promised the plaintiff to make further deliveries of oil under the contract, or the defendant thereafter made subsequent unconditional deliveries of oil under the contract, and that the plaintiff did not after such promises or delivery of oil by the defendant, and before the date of the alleged termination of the contract commit a further breach or breaches of the contract, you must find that the breach or breaches on the part of the plaintiff were waived by the defendant, and that the defendant was without right to terminate the contract. If, on the other hand, you do not so find you must then find as a fact whether the defendant elected to rescind, and whether it gave notice to the defendant of its election. A mere threat to terminate or to abandon a contract is, of course, not a termination. Notice of an election to rescind, if given to Mr. Gerteis, would be sufficient, without regard to whether either Mr. Gerteis or the defendant then or subsequently repeated such notice to any officer or director of the defendant company.

After you shall have disposed of the question as to the termination of the contract by the defendant you should then inquire whether the contract was broken by the defendant as claimed by the plaintiff. If you find that the contract was terminated by the defendant in conformity with the legal principles above stated, the period of the present inquiry will be restricted to the period beginning with the day the pipe lines were connected with the Taylor tract and ending on the day upon which such termination was made by the defendant. If, on the other hand, you find that there was not an effective termination of the contract by the defendant, the present inquiry will be directed to the entire contract period after the date of the connection of the pipe lines with the Taylor lease. You must consider the question of defendant's breach as to each day during the period of the time covered by your inquiry. The principles of law by which you are to be guided in so doing have been hereinbefore stated. If you find that the defendant was not ready, able, and willing to deliver an installment or installments of oil to the plaintiff upon any day or days upon which the plaintiff was ready, able, and willing to receive the same, you must then find that upon each of such days the defendant committed a breach of the contract. If you do so find, the defendant would be liable in damages to the plaintiff therefor.

[3] The measure of damages to which the plaintiff would be entitled under such circumstances would, if the market value of the oil exceeded the contract price, and except for the matter hereinafter to be stated, be the sum of the differences between the contract price and the market value on the day or days upon which the breach or breaches by the defendant occurred;[3] but if, upon any such day or days, the market value did not exceed the contract price the damages to which the plaintiff would be entitled for such day or days would be nominal damages only. The plaintiff contends, and has offered evidence in support of its contention, that the defendant was from time to time until some time in the month of December charged by the plaintiff with failure to make delivery of installments of oil at the times appointed therefor by the contract, and that the defendant at such times promised the plaintiff to make delivery of the oil. If you find that such promise or promises were made by the defendant, and applied to installments of oil in arrear at the time of such promise or promises, and that the plaintiff waited for a reasonable time after the last of such promises for the defendant to make delivery of the oil so promised, the plaintiff is entitled to have its damages for the nondelivery of the oil so promised ascertained upon the basis of the difference between the contract price and the market value of like oil on the expiration

[3] Roper v. Johnson, L. R. 8 C. P. 167; Brown v. Muller, L. R. 8 Ex. 319; 24 A. & E. (2d Ed.) p. 1152.

of a reasonable time from the time of the last promise.[4] What is a reasonable time must be determined by you after taking into consideration all the facts and circumstances of this case.

Market value means the fair value as between one who desires but is not compelled to purchase, and one who is willing but is not compelled to sell, not what could be obtained for like oil under peculiar circumstances, when a price greater than its fair value could be obtained, nor a speculative value, nor a value obtained from the necessity of the seller to sell or the purchaser to buy, but its value at a sale which a prudent owner would make if he had the power of election as to time and terms.[5] In determining market value you are not restricted to the evidence of actual sales, but you are at liberty to consider in this connection accredited price current lists and market reports, if any, published in trade journals which have been admitted in evidence, if you believe from the evidence such trade journals to be trustworthy.[6] The market price must be determined as of the place of delivery provided the goods have a market price at such place.[7] If there is no market price at the place of delivery the price at the nearest available market, where the same or like goods could be procured should be taken.[8] In the latter instance the difference in cost of transportation should be adjusted. In the event that you find no direct evidence as to the market value on a day or days upon which such value is to be ascertained by you, the price at which a sale of like oil was made within a reasonable time of the day or days upon which the market price is to be ascertained may be considered by you as some evidence of the market price on such day or days. Whether or not the plaintiff is entitled by way of additional damages to interest at the legal rate on the amount of damages, if any, found by you to be due the plaintiff, is for your determination, after taking into consideration all the circumstances of the case.

[4] After you shall have determined the aggregate of the damages, if any, to which the plaintiff is entitled under the evidence and the instructions already given you, you will next consider whether those damages should be reduced by reason of the matters offered in evidence under the defendant's notice of recoupment. By its notice of recoupment the defendant alleges that at the time of the execution of the contract in question the plaintiff was informed that the defendant made the contract for the purpose of marketing the flush production of oil from its wells, that is, the oil flowing from the wells while impelled by pressure of natural gas or other natural forces; that the plaintiff was then informed that if it did not take from the defendant the oil referred to in the contract as thereby required the defendant would be damaged by inability to mine, produce, and dispose of the flush production oil, whereby said oil and the value thereof would be entirely lost to the defendant; that by reason of the failure of the plaintiff to accept and receive the oil covered by the contract the defendant's wells were injured, and the defendant lost, by inability to market said oil and by seepage from defendant's wells into wells of adjoining owners, a large quantity of oil.

If you find that the plaintiff did not break the contract, or that the contract was broken only by the plaintiff, or if you find that the defendant did not give to the plaintiff the notice that it alleges in the recoupment that it gave, then the notice of recoupment is of no value in this case, and may be wholly disregarded by you; but, if you find that the contract was broken by both the plaintiff and the defendant, then you will determine whether as a result of such breach or breaches on the part of the plaintiff the defendant's wells were injured, and, if so, to what extent, and whether the defendant lost

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[4] Hickman v. Haynes, L. R. 10 C. P. 607; Ogle v. Lord Vane, L. R. 2 Q. B. 275, in error 2 Q. B. 272; In re Llansmalet Tin Plate Co., L. R. 16 Eq. 155; Tyres v. Rosedale Iron Co., L. R. 8 Ex. 305.

[5] Madisonville, H. & E. R. Co. v. Ross, 13 L. R. 2 N. S. 430.

[6] Virginia v. West Virginia, 238 U. S. 202, 212, 35 Sup. Ct. 795, 59 L. Ed. 1272.

[7] 35 Cyc. 638.

[8] Grand Tower Min., etc., Co. v. Phillips, 23 Wall. 471, 23 L. Ed. 71.

any oil by inability to market such oil and by seepage from defendant's wells into wells of adjoining owners. If you so find, you must ascertain the amount of oil the defendant lost in this manner solely by reason of plaintiff's breach. In ascertaining the amount of oil so lost by the defendant, if any, you may not charge the plaintiff with losses to the defendant of oil by seepage or otherwise, which the defendant may have sustained by reason of the increase in the number of wells in the northwest extension of the Burkburnett district, or in the activity of the new wells, or in the greater activity of the wells on the adjoining properties at the time of the execution of the contract, if there was any increased activity in such wells.

Nor may you charge the plaintiff with losses of oil, if any, sustained by the defendant by reason of the cessation of the flush production of oil in the Burkburnett district, if the breach or breaches of the plaintiff had no appreciable effect in bringing about such cessation. If, after taking into consideration the foregoing matters and the other evidence in the case, you find that, due solely to the default of plaintiff, the wells of the defendant were injured, or the defendant lost certain oil from the so-called subterranean reservoir, by drainage from its lands to wells of adjoining lands, which, but for the default, it would itself have mined and saved, the defendant would be entitled to have the damages of the plaintiff, if any, reduced by you by the amount to which the defendant was injured thereby. The amount of defendant's damages in such event would be ascertained by multiplying the number of barrels of oil so lost, by the contract price less the cost of production, if any, with interest thereon should you determine to allow such interest by way of additional damage. If you find that the defendant sustained damage as alleged in its notice of recoupment, the result obtained by subtracting the aggregate of the damages so sustained by the defendant from the aggregate of the damages so sustained by the plaintiff should be the amount of your verdict for the plaintiff, in the event that the damages sustained by the plaintiff exceed the damages sustained by the defendant; but should you find from the evidence that no breaches of the contract were made by the defendant, or if you find that the damages sustained by the defendant equal or exceed those sustained by the plaintiff, your verdict should be for the defendant.[9] If, on the other hand, you find that the contract was broken in whole or in part by the defendant, and not broken in whole or in part by the plaintiff, your verdict should be for the plaintiff, and for the full amount at which you may ascertain its damages under the evidence and the principles of law heretofore stated to you.

You have heard the testimony. It is fresh in your recollection, and I shall not comment upon or summarize it. The burden of proving the allegations and matters essential to sustain plaintiff's claim to damages as to any installment or installments of oil rests upon the plaintiff, while the burden of proving the matters essential to sustain defendant's claim to damages by way of recoupment as set up in its notice of recoupment rests upon the defendant.

You are the sole judges of the facts, and of the weight and value of the testimony of the witnesses, aand where there is conflict in the evidence you are first to reconcile that conflict, if you can. If you cannot, you are to give credit to those witnesses whom, from all the circumstances—the appearance of the witnesses, their apparent fairness, their manner on the stand, their ability to testify, and their knowledge of the things to which they testify—you deem most worthy of credit, and reject that part of the testimony which you deem to be not worthy of credit.

Your verdict should be based upon the preponderance or greater weight of the evidence, and not necessarily upon the greater number of witnesses.

The court has been requested to give you instructions on a number of points of law in the language employed by counsel. The charge of the court embraces in substance all of the propositions suggested by counsel, in so far as those propositions are, in my opinion, properly applicable to the case.

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[9] 24 R. C. L. 884; 25 A. & E. (2d Ed.) 561.

Louis Marshall, of New York City, and Caleb S. Layton, of Wilmington, Del., for plaintiff in error.

Rowland M. Connor, of Detroit, Mich., and William S. Hilles, of Wilmington, Del., for defendant in error.

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

DAVIS, Circuit Judge. The plaintiff below, a Michigan corporation, brought suit against the defendant below, a Delaware corporation, to recover damages for breach of a contract dated October 22, 1919, wherein defendant agreed to sell and plaintiff to purchase 100,000 barrels of crude oil in approximately equal daily quantities during the period of 90 days beginning November 1, 1919, and ending January 28, 1920, at $1.60 per barrel, "time being the essence" of the contract. The plaintiff was to make all necessary arrangements to receive the oil at the wells of the seller during the period, and "to use their utmost endeavor to prevent delay." The defendant agreed "to deliver all oil promptly," and the plaintiff to accept it promptly and without delay, but was not to be "liable for not accepting same when inability to do so is the result of fires, strikes, or other causes beyond its reasonable control."

The oil was to be delivered at the defendant's wells to the Empire Pipe Line Company, an independent common carrier, which had to lay its pipes a distance of about two miles, and connect them with the wells of the defendant company. The plaintiff made arrangements with the Pipe Line Company on October 22, 1919, the same day the agreement was executed, to lay the pipes and make connections with the wells of the defendant company. The Pipe Line Company, however, did not connect its pipes with the wells until on or about November 7 or 8, 1919, although urged to do so.

In November, 1919, defendant delivered 803.84 and in December 1,223.92 barrels, making a total of 2,027.76 barrels. On or about January 31, 1920, defendant definitely and orally informed plaintiff that it would not make "any further deliveries on the contract." From the time the pipe connections were made until January 31st, the plaintiff alleges it constantly urged the defendant to make deliveries in accordance with the terms of the contract, and suggests as a reason for its failure and refusal to do so that oil advanced in price almost daily from about the contract price, of $1.60, to $3 per barrel on January 6, 1920, and continued to advance until on February 27, 1920, it was $3.25, and in March following $3.50, per barrel. On the other hand, the defendant alleges that it was ready and willing to deliver, but the plaintiff could or would not receive, though urged to do so, and so on or about December 6, 1919, it repudiated the contract, but did as a mere matter of accommodation deliver 803.40 barrels afterward. It contends that it was anxious to deliver, because it was daily losing oil through seepage from its lands into adjoining lands, from which oil was being abstracted. It therefore filed a recoupment in damages against the plaintiff.

The defendant seems to rely mainly on its contention that the allegations in the declaration as to diverse citizenship of the corporations were insufficient to confer jurisdiction on a federal court. This point was stressed in the brief, and, notwithstanding that it was not raised below, it will be fully considered here, because it is a jurisdictional question. The plaintiff alleged in the introductory paragraph of the declaration that it was "a corporation existing under the laws of the state of Michigan," and the defendant was "a corporation existing under the laws of the state of Delaware." It further appears in each of the three counts that the plaintiff is "a corporation existing under and by virtue of the laws of the state of Michigan," and the defendant is "a corporation existing under and by virtue of the laws of the state of Delaware."

[5-7] These allegations are insufficient, defendant says, because "a corporation may exist under the laws of several states" at the same time. The averment in a formal pleading that a corporation exists under and by virtue of the laws of a state, by legal intendment, means that it legally exists. A corporation, the legal entity or person which exists by force of law, can have no existence beyond the limits of the state which creates it and endues it with faculties and powers. Ohio & Mississippi Railroad Co. v. Wheeler, 66 U. S. (1 Black) 286, 17 L. Ed. 130. It is a citizen of the state under whose laws it was created, and is deemed a person, but may do only what is authorized by its charter, while natural persons may do whatever is not forbidden by law. Railroad Co. v. Harris, 79 U. S. (12 Wall.) 65, 81, 20 L. Ed. 354. A corporation created in one state may not migrate from state to state, but may carry on business and exercise its charter powers in another state by complying with the laws of that state, without becoming a citizen thereof.

[8] Authority of a corporation to carry on business in another state is most frequently given by general statutes applicable alike to all foreign corporations, but sometimes a special enabling statute is passed for a particular corporation. This statute may confer practically the same powers upon a foreign corporation as it possesses in its home state. If the purpose of the Legislature in passing the statute for a particular corporation is to make the corporation of another state its own, it thereby creates a new corporation with a new existence. Each corporation, it may be, with the same name and powers in each state, exists independently under and by virtue of the laws of its own state. This results in two separate, legal entities, alike in name and powers, but each existing under the laws of its own state quoad hoc any property within its territorial jurisdiction. If the purpose is not to create, but simply to enable, permit, and control, the corporation is not a citizen of the enabling state, but remains a foreign corporation. Ohio & Mississippi Railroad Co. v. Wheeler, supra; Railroad Co. v. Alabama, 107 U. S. 581, 584, 2 Sup. Ct. 432, 27 L. Ed. 518.

[9] The creation of a corporation is the beginning of its existence, but for the purpose of jurisdiction in a federal court on the ground of diverse citizenship, the beginning of existence is not enough. Continuance is necessary. The full allegation, in pleading the citizenship of

a corporation, is that it is a corporation created and existing under the laws of the state in question. This is illustrated in the case of the Sun Printing & Publishing Association v. Edwards, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027. It was alleged in the declaration that the association was a corporation "duly organized and existing under the laws of New York." The averment, however, is often made and held sufficient that the corporation was simply "created"—a past act —under the laws of the state, but the presumption and legal intendment are that the corporation was not only created, but continues to exist, under the laws of the state. Likewise the statement that a corporation "exists" under and by virtue of the laws of a state intends to import the fact that it not only exists, but also began its existence—was created—under and by virtue of the laws of that state, and so, in legal intendment, "created by, organized under, or existing under" the laws of a state are equivalent phrases. Mathieson Alkali Works v. Mathieson, 150 Fed. 241, 80 C. C. A. 129. "If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient." Marshall v. Baltimore & Ohio Railroad Co., 57 U. S. (16 How.) 314, 14 L. Ed. 953.

[10] Where jurisdiction in a federal court depends upon diverse citizenship, the whole record may be looked to for the purpose of curing a defective averment of citizenship, and if the requisite citizenship is anywhere expressly alleged, or facts stated which in legal intendment constitute such averment, it is sufficient. Sun Printing & Publishing Association v. Edwards, supra.

[11] At the beginning of the trial the following admission was made:

"Mr. Hilles: If your honor please, the plaintiff and defendant, respectively, are willing to admit the corporate existence of the parties as alleged in the declaration and their citizenship.
"The Court: Is it so understood, Mr. Layton?
"Mr. Layton: Yes, sir."

This was, in our opinion, an intended admission that the parties were corporations and citizens created and existing under the laws of the respective states mentioned in the declaration. The truth of their citizenship as such has been nowhere challenged, and if the question of the sufficiency of the averment had been raised in the District Court, an amendment could and doubtless would have been made. We therefore conclude that on this branch of the case there is nothing to disturb the judgment of the District Court.

[12] The other assignments refer to alleged errors in charging the jury and in refusing to charge requests. At the close of the charge the judge stated that:

"The charge of the court embraces in substance all of the propositions suggested by counsel, in so far as those propositions are, in my opinion, properly applicable to the case."

Counsel for defendant neither noted an exception to the refusal to charge requests, nor did he note an exception to any particular part of the charge, but simply noted an "exception to the charge of the court." This was a general exception, which is contrary to rule 10 of this court

(224 Fed. vii, 137 C. C. A. vii). It provides that the party excepting shall state distinctly and separately the several matters in the charge to which he excepts, and only such matters shall be included in the bill of exceptions. Experience has confirmed the wisdom of this rule, and assignments of error not based upon such exceptions, this court has held, will not be considered. Barnes & Tucker Coal Co. v. Vozar, 227 Fed. 25, 141 C. C. A. 579; Pennsylvania Railroad Co. v. Repine, 272 Fed. 898.

[13] In this case, however, the learned trial judge in a most carefully prepared and comprehensive charge clearly analyzed the facts, fully stated the issues, and correctly expounded the law. The verdict of the jury settles the facts, and the judgment of the District Court is affirmed.

MECARTNEY v. GUARDIAN TRUST CO. et al. *

(Circuit Court of Appeals, Eighth Circuit. February 17, 1922.)

No. 5582.

Attorney and client ⟸155—Fee allowable to attorney from fund recovered for corporation by intervening stockholders.

When, through breach of duty by the officers or attorneys of a corporation, its rights were imperiled and stockholders were justified in intervening for their protection, a reasonable fee is properly allowable to their attorney from funds recovered for the corporation.

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

Suit in equity by Edward A. Shedd and others against the Guardian Trust Company and others, in which Henry C. Flower was appointed receiver. From an order allowing in part only his claim against the Trust Company, Harry S. Mecartney appeals. Modified.

James A. Reed and J. G. L. Harvey, both of Kansas City, Mo., for appellant.

Justin D. Bowersock and C. W. German, both of Kansas City, Mo., for appellees.

Before HOOK, Circuit Judge, and COTTERAL and JOHNSON, District Judges.

JOHNSON, District Judge. On the 29th day of August, 1916, Henry C. Flower was appointed by the court below receiver of the property of the Guardian Trust Company in a suit pending in said court in which Edward A. Shedd and others were plaintiffs and the Guardian Trust Company and others were defendants.

On May 12, 1919, the appellant, an attorney at law, filed in said cause a claim against the Guardian Trust Company for the sum of $75,000 and interest thereon from the 15th day of April, 1916. He claimed this amount as the reasonable value of legal services rendered by him and associate counsel in behalf of the Trust Company. In his claim he averred, among other things:

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

*Rehearing denied August 18, 1922.

"That his claim herein asserted is for legal services * * * rendered * * * in a certain cause formerly pending in the United States Circuit Court of Appeals for the Eighth Circuit, entitled 'Central Improvement Company, Appellant, v. Cambria Steel Company, Guardian Trust Company et al., Appellees, No. 3489, and Guardian Trust Company, Appellant, v. Cambria Steel Company, Kansas City Southern Railway Company et al., Appellees, No. 3490, Consolidated Cause.' That such cause involved a review of the record in case No. 2468 of this District Court in which latter cause the Cambria Steel Company was complainant, the receivers of the Kansas City Suburban Belt Railroad Company—herein called the 'Belt Company'—et al. were ancillary complainants, and the Kansas City Southern Railway Company, intervener, and to which the Guardian Trust Company, the Central Improvement Company, and various other companies were defendants.

"That the said services * * * were rendered * * * more particularly in and about the issues raised upon and occasioned by two different intervening petitions filed in said cause in the said Court of Appeals by and in the name of Edward A. and Charles B. Shedd and Robert H. Law, stockholders of said Guardian Trust Company on behalf of said Trust Company, and have resulted in a large financial benefit to said Guardian Trust Company and all its stockholders. * * *

"That the said legal services for which compensation is here asked were rendered and furnished by this claimant and by associate counsel who were employed and paid by this claimant. * * *"

The trial court found that the sum of $15,000 was the reasonable value of the services rendered by claimant in behalf of the Trust Company and entered judgment in his favor for said sum. Claimant has appealed the case to this court and urges that, under the uncontradicted evidence in the case, he was entitled to the whole of the sum claimed by him.

The consolidated cause above mentioned was argued and taken under advisement on the 26th day of May, 1911, by the court which will be referred to hereafter when necessary for clearness as the Circuit Court of Appeals.

The status of the litigation at the time the cause was submitted will be seen from the following statement which we quote from the opinion subsequently filed in the case and reported in 201 Fed. pp. 816, 817, 120 C. C. A. 126, 127:

"On September 6, 1900, the Cambria Company filed a creditor's bill against the Belt Company, Trust Company, and other companies, the object and purpose of which was to recover certain securities belonging to the Belt Company, which had been deposited with the Trust Company and security for the Belt Company's indebtedness to the Trust Company, claiming in its bill that the Belt Company was not in fact indebted to the Trust Company, and made an application for the appointment of a receiver, and on that day receivers were appointed for the Belt Company upon the joint application of the Cambria Company and the Provident Company complainant in the foreclosure suit against the Belt Company.

"In the suit brought by the Cambria Company issues were joined, the receivers appointed for the Belt Company filed a cross-bill against the Trust Company, denying indebtedness upon the part of the Belt Company to the Trust Company, but claiming that the Trust Company was in fact a debtor of the Belt Company. The case was, in November, 1900, referred to Hon. Shannon C. Douglass, as special master, to take the testimony, etc. The hearing proceeded before the master, and after much testimony had been taken an order was made by the court in February, 1905, pursuant to a stipulation of parties, admitting the Southern Company as a party and giving it leave to file a petition of intervention, and the Southern Company filed its petition of intervention on the 27th day of that month, claiming that the various

securities held by the Trust Company to secure its indebtedness against the Belt Company were covered by the mortgage which was foreclosed against the Belt Company, and sought to recover such property by its bill of intervention.

"The hearing before the master extended over several years, upwards of 34,000 pages of testimony was taken, and the master, on the 21st of May, 1910, filed his report, which comprises 381 pages of the printed record. The evidence has not been brought to this court; hence all questions of fact as found by the master are conclusive upon the parties on this appeal.

"The master found that the evidence did not support the claim of the Cambria Company and recommended that its bill be dismissed for want of equity. The master found upon the accounting that there was due from the Belt Company to the Trust Company the sum of $639,658.86.

"The master found fully the facts as to the reorganization plan [referred to in the preceding pages of the opinion], the acquiring by the Southern Company of the stock and bonds of the Gulf Company, Dock Company, and Belt Company, the issuing of its new stock and bonds to the holders of the bonds and stock of those companies, in exchange for the bonds and stock of the respective companies held by them. * * *

"The master found, as a matter of law, that the Southern Company was not liable for the debts of the Belt Company.

"The Trust Company filed exceptions to the report of the master, among other things to the finding that the Southern Company was not liable for the floating indebtedness of the Belt Company, giving as reasons therefor that that was not an issue in the case, and no finding thereon should have been made by the master. * * *

"Subsequently, a hearing was had by the court upon the report of the master and the exceptions thereto, the exceptions were overruled, and the report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the master, from which the Trust Company and the Central Improvement Company have prosecuted their appeal. * * *

"The assignments of error relied upon in this court are: (1) That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company," etc.

The case was submitted in behalf of the appellant Guardian Trust Company upon the assignment of error above quoted.

On the 16th day of June following, claimant through associate counsel presented to the Circuit Court of Appeals the first of the two intervening petitions above mentioned and asked leave to file the same. In the petition the attention of the court was called to the finding in the decree of the lower court that the Southern Company was not liable for the debts of the Belt Company, and the suggestion was made that this finding was not supported by the facts found by the master appearing in the record. It was also called to the attention of the court that in the briefs filed by the Trust Company the only question argued was the right of the lower court to make a finding in respect to the liability of the Southern Company for the indebtedness of the Belt Company to the Trust Company, and the suggestion was made, if the court should hold that the lower court had the right to make a finding in respect to the liability of the Southern Company for this indebtedness of the Belt Company, it would follow, if the merits of the ruling of the trial court were not gone into, the Trust Company would lose its right to a decree against the Southern Company for the amount due from the Belt Company.

On the return day counsel for the Trust Company joined hands with counsel for the Southern Company in opposing the application of the

stockholders to intervene and present the issue raised by them in their petition. Among other things, he said:

"The law covering that application is in our judgment quite fully and ably presented by the counsel opposed to us. We are, counsel on both sides of this case, of the opinion that the petition of these stockholders should not be granted. Both sides are desirous of the speedy determination of the case; both sides are desirous of the judgment of the court on the issue of the case.

"We believe, for the reasons already stated, that the application is not proper. It comes untimely and from persons not entitled to be heard by this court. * * * We desire to say further in respect to our personal conduct in this litigation, that not only did we prepare the case, but as to policy to be adopted and the manner of presentation to this court, and the subject-matter of this appeal, but the matter was taken up before the appeal was taken with the members of the executive committee of the Guardian Trust Company, and the whole matter laid before them. The policy of this appeal recommended by us was formally and expressly adopted by resolution of the executive committee. Furthermore, as soon as the filing of this petition, reflecting at least upon the intelligence and by implication upon the integrity of counsel and members of the executive committee of the Guardian Trust Company, the matter has been laid before the majority of the executive committee, those of the committee who reside in Kansas City, and the policy pursued by counsel in taking this appeal has met with the approval of the members who could be reached. * * *

"Now the essence of the application is such that we feel constrained to go a bit out of the record. It will not be denied, I presume, that the whole petition, the whole construction of this petition, is that of former counsel for the Trust Company (claimant). * * * The former counsel for the Guardian Trust Company is now suing the Trust Company for services rendered in this case. The notice which he gave to counsel representing the Trust Company of the danger which he conceives in this matter was given under oath during his cross-examination in this case. * * *

"We refrained from saying on argument what we now say, that the case had assumed the form whereby in the national court it was impossible for the Guardian Trust Company to recover any substantial sum, or any substantial benefit in any way. * * * Mr. Mecartney brought the Kansas City Southern into this case by stipulation. * * * He filed the answer * * * which has raised all of this trouble. He never asked for any relief against that company, and had it fixed in such form that if the decision of the national court was [not] in favor of the Guardian Trust Company it could receive not one dollar from the Kansas City Southern, but if it was against the Guardian Trust Company it might * * * be res adjudicata. * * *

"(Of) the stockholders who come in here now as petitioners one is not a stockholder of record and the other two have been clients of Mr. Mecartney's for many years, and their legal policy is entirely shaped by him. They are no longer officers of the company, and there seems to be a desire upon his part to hamper the present counsel and to show them how much more law he knows than they do. That we believe to be the dominating motive and the real subject-matter of this petition which is made here."

The determined opposition of counsel for the Trust Company to granting the application of the stockholders to intervene and present the issue raised by them continued until Judge Sanborn, in the course of the proceeding, made the following frank statement:

"We think perhaps it is wise to say to you gentlemen that we have considered the arguments made on the former hearing, and have examined the authorities and reached a unanimous conclusion upon the question as to whether or not that finding and decision of the master that there was no liability of the Southern Company is properly in the decree. That is the main proposition upon which Messrs. Gates and English rely. The opinion is not written, and is subject to review again when the opinion comes up; but we think it

is proper to state to you that in consideration of this that after a consultation, and having examined the authorities, we (have) come to the conclusion, a tentative conclusion, which we do not hold ourselves (bound) by, that that question was properly submitted by the master, and his decision properly inserted in the decree. We think it our duty * * * to say this to you now, because it may make some difference in your arguments and presentation of this question, and, if we withheld it from you, it may be that we would deprive you of some opportunities that you may desire to take advantage of."

After this statement by the court, counsel for the Trust Company receded from his previous position and asked leave to present a brief upon the question of the liability of the Southern Company for the indebtedness of the Belt Company to the Trust Company. The stockholders were permitted to intervene and file their petition and brief. Later the claimant suggested to counsel for the Trust Company the propriety of moving for a final judgment against the Southern Company for the amount due it in case the court should hold the Southern Company liable for the indebtedness due from the Belt Company to the Trust Company. Counsel for the Trust Company, however, ignored the suggestion. Thereafter claimant in behalf of the three stockholders above named prepared and was permitted to file the second intervening petition, in which it was suggested that, in case the court should hold the Southern Company liable for the debt of the Belt Company, a final judgment for the amount due should be given in said cause in favor of the Trust Company against the Southern Company.

On October 22, 1912, this court handed down the opinion reported in 201 Fed. 811, 120 C. C. A. 121, in which it upheld all of the contentions made by claimant in the first petition. In respect to the second petition above referred to, the court said:

"Three of the stockholders of the Trust Company, at whose instance the question of the liability of the Southern Company was pressed to a decision in this court by the Trust Company and its counsel, have filed a petition for leave to present the suggestion that, in case this court finds, as it has found, that the Southern Company owes this debt, a decree should be rendered against it in this suit to the effect that the Trust Company recover this amount from the Southern Company and have execution therefor. * * * The three stockholders are accordingly permitted to file their suggestion, and leave is granted to the Trust Company, the Southern Company, and to any other party to this suit, to make such motions and present such arguments and authorities, either orally or in writing, to this court at St. Louis on January 10, 1913, regarding this suggestion, as to them shall seem meet. The issue presented by this suggestion is reserved for later consideration."

On December 2, 1913, the court filed its final opinion in said cause, reported in 210 Fed. 696, 127 C. C. A. 184, reversing the decree of the court below and directing that judgment be entered against the Southern Company and in favor of the Trust Company for the indebtedness due the Trust Company from the Belt Company, as suggested in the second intervening petition.

The contentions of claimant in behalf of the three stockholders of the Trust Company were sustained in every particular in the two opinions of the court above referred to.

It is apparent from the remarks of counsel for the Trust Company above quoted that the opposition of counsel and of the officers of the Trust Company in charge of the litigation to the application of the

stockholders to intervene and present the issue raised in their petition was due to ill will towards claimant and prejudice against any suggestion which he might make. It is not necessary to go far to find the cause. Counsel stated it in his remarks above quoted when he said:

"The former counsel for the Guardian Trust Company (claimant) is now suing the Trust Company for services rendered in this case. The notice which he gave to counsel representing the Trust Company of the danger which he conceives in this matter was given under oath during his cross-examination in this case. * * * We refrained from saying on argument what we now say, that the case had assumed the form whereby in the national court it was impossible for the Guardian Trust Company to recover any substantial sum, or any substantial benefit in any way. * * * Mr. Mecartney brought the Kansas City Southern into this case by stipulation. * * * He filed the answer * * * which has raised all of this trouble. He never asked for any relief against that company, and had it fixed in such form that if the decision of the national court was [not] in favor of the Guardian Trust Company it could receive not one dollar from the Kansas City Southern, but if it was against the Guardian Trust Company it might * * * be res adjudicata. * * * There seems to be a desire upon his part to hamper the present counsel and to show them how much more law he knows than they do. That we believe to be the dominating motive and the real subject-matter of this petition which is made here."

The outcome of the lawsuit of claimant against the Trust Company mentioned in the above quotation is reported in 274 Mo. 224, 202 S. W. 1135.

The opinion of the judge who tried the cause is made a part of the record in the case before us.

As tending to explain the attitude of counsel and the officers of the Trust Company towards claimant and towards any suggestion made by him, we quote the following from the opinion of the trial court:

"Not content with depriving the plaintiff of a justly earned reward for his services and with putting him to a lawsuit for his fees, the defendant in its answer and in the course of the hearing before the referee and in this court has made an assault upon the plaintiff's professional ability and skill and even upon his personal integrity. It charges him with negligence in the conduct of its business, with being a bungling and unskillful lawyer. Not only are these charges utterly without warrant on the evidence, but on the contrary, it shows that he conducted his client's business with the highest degree of efficiency, and so far as his personal integrity is concerned, there is not a syllable in the evidence which would warrant such a charge. * * *

"In the meantime, in October, 1905, Prescott (one of the executive committee referred to in the remarks of counsel above quoted) and his associates had succeeded in obtaining voting control of the Trust Company. Prescott promptly proceeded to eliminate from the directory and management of the company those who had opposed him. He became secretary of the company and he and his friends constituted a majority of the executive committee. Although outwardly and ostensibly giving support to the plaintiff (claimant) in his representation of the Trust Company, there is much evidence that Prescott was in secret sympathy with its adversaries. His first overt step was an effort to engineer a compromise with the Southern Company of the Trust Company's claims for $200,000, and it was his plan that he, who had come into the directory as the agent and representative of the Gates interests, should act as the representative of the Trust Company in its negotiations with the Southern Company for the compromise. The impropriety of this was suggested to him by plaintiff in a personal letter, as a result of which Prescott found it expedient not to act as the negotiator. Others acted in his stead and the negotiations came to nothing. Prescott resented plaintiff's intervention in the matter and it is very plain that he harbored ill will against him.

His next step was to endeavor to displace the plaintiff as the company's attorney and he made overtures to plaintiff's assisting counsel looking to that end, but these overtures were rejected. Later, plaintiff discovered that Prescott without plaintiff's knowledge had caused certain orders to be made by the federal court whereby valuable lands, the title of which was involved in the litigation, were transferred to the Southern Company without adequate consideration to the Trust Company. These lands were owned by the Central Improvement Company, which was a party to the litigation, and of whose outstanding and total stock the Trust Company held substantially all, said stock having been pledged with it as collateral security for the debt of the Belt Company. The transfer of these lands greatly impaired the value of the collateral security held by the Trust Company. Plaintiff (had) been put by the defendant in complete charge of its said litigation so far as it concerned said lands and these conveyances thus made without the knowledge or consent of the plaintiff greatly embarrassed the plaintiff in his representation of the Trust Company. He accordingly called upon Prescott for some explanation of these conveyances and while he was pressing his inquiries, Prescott, on March 25, 1908, called together the executive committee, which passed a resolution dispensing with plaintiff's further services. It is suggested by the referee's report and is contended by the defendant that the reason for plaintiff's discharge was because defendant had lost confidence in plaintiff's ability and judgment, and because of alleged unfounded attacks of the plaintiff upon the judge or judges of the court in which its litigation was pending and because the officers of the Trust Company feared that they would be punished for contempt of court. In my opinion these are mere disingenuous pretexts for the plaintiff's discharge and Prescott and his friends on the committee had quite a different motive in dispensing with the plaintiff's services. * * *

"The Trust Company in taking its appeal (decided in 201 and 210 Federal, supra) and in assigning error did not complain that the court below had erred in exempting the Southern Company from liability, but claimed that such liability was not in issue and should not have been decided one way or the other. With the Trust Company's appeal in this posture and while the plaintiff in this suit was on the witness stand testifying in his own behalf, and was under cross-examination, he was severely cross-examined and criticized by defendant (through counsel making the remarks above quoted) for having allowed, through his framing of the issue, the case to get into such posture as to have brought about the adverse ruling touching the liability of the Southern Company, and throughout this case in the examination of witnesses and in the arguments of counsel the plaintiff has been charged with having mismanaged the case and with being responsible for the adverse finding of the special master and of the United States Circuit Court. It was charged against the plaintiff that he had bungled the pleadings, that he had made a colossal error in bringing the Southern Company into the litigation, that he had erred in failing to file a cross-bill against the Southern Company after it was in the litigation, and the like. In his testimony the plaintiff defended himself, and to my mind, successfully and unanswerably against these charges."

Upon the record, the salient features of which we have set out in the foregoing quotations, we think the case well within the rule permitting the stockholders of a corporation to bring suit or intervene for the protection of the rights of the corporation where through breach of duty the officers of the corporation have failed to protect its rights. Farmers' Loan & Trust Co. v. Toledo, etc., Co. (C. C.) 67 Fed. 53; General Electric Co. v. West Asheville Imp. Co. (C. C.) 73 Fed. 386; Dodge v. Woolsey, 18 How. 345, 15 L. Ed. 401; Del. & Hud. Co. v. Albany & Susquehanna, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862.

We also think the case within the rule permitting the allowance of reasonable attorney's fees from funds recovered for the corporation. McCourt v. Singers-Bigger, 145 Fed. 103, 76 C. C. A. 73, 7 Ann. Cas.

287; Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915.

The failure of the officers and attorneys of the Trust Company to present the issue raised by claimant after their attention had been called to it was not a simple error of judgment but was so palpably the result of prejudice against claimant and a desire to depreciate him and the value of his services while counsel for the Trust Company that in our judgment it amounted to a breach of duty.

It is highly probable that the Southern Company would have escaped liability altogether if the issue had not been raised by claimant in behalf of the intervening stockholders at the time and in the manner it was raised.

After the decision of the case by the Circuit Court of Appeals, the Southern Company appealed to the Supreme Court of the United States. Claimant in the name of his clients was permitted to appear in that court, make an oral argument, and file a brief in behalf of the Trust Company. The opinion of the Supreme Court affirming the judgment of the Circuit Court of Appeals is reported in 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579.

The Southern Company in satisfaction of the claim against it paid the Trust Company in round numbers $900,000. The value of the securities held by the Trust Company was about $200,000. The direct result of the successful termination of the litigation was the recovery of about $700,000 which in all probability would, except for the intervention of the stockholders represented by claimant, have been lost. Indirectly, the successful termination of the litigation made it possible for the Trust Company to collect an additional $75,000 on obligations held by it for which the Southern Company was liable.

Eminent lawyers testified in the case in behalf of claimant and expressed opinions as to the value of the services rendered by him in the Circuit Court of Appeals and in the Supreme Court of the United States. Their estimates ranged from $75,000 to $200,000.

The services rendered in the Supreme Court do not fall within the rule which permits an allowance of fees for services rendered in behalf of a corporation at the instance of a stockholder. Claimant had fully accomplished his purpose when he intervened and presented the issues in the Circuit Court of Appeals upon which the case was won. The Trust Company employed additional and eminent counsel who appeared for it in the Supreme Court and who by brief and oral argument sought to sustain the decisions of the Circuit Court of Appeals. We are unable to see how it can be fairly claimed that the services of claimant in the Supreme Court were necessary or of any benefit to the Trust Company.

The fee allowed claimant should not be estimated upon a contingent basis. Graham v. Dubuque Specialty Mach. Works, 138 Iowa, 456, 114 N. W. 619, 15 L. R. A. (N. S.) 729.

On the other hand, the amount recovered by claimant in his suit against the Trust Company, reported in 274 Mo., supra, should not be taken into consideration in determining the amount to be allowed him in this suit. Both the trial court and the Supreme Court in that

case say that claimant earned prior to his discharge in March, 1908, all that he was allowed in the case.

When we remember the state of the case in the Circuit Court of Appeals and the circumstances under which claimant forced the issues raised by him upon the attention of the court in the face of the opposition of counsel for the Trust Company, we think the learned court below fell into error when it found that $15,000 was the reasonable value of the services rendered by claimant in behalf of the Trust Company, and the fact that additional counsel was employed by the Trust Company in the Circuit Court of Appeals after claimant had pressed upon the attention of the court the vital issue in the case does not in our judgment affect the value of the services rendered by him.

Special counsel who was employed by the Trust Company to present the case in the Supreme Court of the United States and whose only duty it was to maintain the correctness of the decisions of the Circuit Court of Appeals, was paid the sum of $16,000.

While we are persuaded that the sum allowed claimant by the learned court below is inadequate compensation for the service rendered by him in behalf of the Trust Company, it has been a somewhat difficult matter to arrive at and agree upon a sum which is alike fair and just to the estate of the Trust Company and to those beneficially interested in its assets, and to claimant. Since the fee of claimant should not be estimated upon a contingent basis, and since nothing can be allowed for his service in the Supreme Court of the United States, it is apparent that the estimates of the expert witnesses testifying in the case afford little aid in arriving at a conclusion. The situation, at the time the services were rendered in the Circuit Court of Appeals, was critical; the circumstances, exceptional—requiring decision, courage and persistence.

After a careful consideration of the case, we have reached the conclusion that claimant should be allowed the sum of $22,500 in addition to the sum allowed him by the District Court, that is, the sum of $37,500. Although this sum is only one-half of the lowest estimate of any of the witnesses called by claimant, it is about 5 per cent. of the amount recovered by the Trust Company as the result of the claimant's efforts, and under the circumstances of the case we believe it to be a reasonable fee to be paid claimant from said amount.

The judgment of the court below is modified by the allowance of the said sum of $37,500, with legal interest thereon from the date of the filing of the claim, and the judgment as thus modified is affirmed.

HOOK, Circuit Judge, participated in the hearing of this cause but died before a conclusion was reached and the opinion prepared.

McGOVERN et al. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Seventh Circuit. January 24, 1922.)

Nos. 2024, 2025.

1. **Appeal and error ⟸333—Contempt proceedings abate on death of defendant after judgment.**
   A judgment convicting a defendant of contempt for violating an order abating a liquor nuisance abates on the death of the defendant subsequent to the entry of the judgment, and a writ of error to review the judgment will be dismissed as to such defendant.
2. **Intoxicating liquors ⟸279—Proceedings to enforce injunction against liquor nuisance are criminal.**
   Proceedings for contempt to enforce an order abating a liquor nuisance, under National Prohibition Act, tit. 2, § 22, are criminal contempt proceedings.
3. **Contempt ⟸38—Failure to plead pendency of another suit in same court does not authorize double judgment.**
   The failure, in criminal contempt proceedings to enforce an injunction against a liquor nuisance, to plead the pendency of other proceedings in the same court against the same parties and based upon the same facts, which were established in the second proceedings by the evidence received in the first, is not fatal to defendant's right to insist that he shall only be punished once for that offense, and does not authorize a judgment committing him for contempt in both proceedings.
4. **Judgment ⟸550—Order abating liquor nuisance bars subsequent order on same facts.**
   An order entered in proceedings by the United States brought by the United States district attorney enjoining a liquor nuisance is a bar to a similar order in a suit subsequently instituted on behalf of the United States by the Attorney General of the state against the same defendants for the same relief and based on the same facts, so that a judgment in the second proceeding is void and does not sustain a commitment for contempt.

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

Separate proceedings by the United States against John McGovern and William McGovern to punish defendants for contempt for violating orders abating a liquor nuisance. From judgments in each proceeding, convicting of contempt, defendants bring error. Proceedings dismissed as to William McGovern, who died subsequent to the judgment, and judgment as to John McGovern affirmed in the first proceeding and reversed in the second.

Certiorari denied 257 U. S. ——, 42 Sup. Ct. 464, 66 L. Ed. ——.

Seymour Stedman, of Chicago, Ill., for plaintiffs in error.

C. W. Middlekauff and Jacob I. Grossman, both of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Two writs of error are here prosecuted to review judgments punishing plaintiffs in error for contempt of court. Though prosecuted separately, they were presented and argued together and will be disposed of in a single opinion.

John and William McGovern were convicted of contempt for violating two orders made in certain pending equity proceedings instituted under and by virtue of title 2, § 22, of the National Prohibition Act (41 Stat. 314). Each was fined $1,000 and sentenced to imprisonment for one year in each contempt proceeding.

The first proceeding, known here as No. 2924, was instituted in the name of the United States and by the United States district attorney; the second suit, known here as No. 2925, was begun in the name of the United States by the Attorney General of the state of Illinois. Each suit was prosecuted separately, and the contempt proceedings were separately instituted and separately prosecuted to judgment.

[1] Subsequent to the entry of the judgment in the contempt proceedings in the District Court, and prior to the hearing in this court, William McGovern died. As to him, therefore, the judgments abated, and the writs of error must be dismissed, in accordance with the practice announced in the case of Cæsar Dal Pino v. U. S., 278 Fed. 479, recently decided by this court.

As to John McGovern, two judgments are outstanding, each imposing a fine of $1,000 and a prison sentence of one year. Examination of the pleadings, orders, subpœnas, etc., as they appear in the record, discloses that the equity suit wherein the contempt proceedings arose and here known as No. 2924 was first instituted (November 24, 1920). Upon the same day an order was made, abating the nuisance and restraining the defendants from "selling, keeping, or bartering any intoxicating liquor" on the premises therein described. This order was served upon John McGovern December 3, 1920. The other equity suit instituted by the Attorney General of the state of Illinois, to abate the same nuisance and to restrain the same defendants from selling or disposing of liquor on the same described premises, was also filed November 24, 1920, but the injunctional order was signed November 26th.

Proceedings for the punishment of the defendant for contempt of court in No. 2924 were instituted on the 15th day of December, 1920, and hearing had on January 15, 1921. Contempt proceedings were begun in No. 2925 on the 11th day of January, 1921, and hearing had on the 15th day of the same month, immediately following the hearing in the contempt proceedings in No. 2924. The judgment was pronounced in No. 2924 first, and the trial in No. 2925 was then immediately begun.

The institution of the two similar proceedings was most unfortunate. The fact that in one suit counsel for the moving party was the United States district attorney, and in the other the Attorney General of the state of Illinois, does not change the character of the proceedings or the interest of the parties to the suit. In each equity proceeding the United States was the petitioner, and the plaintiffs in error the defendants. In each suit the relief sought was that designated by section 22 of the National Prohibition Act, the abatement of a nuisance maintained on the first or ground floor of the building located at 661 North Clark street. The evidence in each of the two contempt proceedings tried on January 15th was very similar. In fact, counsel on the second trial offered the evidence which the district attorney had a few minutes

before offered in the contempt proceedings arising in No. 2924. The two judgments entered were similar.

[2, 3] Both contempt proceedings were, judged by the test applied in Lewinsohn v. U. S. (C. C. A.) 278 Fed. 421, criminal contempt proceedings. No reason is now urged by the government why the two judgments were entered, other than that plaintiff in error failed to plead the pendency of another suit.

While it may be the proper, and undoubtedly the better practice, to plead the pendency of other suits, if the facts warrant such a plea, it by no means follows that a court should, in the absence of such a plea in abatement, enter two decrees in the two separately pending but substantially similar suits. Certainly, in proceedings so similar to criminal actions as criminal contempt, failure to plead the pendency of another contempt proceeding in the same court, between the same parties, and before the same judge, should not be fatal to defendant's right to insist upon not more than a single punishment for the commission of a single offense. That the two proceedings were substantially one and the same is shown, not alone by the title, the allegations in the petition, and the prayer for relief, but also by the fact that the evidence offered in No. 2924 was offered and received in No. 2925. U. S. v. Nickerson, 17 How. 204, 15 L. Ed. 219.

[4] Whatever may be the rule respecting the necessity and advisability of pleading in abatement the pendency of another suit, the bar into which the plea ripens when a decree is entered forbids the entry of a second judgment. In other words, when two suits of like nature, for the same purpose, and between the same parties, are pending at the same time, defendants in the second suit may plead the pendency of the first suit as a plea in abatement. But when the first suit has proceeded to judgment, it is no longer simply a matter in abatement, but a bar, a complete defense to the prosecution of the second suit.

True, the bar thus created is dependent ordinarily upon the entry of a final decree or a final judgment, and does not exist where a temporary order is granted. But, while the distinction thus based upon the temporary or final character of the order may be the basis for granting modified relief in the second case, such proposed change in the order could be expected only where the two similar suits were pending in different courts. If the two similar applications were copending in the same court, the order first entered would be presumed to be a disposition of both applications.

In the instant proceedings complaints for the same purpose, alleging the same material facts, between the same parties, in the same court were filed on the same day by the United States district attorney and by the Attorney General. The one we recognize as No. 2924 first received the attention of the court, and an order was therein entered abating the premises as a nuisance and enjoining plaintiffs in error from selling liquor therein. The second petition was presented a few hours later and a similar order was (inadvertently, we assume) signed in such suit (No. 2925). It is worthy of note that both injunctional orders were entered ex parte and the defendants had no opportunity to enter any plea.

We conclude that the first order was a bar to the entry of the second order, 23 Cyc. 1118, 1119. Counsel have cited no case wherein such an order was upheld and we have found none. Vigilance by the law enforcement officers may well be commended, but it can hardly afford justification for double prosecution of the same offense, or the imposition of double punishment for one offending against the order thus twice pronounced. The second injunctional order is void, and the judgment entered in the second contempt proceedings (2925) must be vacated.

The judgment in No. 2924 is assailed for various reasons. No assignment of errors, other than those already considered and decided by this court in Lewinsohn v. U. S., has been suggested, except it is urged that the evidence does not support the judgment. It would serve no useful purpose to restate the questions disposed of in the Lewinsohn Case, nor is it necessary to discuss the evidence upon which this judgment is predicated. It is sufficient to say that the evidence clearly established the sale of beer and whisky upon the premises described in the injunctional order, and that the two plaintiffs in error were both behind the bar in the saloon known as "Liberty Inn," selling intoxicating liquor at a date later than November 26th, 1920.

As to William McGovern, the writs of error in both No. 2924 and No. 2925 are dismissed. As to John McGovern, the judgment in No. 2925 is reversed, and in No. 2924 judgment is affirmed.

UNITED STATES et al. v. BENEDICT.

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 94.

1. **Courts ⟸405(3)—Circuit Court of Appeals has jurisdiction to review judgment in action for compensation for property requisitioned.**

The judgment of a District Court in an action against the United States, under Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), to recover additional compensation for property requisitioned by the government, *held* reviewable by the Circuit Court of Appeals, under Judicial Code, § 128 (Comp. St. § 1120).

2. **Evidence ⟸524—Expert testimony as to value of real estate held admissible.**

On the question of the value of a considerable tract of land abutting on the waters of New York Harbor, in the absence of sales of other like property in the vicinity and near the time, testimony of experts *held* admissible.

3. **Appeal and error ⟸1008(2)—Findings of trial court have force of verdict.**

Findings of a trial court, where a jury has been duly waived, have the force of a verdict.

4. **War ⟸14—Interest is recoverable on value of property requisitioned by the government; "just compensation."**

In an action against the United States, under Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), to recover just compensation for property requisitioned by the government, "just compensation" is the fair value of the property when taken, with interest at the legal rate of the state from that time.

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

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5. Trusts ⟸191(3)—Power in will to sell held to authorize conveyance of streets to city.

Trustees under the will of a testator, who left a large tract of land fronting on New York Harbor and valuable for harbor, given by the will broad powers to sell all or any part of the land, *held* to have authority to convey streets through the tract, extending to the shore, to the city in consideration of exemption of the remaining land from taxation, for extension of the streets, where such streets were necessary to the development and use of the remaining land, and would increase its value for maritime purposes, which was the evident intention of the testator.

6. Municipal corporations ⟸224—"Block," as used in charter providing for conveyances to city by owners of block, defined.

The word "block," as used in New York City Charter, § 992, providing that "the owners of land * * * within the lines of any street * * * and comprising all the land within said lines in an entire block in extent," may convey the same to the city on terms therein stated, *held* to include within its meaning the distance between an established street and the harbor front.

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

7. Eminent domain ⟸157—Distribution of compensation for land taken.

Where the United States requisitioned a tract of shore land in Brooklyn, including strips across it which had been conveyed by the owner to the city for streets, but which had not been opened as streets, and compensation was awarded on a valuation per square foot of the entire tract, the city *held* entitled to the part of the award represented by the street area.

8. Appeal and error ⟸1140(4)—Judgment erroneous in amount only may be corrected.

Where a judgment is erroneous only as to amount, and is capable of correction by computation only, a remittitur or its equivalent may be directed by the appellate court.

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

Action at law by George F. Benedict, sole surviving trustee under the will of William C. Langley, deceased, against the United States and the City of New York. From the judgment, defendants bring error. Modified and affirmed, on filing of assignment by plaintiff of part of judgment to defendant City.

For opinion below, see 270 Fed. 267. See, also, 271 Fed. 714.

Writs of error to a judgment entered after trial with jury waived. Defendant in error (who will be hereafter referred to as the Langley Estate) owned in 1918 a considerable body of land, consisting both of upland and land under water, in the county of Kings and city of New York, and extending, according to the Langley contention, from First avenue, Brooklyn, to the pierhead line in the waters of New York Harbor. It was separated into two parts, one extending from the center line of Fifty-Eighth street to the corresponding line of Fifty-Ninth street, and the other from the southerly line of Sixty-Third street to a point 118 feet north of the center line of Sixty-First street. The area of the whole property was, as found by the court below, 1,714,322 square feet.

The property had been in the Langley family for many years, but defendant in error held title by virtue of the will of William C. Langley, deceased, which conferred a power upon this defendant in error and his predecessors in office in the following words: "I hereby authorize and empower my said executors and trustees and their successor and successors to sell at their discretion as to the time and terms, and at public or private sale, all and every part of

my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof."

In assumed compliance with this power the trustees of the Langley Estate for the time being conveyed on April 25, 1899, to the city of New York as much land as was necessary to continue (through the Langley property) Sixty-First, Sixty-Second, and Sixty-Third streets to (as the deed stated) "the New York Bay." Such conveyance was executed, not only in pursuance of the testamentary power aforesaid, but of section 992 of the Charter of the city of New York (Laws 1901, c. 466), which provides in substance that "the owners of land * * * within the lines of any street * * * on the * * * plan of the city of New York, and comprising all the land within said lines in an entire block in extent, may" convey the same free of encumbrances to the city. If the city accepts such conveyance it "shall become vested with the title to said lands to the same effect and extent as if they had been acquired" in a condemnation proceeding for street purposes. After such conveyance "the lands fronting on that portion of the streets so conveyed, and extending to the center of the block on either side of such portion of said street as conveyed" shall not be chargeable (in effect) with any assessments consequent upon the "opening the residue or any portion of the residue of such street."

From 1899 to 1918 the streets in question remained unopened, in the sense that they were not used as highways. The entire property was not improved as a water front; some filling was done by which the area of land above water was somewhat increased, but whether by 1918 the process of filling had been extended to the bulkhead line as then authorized is a matter not specifically found by the lower court. On April 6, 1918, the United States acquired title to one of the above-stated parcels of Langley realty, and at a slightly later date to the other parcel; such acquisition being by virtue of what is known as the Lever Act of 1917 (40 Stat. 276 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛l–3115⅛r]), whereof the important section is the tenth (section 3115⅛ii), as follows:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Pursuant to that statute the Executive appointed a commission for the purpose of ascertaining and paying a "just compensation for what had been taken or requisitioned," which included all that the Langley Estate had conveyed to the city of New York in 1899. The governmental commission determined that just compensation was $1,796,522.20, with interest at 5 per cent. from May 1, 1918. This was in effect a determination that the property was worth $1.10 per square foot, and that the Langley Estate was entitled to be paid at that rate for all of the land except so much as lay within the limits of Sixty-First, Sixty-Second, and Sixty-Third streets "if projected between the westerly line of First avenue and the high-water line" as shown on the plan attached to the city's deed. The area of these street beds as above described was found to be 81,120 square feet.

This award was not satisfactory to the Langley Estate, in that (1) $1.10 per square foot was not enough; and (2) the city's title to the street beds was recognized in reduction of its acreage. Therefore this suit was brought, pursuant to the act of Congress above set forth.

The United States was originally the sole defendant, and on its motion the court below ordered that the city be "brought in as a party defendant" and that a supplementary summons issue accordingly. Such summons issued; an amended complaint was filed, in which it was alleged that the city, "by reason of the alleged deed" above referred to, claimed an "interest either substantial

or nominal in the streets hereinbefore referred to adverse to that of the plaintiff." The city appeared and answered, asserting title in itself in said streets and in an area of 81,120 square feet, and prayed for the dismissal of the complaint, and for "such other and further relief as to the court may seem just and proper."

The trial court (270 Fed. 267) determined (by formal findings of fact and conclusions of law) that the fair and reasonable value, and therefore just compensation, for what the United States had taken, was $3,428,644, or at the rate of $2 per square foot. It further found that the value was the same, "whether or not the city of New York held title to the lands within" the streets heretofore mentioned, but that the above referred to conveyance of April 25, 1899, was void, wherefore the title to the entire property taken was in Langley Estate, and to it should be awarded the entire recovery. To judgment accordingly both the United States and the city of New York took writs of error.

Wallace E. J. Collins, U. S. Atty., of Jamaica, N. Y., and Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N. Y. (Howard W. Ameli, Asst. Atty. Gen., of counsel), for the United States.

John F. O'Brien, Asst. Corp. Counsel, of New York City (Charles J. Nehrbas and Edward J. Kennedy, Jr., both of New York City, of counsel), for City of New York.

Seibert & Riggs, of New York City (William H. Seibert and Royal E. T. Riggs, both of New York City, of counsel), for Langley Estate.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Defendant in error suggests rather than asserts that this court has no jurisdiction, because the statute intended, when it gave to the District Court power to "hear and determine," that the determination of that tribunal should be final. We do not so read United States v. Pfitsch, 256 U. S. 547, 41 Sup. Ct. 569, 65 L. Ed. 1084 (Sup. Ct., June 1, 1921). On the contrary, we think it was there plainly held that Congress intended, in section 10, to preserve the right to a jury and to create a cause of action governed by the "usual procedure of a District Court in actions at law for money compensation." That such usual procedure gives rise to a final decision, over which (under Judicial Code, § 128 [Comp. St. § 1120]) this court "shall exercise appellate jurisdiction" seems especially plain.

[2] The writ taken by the United States—under guise of objecting (1) to certain evidence; and (2) to the allowance of interest—really complains of the size of the award. It is not denied that, since the only contest between the Langley Estate and the nation was the value of what the latter had taken, the one thing incumbent upon the plaintiff to prove was the fair and reasonable market value of this land. Further, it is admitted that there were no actual sales of similar property within reasonable limitations of time and contiguity upon which to base decision. The only possible evidence was that of experts; i. e., persons who had studied the pecuniary possibilities of large lots of land abutting upon the waters of New York Harbor.

[3] As matter of law, expert testimony under even far less extreme circumstances than those just stated is admissible, as we held in Shields v. Norton, 143 Fed. 802, 74 C. C. A. 254. Under law too

well settled to require citation, the finding of the court below in an action at law, where a jury has been duly waived, has all the force of a verdict, and it is sufficient on this point to say that none of the opinion evidence offered by the experts on both sides was unlawfully received. There was beyond all question some evidence upon which to base a finding of value in the sum of $2 per square foot.

[4] As to interest, it is to be noted that the acquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the necessity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for speed under the dreadful pressure of war. But, whether the taking be by the familiar condemnation of peace or by the strong arm of a nation at war, the obligation upon the taker is always that recognized in this very statute, viz. to make "just compensation" to the owner. Monongahela, etc., Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463. And see a general consideration of the matter in National City Bank v. United States (D. C.) 275 Fed. 855.

It is certain that the national immunity from payment of interest does not extend to condemnation proceedings. United States v. Rogers, 257 Fed. 397, 168 C. C. A. 437; United States v. Highsmith, 257 Fed. 401, 168 C. C. A. 441, affirmed 255 U. S. 170, 41 Sup. Ct. 282, 65 L. Ed. 569, Feb. 28, 1921. Since, therefore, just compensation by definition includes interest (cf. Agency, etc., Co. v. American, etc., Co., 258 Fed. 363, 369, 169 C. C. A. 379, 6 A. L. R. 1182) and this statutory method of arriving at compensation is analogous to condemnation proceedings, we are of opinion that the statutory rate prevailing in New York was rightfully allowed. No error is discovered upon the writ of the United States.

The city's writ raises questions which may be stated as they are put by defendant in error: The Langley Estate deed to the city conveyed nothing, because (1) the trustees had no power to convey and (2) the city had no power to receive; and, if both these propositions be swept aside, then (3) the city's ownership is of such a nature as to make no difference in the award to plaintiff below.

[5] The alleged inability of the Langley trustees to convey is based upon the terms of their power to sell as embodied in the will which created them plus the Real Property Law of New York (Consol. Laws, c. 50, § 105, subd. 1), which provides that:

"If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee, in contravention of the trust * * * shall be * * * void."

But it will not do to stop with any narrow definition of the word "sell," which in its ordinary sense means a transfer of property for a fixed price in money or its equivalent. The Five Per Cent. Cases, 110 U. S. 471, at page 478, 4 Sup. Ct. 210, 28 L. Ed. 198. That immunity from assessments for street openings might be the equivalent of the definition is assuredly an arguable point with those acquainted

with the certain weight of that burden in the city of New York. But the broader view is to consider the history of this land as revealed by the record and the disposition thereof made by Langley the testator. It was plainly his intent to make as easy as possible the carrying of this land until the time came for its development. It was to that end that he gave to his trustees such extensive powers, and it must be assumed, in construing his will (including the quoted power), that it was the testator's desire that the authority he gave should be used in furtherance of his general purpose.

This property had come to be a most valuable water front; harbor development had caught up to it, defendant in error's argument rather broadly asserts that it was the last large frontage left unimproved and on the bay. To such a property streets are a necessity; access to the water front is a necessity of any development, in which respect property of this kind does not differ from other unimproved urban holdings.

It is pressed upon us that the state decisions, viz. Russell v. Russell, 36 N. Y. 581, 93 Am. Dec. 540, Scholle v. Scholle, 113 N. Y. 261, 21 N. E. 84, Turco v. Trimboli, 152 App. Div. 431, 137 N. Y. Supp. 343, and Wellbrock v. Roddy, 169 App. Div. 251, 154 N. Y. Supp. 830, compel the conclusion that nothing but a cash sale will satisfy the terms of the will. An examination of these authorities will show that in each instance decision was rested upon the facts of the case in hand, and no such absolute rule as is here contended for was laid down, while in Thomas v. Evans, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519, is presented a litigation far more nearly resembling the present, and in that case the court stated the point here made, and proceeded to decide the cause on other grounds.

On the other hand, the Matter of Sixty-Seventh Street, 60 How. Prac. (N. Y.) 264, is, in the reasoning of Judge Daniels, perfectly applicable to this case. That learned justice, arguing from the obvious purpose and intent of a testator who left a large unimproved tract of urban property and gave to his personal representatives a power of sale substantially like the one at bar, found in that testator's executors a capacity so completely to divest themselves of title by merely selling lots as abutting upon unopened streets as to debar the estate they represented from receiving any compensation for the taking of their land when the streets were actually opened. If executors or trustees who never in terms exercised a power of sale in the premises could in effect merely surrender that which they had power only to sell (as this defendant in error would argue), it would seem plain that executors who wished to do exactly the same thing could arrive at the desired result for a valuable consideration.

The Sixty-Seventh Street Case was largely rested upon Earle v. Mayor, 38 N. J. Law, 47, and both the decisions last cited were specifically approved in Simmons v. Crisfield, 197 N. Y. 365, 90 N. E. 956, 26 L. R. A. (N. S.) 663. We therefore hold that the Langley trustees had authority to do what they did in 1899, and (as pointed out by Daniels, J.) it is not necessary to inquire whether the convey-

ance in question was merely in fulfillment of a power or the act of a trustee as such.

[6] The second proposition, viz. that the city had no power to take the property is based upon that portion of section 992 of the City Charter which requires such conveyances to be by the owners of land "an entire block in extent," and it is said that the distance from that street which was nearest the shore line to the shore was not a "block long." The exact number of feet from this street to the shore line is not specifically found, and we do not think any such finding material; for it is admitted that, however long or short was that distance, it measured the space between a street and navigable water.

The meaning given by lexicons of authority to the word "block" has often been judicially recognized, to wit, "the portion of a city inclosed by streets, whether occupied by buildings or not. Harrison v. People, 195 Ill. 466, 63 N. E. 191. But we must recognize obvious facts in a city like New York, delimited or marked off, not always by streets, but by water, and navigable water, which is as much a highway as any street; indeed, it has been held, and in respect of New York City, that "the general public has a right of passage over the places where land highways and navigable waters meet." Knickerbocker, etc., Co. v. 42d Street, etc., Co., 176 N. Y. 408, at page 417, 68 N. E. 864, at page 866. We therefore do not hesitate in holding that a block, within the meaning of the quoted section of the charter, covers the distance between an existing street and the navigable waters of New York Harbor.

[7] By the conveyance of 1899 the city became vested with title to a portion of the land taken by the United States, for which the defendant in error has been awarded compensation, and the extent of that land is proven and found to be 81,120 square feet, and it was worth $2 a square foot on April 6, 1918. Although it owned this land, it held it "in trust for the public use." Knickerbocker, etc., Co. v. 42d Street, etc., Co., supra.

It is now argued that, with a title of this kind and on evidence proving that "whether or not the city held title to" the 81,120 square feet the value of the entire property was just the same, and the award to the Langley Estate should not be disturbed in amount. But, if the record be examined to ascertain why the expert witnesses substantially agreed that the value of the land was unchanged by the conveyance for street purposes, it is found that they all said in effect that the street value (i. e., land value of the streets) was "reflected" in the value of the land as bounded or limited by the proposed streets.

This means that, if and when the streets were opened, the abutting property would, by reason of the streets, be worth at least as much more as was the value of the land appropriated for highway purposes. But no streets have been opened in the physical sense, and the city owns the surface to be devoted to streets. That it is held in trust for a public purpose does not in any way change its market value, and the city has been as much deprived of what it owned as was the Langley Estate. To put it another way, the Langley Estate has been award-

ed all that the land is worth, streets and all, because, when streets are opened, the land they have left will be worth the amount of the award. This will not do. The government is called upon to make just compensation for things as they are, not as they may be hereafter, and the compensation must flow to those who were actually deprived of what they own.

[8] Since the valuation of this property on the testimony adopted by the court below is a mere matter of computation, and since the street land was taken on April 6, 1918, it follows that the record before us shows that the city has been deprived of and is entitled to compensation for 81,120 square feet of land, worth $2 per foot, or $162,240, with interest thereon at 6 per cent. from April 6, 1918.

The judgment is therefore excessive so far as the Langley Estate is concerned, but under such circumstances, where the error is capable of correction by computation only, a reversal is not necessary; a remittitur or its equivalent may be directed by the appellate court. Van Boskerck v. Torbert, 184 Fed. 419, 107 C. C. A. 383, Ann. Cas. 1916E, 171. Usually the remittitur ordered merely reduces the recovery against the defendants generally, but in this instance the remittitur should be in effect an assignment to the defendant the city of New York of its just proportion of the judgment, to wit, $162,240, with interest thereon from April 6, 1918. Upon the filing of such assignment within 30 days from the rendition of this decision, the judgment will be affirmed; otherwise, judgment reversed, and a new trial awarded.

The issuance of any mandate will be delayed for the above period of 30 days.

LACLEDE-CHRISTY CLAY PRODUCTS CO. v. CITY OF ST. LOUIS.*

(Circuit Court of Appeals, Eighth Circuit. April 24, 1922.)

No. 5830.

1. **Patents ⟸328—986,455, claims 1 to 3, for furnace arch, held anticipated.**
   Girtanner patent, No. 986,455, claims 1 to 3, for a furnace arch having parallel I-beams on which are brackets from which tile are suspended by tongue and groove arrangement, *held* void for anticipation.
2. **Patents ⟸24—Ordinarily separation of parts is not invention.**
   Ordinarily the making of two or more parts out of a thing that had theretofore been used in one part, and using the separate parts to serve the purpose that had been served before the division, is not invention.
3. **Patents ⟸26(2)—New combination of old elements, producing new result from new interaction, is invention.**
   A combination involving old elements, brought together in a way not theretofore known, and which produced by their interaction a new and useful result, is patentable.

Appeal from the District Court of the United States for the Eastern District of Missouri; Charles B. Faris, Judge.

Suit in equity for infringement of a patent by Laclede-Christy Clay Products Company against the City of St. Louis. From a decree dismissing the bill (270 Fed. 338), complainant appeals. Affirmed.

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

*Rehearing denied July 7, 1922.

Thomas H. Sheridan and Thomas F. Sheridan, both of Chicago, Ill. (Jesse McDonald, of St. Louis, Mo., on the brief), for appellant.

James A. Carr, of St. Louis, Mo. (Henry S. Caulfield and Joseph J. Gravely, both of St. Louis, Mo., on the brief), for appellee.

Before SANBORN, STONE, and LEWIS, Circuit Judges.

LEWIS, Circuit Judge. This suit is for infringement of rights alleged to belong to appellant under Girtanner's Letters Patent 986,455, issued March 14, 1911, on application of January 8, 1910, for a furnace arch. On final hearing the District Judge, in a well-considered opinion, 270 Fed. 338, sustained the defense of anticipation as to the involved claims 1, 2 and 3, and dismissed the complaint. The three claims are so nearly alike that we adopt the course of appellant in setting out only claim 3 as the most specific and best to consider:

"In a furnace arch, the combination with a pair of I-beams extending across the furnace, of brackets supported by said I-beams; each of said brackets comprising a pair of separate end-pieces one extending at the front, the other at the rear of said I-beams, and a separate center piece extending between said I-beams; flanges on the lower edges of both said end-pieces and said center piece, and tiles provided with grooves to receive said flanges."

[1] Broadly speaking, the claim contains three elements separated above by semi-colons, as will be seen; the first and third of which seem without doubt to have been embodied in prior patents set up in the answer. Stimmel's patent, 944,296, issued December, 1909, on application of March 18, 1909, for improvement in tops for furnaces, does not call for I-beams but "main supporting elements" in his claims, and his specification and drawings show three I-beams extending across the furnace, one at the front, rear and center as supports for the tile-carrying elements; Girtanner's earlier patent, 910,809, issued January 26, 1909, for arch for furnaces, has one I-beam transverse the center, supporting integral brackets extending both rearward and forward, —both are of flat arch type. Further, Green and Gent's patent, 676,606, issued June 18, 1909, for arch for furnaces, calls for "a plurality of transverse girders which rest at their ends on the side walls of the furnace," and Poppenhusen's patent, 783,132, issued February 21, 1905, shows three transverse supporting girders. The purpose of the transverse I-beams or girders in all cases is to give support to the burden of the underhanging firebrick or tile. Thus as to the first element, there was not only anticipation by Stimmel, Green and Gent and Poppenhusen in the use of more than one transverse support, but also we agree with the trial court that the question whether two (or more) I-beams (or girders of other form) should be used, as called for in the three patents last-noted and in Girtanner's second, rather than one as called for in his first patent, is a question answered by mechanical suggestion when it is desired to make the arch longer.

Again, as to the third element, it seems to us there is nothing new in the patent in suit; for Girtanner's first patent has the grooved tile fitting into lateral extensions of pendent portions of the brackets, and Green and Gent call for—

"beams attached to the lower edges of the said girders and extending beneath the same, said beams being provided with lateral flanges, and firebrick provided with lateral grooves in their side faces near their upper surfaces, adapted to engage said flanges of the beams, said firebrick being suspended from said beams with their upper surfaces below and free from all contact with said girders."

This is identical barring choice of terms; one says I-beams and brackets, the other girders and beams, for the same thing. And Poppenhusen shows—

"beams (brackets) provided with flanges at their lower edges which engage prooves in the adjacent side faces of firebrick."

The obvious purpose in all was to position the firebrick in the top of the furnace between the suspending members and direct heat contact, as a shield.

The second element opens the field of contention. Along with it attention is called to the specification:

"It will be evident that with my construction a flat arch of any desired length can be readily supported, and at the same time the separate parts of the arch can be readily renewed in case of injury."

[2] It is insisted that Girtanner's first patent called for one transverse I-beam which supported integral brackets extending rearward and forward over the length of the arch, while the structure disclosed in his second patent, which calls for two I-beams spaced apart, with brackets in three separate pieces, one extending forward from the front I-beam, one extending rearward from the rear I-beam, and one between the two, demonstrates inventive genius in devising means for lengthening the arch. But a plurality of transverse supports was disclosed, as noted, in prior patents, and Girtanner lengthened the arch in the same way by using two beams instead of one. That was anticipated, if patentable; though we think it wholly within mechanical suggestion. Ordinarily, the making of two or more parts out of a thing that had theretofore been used in one part, and using the separate parts to serve the purpose that had been served before the division is not invention. Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039; D'Arcy v. Staples & Hanford Co., 161 Fed. 733, 88 C. C. A. 606; Mueller Mfg. Co. v. Mfg. Co. (D. C.) 164 Fed. 991; Gen. Elec. Co. v. Heat & Motor Co. (D. C.) 205 Fed. 42.

[3] However, where a discovery embodies co-acting elements, although they be old, yet, if when brought together in a way not theretofore known, they produce by their interaction a new and useful result, the combination is patentable, Regent Mfg. Co. v. Penn. Elec. Mfg. Co., 121 Fed. 80, 83, 57 C. C. A. 334; and if one of the elements in the combination be removed or changed so that their interaction is then in another way (in obedience to a different co-operative law), there is nevertheless invention, although the same result is attained; for in that case a different idea of means expresses the discovery, and the new is not an equivalent of the old. 1 Robinson on Patents, § 254. But the inquiry in such a case is always one of fact, whether the change or rearrangement of those elements has, in their co-action, produced the old result in a different way; and here we fail to find that it has

done so. The three elements in combination, whether the brackets be integral or in three parts, were utilized for the same purpose, and perform the same function in the same way and produce the same result for which they were used in other prior patents. Whether integral or in separate parts, the one useful purpose of a bracket, so-called, was to engage the tile and hold them suspended between the fire and the supporting elements. But in all the patents that have been mentioned this purpose was successfully attained in the same way.

The principal insistence is on the latter part of the quotation from the specification. It is said that firebrick or tile at the rear end of the furnace are subject to the greatest heat, that they are liable to give way and the end of the bracket may become damaged or burned off, and that repair is made easy by simply removing that part of the bracket and putting in a new part, leaving undisturbed the remaining parts. We think the answer to this, and all other claims based on a tile-supporting bracket of cantilever form, is McKenzie's patent, issued August 9, 1904, for fire arch for furnaces, in which claim 1 reads:

"In a fire arch of the class described, the combination of beam mechanism arranged transversely across the furnace, a plurality of brackets attached thereto and extending inwardly therefrom, a plurality of beams longitudinally disposed and removably attached to the inwardly extending brackets and provided with grooves in the lower portion thereof, and a plurality of fire brick or tile provided with portions engaging the grooved mechanism of the longitudinal beams to permit the easy insertion or removal of said tile mechanism, substantially as described."

The claimed purpose to be attained (easy repair and renewal of brackets) appears to be as readily attainable by the use of one as by the use of the other, that is, the means in the two patents are equivalents; and McKenzie was first.

Affirmed.

SHARP et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 27, 1922.)

No. 3808.

1. **Criminal law ⊜1167(3)—Refusing to quash counts on which defendant was not convicted is not prejudicial.**

Where numerous defendants were charged with several offenses, by an indictment containing five counts, the overruling of a motion made by one defendant to quash counts 4 and 5 of the indictment was not prejudicial, where he was convicted only on counts 1 and 2.

2. **Commerce ⊜33—Alcohol consigned to another state is in "interstate shipment" in hands of switching carrier.**

A shipment of alcohol, which had been loaded into a car consigned to another state and was on the tracks of a belt line, which performed only switching services in delivering the car to the carrier which was to haul it to destination, was already in "interstate shipment," within Act Feb. 13, 1913 (Comp. St. § 8603), relating to larceny of goods in interstate commerce.

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

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

3. **Criminal law ⟸1169(3)—Evidence as to fact admitted by objecting defendant is not prejudicial.**
Evidence of the finding of whisky in the rear of the residence of one defendant when the officers made search without a warrant was not prejudicial to that defendant, where he testified that he rented the shed to codefendant, and admitted that the codefendant had stored whisky therein, so that the admission of such evidence was not reversible error.

4. **Criminal law ⟸364(5)—Statement of one defendant after transaction is not res gestæ.**
An extrajudicial statement by one of several defendants, made some time after the larceny from an interstate shipment, to a city detective, that the pay roll of the shipper showed that another defendant was at work at the shipper's factory on the night of the larceny, was a statement as to a past transaction, and not admissible on his behalf as part of the res gestæ.

5. **Intoxicating liquors ⟸224—Government need not prove defendants had no permit to transport.**
In a prosecution for transportation of alcohol without the permit required by the National Prohibition Act, it is not incumbent on the government to prove that defendants had no permit, which, if it was issued, presumably was in defendants' possession or their control.

6. **Criminal law ⟸1122(2)—Record must show refused request was applicable to evidence.**
A conviction will not be reversed for the refusal of a requested written charge, even if it stated correct propositions of law, where the record does not show that those propositions were applicable to a state of facts which evidence adduced tended to prove.

7. **Criminal law ⟸1122(3)—Rulings on sufficiency of evidence to support instructions not reviewed, if record does not disclose all the evidence.**
The rulings on the sufficiency of the evidence to support the charges cannot be reviewed, where the record does not purport to disclose all the evidence or the substance thereof.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Randall Sharp and others were convicted, respectively, on various counts of an indictment, charging theft of alcohol from an interstate shipment and conspiracy to violate the National Prohibition Act (41 Stat. 305), and they bring error. Affirmed.

C. S. Hebert, H. L. Landfried, and Richard B. Otero, all of New Orleans, La., for plaintiffs in error.

L. H. Burns, U. S. Atty., and L. P. Bryant, Jr., Asst. U. S. Atty., both of New Orleans, La.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The nine plaintiffs in error were joined with other persons in an indictment containing five counts, which, respectively, charged that they stole 80 drums of ethyl alcohol from a specified railroad car while the same was on the tracks of the New Orleans Public Belt Railroad, said alcohol then and there moving as and constituting part of an interstate shipment of freight, namely, a shipment of alcohol from a named shipper at New Orleans, La., to a named consignee at Kansas City, in the state of Missouri, via the Illinois Central Railroad Company; that they conspired to commit the offense

charged in the first count; that they unlawfully, willfully, knowingly, and feloniously received and had in possession alcohol described as in the first count, then and there knowing that it was taken, stolen, and carried away while moving as an interstate shipment as aforesaid; that they conspired to willfully and knowingly, without first obtaining a permit from the United States prohibition director at New Orleans, transport alcohol as described in the first count; and that they conspired to willfully and unlawfully possess alcohol described as in the first count.

[1] One of the plaintiffs in error, who was convicted only on counts 1 and 2 of the indictment, complains of the overruling of a motion made by him alone to quash counts 4 and 5 of the indictment. The result of the trial kept that action of the court, assuming that it involved error, from being prejudicial to him or a ground of reversal in his behalf.

[2] At the time of the occurrences charged, the alcohol in question was in a car on a track of the New Orleans Public Belt Railroad, a public utility of the city of New Orleans, which had receipted for it, to be switched to the carrying line. The fact that the alcohol was still in the possession of the carrier which was to render only a switching service did not keep it from being an interstate shipment, within the meaning of the Act of February 13, 1913 (U. S. Compiled Stat. § 8603), relating to larceny, etc., of goods in interstate commerce. The destination of the alcohol was fixed and certain from the time the shipper parted with possession and control of it, and the car containing it was launched on its way to another state by being committed to the switching line for delivery to the carrying line. The switching was the initial step in an interstate carriage. The court was not in error in ruling to the effect that there was an interstate shipment from the time the car containing the alcohol was receipted for by the Public Belt Railroad. Coe v. Errol, 116 U. S. 528, 6 Sup. Ct. 475, 29 L. Ed. 715.

[3] The defendants objected to testimony of one Ford to the following effect: That on the night of the 17th day of September, 1920, after the arrest of several of the defendants, while on a truck whereon alcohol was being transported on a street in the city of New Orleans, the arresting officers, including the witness, who was a city detective and was working in conjunction with the prohibition enforcement officers, without a search warrant, searched the rear of the residence premises of the defendant Vinette and found five drums of alcohol in a shed therein. Vinette stated that he rented that shed to Sharp, a codefendant, and admitted that Sharp stored the alcohol therein. Vinette could not have been prejudiced by the admission of other evidence of a fact which he admitted. In the circumstances disclosed, the action of the court in overruling the above-mentioned objection was not reversible error.

[4] The court sustained an objection by the prosecution to testimony of a witness for the defendants to the effect that Kokemor, one of the defendants, "some time after August 25, 1920,"—the date on which the car was broken into and alcohol was taken therefrom while it was on the premises of the Southern Cooperage Company—after examining the pay roll of the Cooperage Company, stated to a city

detective that the pay roll showed that Fred Brown, another defendant, was at work at the cooperage plant on the night of August 25, 1920. The making of the statement which was so excluded was not part of the res gestæ of the transaction in question. What was said was in reference to an incident of a past and concluded occurrence. Evidence as to what the defendants, or either of them, said "some time after August 25, 1920," as to what occurred on that date, was not admissible in their behalf.

[5] In behalf of each of the defendants a motion was made to direct a verdict in his favor as to the fourth count of the indictment, for the reason that no proof was offered to sustain the averment of that count as to the defendants having no permit to transport alcohol. It was not incumbent on the prosecution to adduce evidence to support such a negative averment, which, if untrue, readily could have been disproved by the defendants producing the permit, which, if it was issued, presumably was in their possession or under their control. Faraone v. United States, 259 Fed. 507, 170 C. C. A. 483.

[6, 7] Complaint is made of the refusal of the court to give part of a requested written charge. Assuming the correctness of the propositions stated in the refused instruction, that action of the court is not a ground of reversal, as the record does not show that those propositions were applicable to a state of facts which evidence adduced tended to prove. As the record does not purport to disclose all the evidence, or the substance of all the evidence, the rulings of the court on the question of the sufficiency of the evidence adduced to support charges made are not properly presented for review.

We do not think that the record shows any reversible error. The judgment is affirmed.

GOLDBERG et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 3, 1922.)

No. 3591.

1. Internal revenue ⟸2—Statute requiring "retail liquor dealers" to pay tax was not repealed by War-Time Prohibition Act.

Rev. St. § 3244 (Comp. St. §§ 5971, 6176, 6187), imposing a special tax on "retail liquor dealers," who are defined as those who sell distilled spirits in less quantities than five gallons at one time, and which required the tax to be paid, not only by persons engaged exclusively in the sale of liquor, but also by druggists and others who, in connection with their other business, sold liquor for medicinal, mechanical, or other purposes, was not repealed by the War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h), which prohibited the sale of distilled spirits for beverage purposes during the war.

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

2. Criminal law ⟸15—Punishment for failure to pay special tax is not released by subsequent enactment of national prohibition.

One who had committed the offense of selling intoxicating liquors without having paid the special tax required of retail liquor dealers, prior to

the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, can be tried and punished for that offense after national prohibition took effect, under Rev. St. § 13 (Comp. St. § 14), providing that the repeal of any statute shall not have the effect to release any penalty unless the repealing act shall expressly so declare.

3. **Criminal law ⟸1035(2), 1129(1)—Error in consolidation of cases for trial not reviewable, where no objection nor assignments of error.**

Even if it was error to consolidate for trial a joint indictment against two defendants for failure to pay the special retail liquor dealer's tax, with separate indictments against each defendant charging a sale of liquor contrary to the War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ $3115^{11}/_{12}$f–$3115^{11}/_{12}$h), the objection is not available to defendants, where it was not made before trial, nor included in the original assignments of error, but was sought to be raised for the first time in the appellate court.

4. **Criminal law ⟸1038(1), 1056(1), 1129(1)—Charge must be objected to, exception saved, and assigned as error, to be reviewable.**

Charges of the court are not reviewable, where no objection was made to them when they were given, no exceptions were taken, and no assignment of error was based upon them.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Harry Goldberg and another were convicted of carrying on the business of a retail liquor dealer without having paid the special tax, and of unlawful sale of distilled spirits for beverage purposes, contrary to the War-Time Prohibition Act, and they bring error. Affirmed.

Shelby Myrick and A. A. Lawrence, both of Savannah, Ga., and J. T. G. Crawford, of Jacksonville, Fla., for plaintiffs in error.

Charles D. Russell, Asst. U. S. Atty., and John W. Bennett, U. S. Atty., both of Savannah, Ga.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. The defendants, Harry Goldberg and Israel Goldberg, were convicted upon a joint indictment, charging that on July 29, 1919, they were carrying on the business of a retail liquor dealer without having paid the special tax required by Revised Statutes, § 3244 (Comp. St. §§ 5971, 6176, 6187). Each defendant was also convicted upon a separate indictment charging an unlawful sale, on July 31, 1919, of distilled spirits for beverage purposes. The joint indictment is based upon Revised Statutes, § 3242 (section 5965), and the separate indictments upon the provision of the War Prohibition Act, to the effect that after June 30, 1919, and until the conclusion of the War and demobilization, it should be unlawful to sell distilled spirits for beverage purposes. 40 Stat. at L. 1046 (Comp. St. Ann. Supp. 1919, §§ $3115^{11}/_{12}$f–$3115^{11}/_{12}$h).

The indictments were found November 15, 1919, and consolidated for trial by order of court upon motion of the district attorney, and without objection by defendants, or either of them. A demurrer to the joint indictment, upon the ground that the payment of tax by a retail liquor dealer has not been required by law since June 30, 1919—the effective date of the War Prohibition Act—was overruled.

There was sufficient evidence that liquor was being sold at retail at

a store in Savannah. Sales on at least three occasions were shown, and several thousand empty bottles and cartons with whisky labels on them were found there.

The principal contention on the facts is that the place of business was being conducted, not by the defendants, but by several of their brothers. The defendant Harry Goldberg claims a case of mistaken identity. One witness seemed to be in some doubt as to the identity of this defendant, but other witnesses testified positively that he was present while sales were being made and asserted the rights of an owner of the place, by resisting a search by government officials, and demanding to be shown their authority to make it. Besides, the defendants offered in evidence, without limitation as to its purpose or effect, testimony taken at a preliminary hearing, from which it appeared that the doubtful witness was more positive just after the arrest of the defendants than he was at the time of the trial, which occurred more than a year later. The defendant Israel Goldberg undertook to prove an alibi, but he was positively identified.

[1] The order of the court overruling the demurrer to the joint indictment is assigned as error. It is contended that section 3244, which required a special tax of retail liquor dealers, was repealed by the War Prohibition Act, and that consequently no tax was required on the date when it is charged by the indictment that defendants engaged in the business of retail liquor dealers. Section 3244 defines a retail liquor dealer as a person who sells or offers for sale distilled spirits in less quantities than five wine gallons at the same time. Prior to the passage of the War Prohibition Act, no distinction was made between dealers engaged in the sale of distilled spirits for beverage purposes and dealers so engaged for any other purpose. Besides, the special tax was required to be paid, not only by persons engaged exclusively in the sale of liquor, but also by druggists and others who, in connection with their other business, sold liquor for medicinal, mechanical, or other purposes. United States v. Stafford (D. C.) 20 Fed. 720; United States v. White (D. C.) 42 Fed. 138; United States v. Morfew (D. C.) 136 Fed. 491.

The joint indictment did not charge, and it was not necessary that it should charge, that the defendants were engaged in the business of selling distilled spirits for beverage purposes. The War Prohibition Act was not intended to repeal the general provisions of law for the collection of internal revenue, and none of those provisions were intended to be or were repealed, superseded or supplanted until the Eighteenth Amendment and the National Prohibition Act (41 Stat. 305) became effective.

[2] Inasmuch as the trial occurred after the effective date of the amendment and the National Prohibition Act, it is also contended that either the amendment or the last-mentioned act repealed the revenue provisions of the Revised Statutes and the War Prohibition Act, and that therefore, although it was a violation of the law to engage in the business of a retail liquor dealer at the time the indictment was found, punishment could not be imposed, because of the repeal before trial. This contention is untenable, in view of section 13, Revised Statutes

(Comp. St. § 14), which provides that the repeal of any statute shall not have the effect to release any penalty, forfeiture, or liability unless the repealing act shall expressly so declare. There is no such declaration in the National Prohibition Act.

[3] The order of the court consolidating the indictments for trial is attacked as being erroneous. That objection was not made before trial; it was not included in the original assignments of error, but is sought to be raised for the first time in this court. It may be assumed that, if timely objection had been made, the order consolidating the indictments would form the basis for reversible error. But parties should not sit idly by, and by their silence acquiesce in, or consent to, proceedings at a trial which are not in strict conformity to law, if they expect to complain of such proceedings in an appellate court. Important rights, even in criminal cases, can be waived. Frank v. Mangum, 237 U. S. 309, 35 Sup. 582, 59 L. Ed. 969. The principal case relied on is that of McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355. But there the defendants objected and excepted to the order of consolidation.

[4] Counsel argue in their brief and orally that the trial judge committed error in several charges given by him to the jury, but no objection was made to these charges when given, no exceptions taken, and no assignment of error is based upon them. Under these circumstances, the charges of the court are not before us for review.

The judgments are affirmed.

CITY OF NEW ORLEANS et al. v. O'KEEFE et al.

(Circuit Court of Appeals, Fifth Circuit. April 1, 1922.)

No. 3735.

1. **Municipal corporations ⇐593—Louisiana Constitution does not permit city to make binding contract fixing street car fares.**

Const. La. 1921, art. 19, § 18, which forbids an abridgment of the police power of the state, as construed by the courts of that state, prohibits a city from making an irrevocable contract, which prevents it from thereafter regulating the rates of public utilities.

2. **Carriers ⇐12(9)—Rate of fares not fixed by contract cannot be enforced as condition of exercising franchise after they became confiscatory.**

Where a city had no authority to make an irrevocable contract fixing street car fares, it could not enforce, as a condition precedent to the right to continue to use its streets, an ordinance fixing such fares, after the fare so fixed had become confiscatory.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Henry D. Clayton, Judge.

Suit in equity by J. D. O'Keefe, as receiver of the New Orleans Railway & Light Company, and others, against the City of New Orleans and others. From a decree granting an injunction pendente lite to restrain interference with the receiver in charging an 8-cent street car fare (273 Fed. 560), defendants appeal. Affirmed.

W. Catesby Jones and Rene Viosca, Asst. City Attys., and Ivy G. Kittredge, City Atty., all of New Orleans, La., for appellants.

H. Generes Dufour, of New Orleans, La., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This is an appeal from a decree of the District Court granting an injunction pendente lite restraining the city of New Orleans, and its officials named in said decree, from interfering with the receiver of the New Orleans Railway & Light Company in charging an eight-cent fare on said street railway system, until said order should be modified by said District Court, during the continuance of the suit pending in said District Court of the Empire Trust Company, as trustee, against said New Orleans Railway & Light Company, in which said receiver was appointed, upon the ground alleged in said bill for injunction that a lower rate of fare would deprive the complainant and said Railway Company of their property without due process of law.

The defendants did not offer any evidence contesting the allegations of the bill (which were supported by proof), but resisted the grant of the injunction upon the ground that the Railway & Light Company, and its subordinate companies, in securing their franchises had made irrevocable contracts with the city of New Orleans by which said rate was fixed at five cents, which rate could not be changed except by consent of the city, as one of the contracting parties, and that the five-cent rate was a condition to the grant of said franchises.

The court, in a very careful and full opinion rendered by Hon. Henry D. Clayton, the judge presiding, found the facts to be as claimed by the complainant receiver, and found that under the Constitution and laws of Louisiana the city of New Orleans and the Railway Company could not make an irrevocable contract fixing street car fares; that the city of New Orleans was empowered to regulate the rates of local public utilities in its borders, having all the powers of the state delegated to it for that purpose; and that where a rate prescribed, or continued, by the city in the exercise of such power deprived the utility of its property without due process of law, as he found would be then done by any rate for street car service of less than eight cents, the city could be enjoined from enforcing the same. O'Keefe, Receiver, v. City of New Orleans (D. C.) 273 Fed. 560. This opinion sufficiently sets forth the facts and authorities supporting this conclusion and renders unnecessary any general discussion thereof by this court.

[1] It was insisted in this court on behalf of the city of New Orleans that under the Constitution of Louisiana in force at the time of the grant to the several railway companies of the franchises to occupy the streets of the city, the city of New Orleans had the power to make irrevocable contracts with said railway companies as to a rate of fare to be charged, and that where such contracts were made they remained binding, even if the rate became confiscatory. Columbus Ry., Power & Light Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648.

The powers of the city of New Orleans to regulate its public utilities have but recently been the subject of elaborate investigation by the Supreme Court of Louisiana, the results of which are given in an illuminating opinion in the case of State of Louisiana v. City of New Orleans (not yet [officially] reported) 91 South. 533, handed down on March 20, 1922. It is there held that the city of New Orleans possesses the full power of the state to regulate the local public utilities in its limits. It is further held that under the Constitution of Louisiana, which forbids an abridgment of the police power of the state, the Legislature cannot bargain away the authority to fix or contract rates for public utilities. This has been a provision of the Constitution of Louisiana since 1879. It is further held that a municipality, invested with authority to grant franchises and fix rates for local public utilities, cannot irrevocably surrender, or barter away, its police power in that respect, even for a limited term, unless, perhaps, the municipality is specifically authorized to make such irrevocable contract by the Legislature of a state whose Constitution allows it. Here, as we have seen, the Constitution forbids it.

It is therefore quite clear, from the foregoing opinion, that the Constitution of Louisiana would prohibit any attempt on the part of the Legislature, or the city of New Orleans as its delegated agency, to make an irrevocable contract, preventing it at any time from regulating the rates of a public utility. Such being the case, no contract existed with the Railway Company binding it to continue a confiscatory rate. As was said by the Supreme Court of the United States:

"The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract." Southern Iowa Elec. Co. v. Chariton, 255 U. S. 539, 546, 41 Sup. Ct. 400, 65 L. Ed. 764; City of San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 41 Sup. Ct. 428, 65 L. Ed. 777.

[2] The argument is also advanced that the maintenance of the rate of five cents was a condition to the grant, and continued use, of the franchises to occupy the streets. Having decided that there is no existing contract fixing the rate, we cannot so construe the ordinances granting these franchises and fixing such rates. In a recent case in which it was insisted, even if there was no contract binding both parties, that the maintenance of the rate originally named in the franchise ordinance would be obligatory on the Railway Company as a condition to the exercise of its franchise, in deciding against the claim, the Supreme Court of the United States, speaking by the late Chief Justice White, said:

"The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate in the public interest, and of government to regulate it by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. * * *"

Therefore where the regulatory power was uncontrolled by contract it is held:

"It would follow that that power would be required to be exerted, and hence the supposed condition, operating upon the private owner, would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power." San Antonio v. San Antonio Public Service Co., 255 U. S. 547, 556, 41 Sup. Ct. 428, 65 L. Ed. 777.

The decree of the District Court is therefore affirmed.

BRYAN, Circuit Judge (concurring). I base my conclusion, that the decree of the court below should be affirmed, solely upon the effect of the decision of the Supreme Court of Louisiana, rendered March 20, 1922, in State v. City of New Orleans, 91 South. 533.

McNEE v. WILLIAMS, District Judge.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1922.)

No. 212.

Appeal and error ⟸1192—Mandate to proceed in conformity with opinion held not to require judgment for defendant.

Where the briefs of the parties on writ of error to review a judgment for plaintiff agreed that the only question for decision was whether the lands in controversy, which defendant claimed under a tax deed, were subject to taxation, though the pleadings in that case presented other objections to the validity of the tax deed, a mandate, after reversal of that judgment, directing the trial court to proceed in conformity with the opinion, did not require it to enter a judgment in favor of defendant, but only required further proceedings to be had in accordance with the determination that the land was subject to taxation.

Rule by George A. McNee against Hon. R. L. Williams, as Judge of the District Court of the United States for the Eastern District of Oklahoma, to show cause why respondent should not be required by mandamus to render a final judgment in favor of petitioner as defendant in a cause pending in that court, wherein James E. Whitehead was plaintiff and George A. McNee defendant. Rule discharged, and petition dismissed.

James S. Twyford, of Oklahoma City, Okl. (Solon W. Smith, of Oklahoma City, Okl., on the brief), for petitioner.

F. E. Riddle, of Tulsa, Okl. (Conn Linn, of Tulsa, Okl., on the brief), for respondent.

Before SANBORN and LEWIS, Circuit Judges, and VAN VALKENBURGH, District Judge.

LEWIS, Circuit Judge. The petitioner, McNee, caused a rule to issue out of this court on Hon. R. L. Williams, as District Judge for the Eastern District of Oklahoma, to show cause why he should not be required by writ of mandamus to enter final judgment in favor of the

defendant in a cause pending in that court entitled "James E. Whitehead, Plaintiff, v. George A. McNee, Defendant." The rule issued on McNee's petition, which charged that respondent had refused to comply with the mandate of this court in cause No. 5126, entitled "George A. McNee, Plaintiff in Error, v. James A. Whitehead, Defendant in Error," 253 Fed. 546, 165 C. C. A. 216, which is the same cause as that now pending in the District Court; that it was tried on its merits in the District Court in November, 1917, resulting in a judgment in favor of Whitehead; that it was then brought here by McNee as plaintiff in error, resulting in reversal, that the mandate that went down contained this:

"On consideration whereof, it is now hereby ordered and adjudged by this court, that the judgment of the said District Court, in this cause be, and the same is hereby, reversed with costs; it is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions for further proceedings in conformity with the opinion of this court."

The return to the rule, taken with the recitations in the petition admitted by respondent, shows that petitioner's motion for judgment in his favor was presented to and denied by the judge who tried the case and who, on denying the motion, granted leave to Whitehead to file an amended complaint, that no demand was ever made on respondent to cause the judgment to be entered for defendant, and that the only action which he was asked to take in the cause was to rule on defendant's motion to strike the amended complaint, which he overruled.

The petition for the writ sets up in full the substance of the pleadings at the time of the trial, from which it appears that the complaint stated two causes of action, one at law, i. e., ejectment, and the other in equity, i. e., a bill to remove as a cloud on plaintiff's title to the lands described in the first count a tax deed held by defendant and alleged to be void because the lands were exempt from the taxes for which they were sold. The answer did not respond separately to each count. It denied that plaintiff owned the lands, it denied the execution and delivery of one of the deeds set up by plaintiff in his chain of title, it admitted that defendant was in possession, it denied that the lands were exempt from taxes, and set up defendant's tax deed as vesting title in him; and then pleaded by way of cross-petition that, by virtue of his tax deed and possession, he is entitled to have the deed declared valid and perfect and to have his title quieted as against the plaintiff, and that plaintiff's alleged title be declared to be null and void, and prayed accordingly. To the answer thus consolidated to the two counts the plaintiff filed a reply, in which he alleged that the tax deed was "void because no notice was given to this plaintiff or to any of his grantees (grantors) or to his tenant of the application for said tax deeds or either of them as is required by law." It further appears from the petition for the writ that when the defendant offered in evidence his tax deed, which was a correction deed of a prior tax deed covering the premises in controversy, the plaintiff objected on the ground that the lands were exempt from taxation at the time of the tax levy under which they were sold and the deed issued to defendant, that the trial judge sustained the objection and announced that judgment would be entered for the plaintiff. The petition further shows

that when the case came on to be heard on writ of error the brief for plaintiff in error contained this:

"All these specifications of error may properly be argued together. The question is this: 'Are the inherited lands of minor Choctaw Indian heirs of the quarter blood, before sale through the proper county court of Oklahoma, subject to taxation?' If this question is answered in the affirmative the plaintiff in error must prevail and the judgment of the trial court reversed and judgment rendered for defendant as prayed by his answer and cross-petition. Otherwise the judgment of the lower court should be affirmed with costs"

—and to that the brief for defendant in error responded:

"We agree with plaintiff in error in his brief that if such lands are taxable by the state, the judgment should be reversed, and if such lands are not taxable, the judgment should be affirmed. Therefore, the one and whole question is—Are these lands taxable?"

Taking counsel at their word, the opinion rendered in the case (McNee v. Whitehead, 253 Fed. 546, 165 C. C. A. 216) went no further than to answer that question in the affirmative. There were other issues raised by the reply not noticed here, because counsel agreed that this court need pass only on the one question of law.

The mandate did not in terms require the court to act in the manner which petitioner now asks to have it do under compulsion of the writ. It required the trial court to take "further proceedings in conformity with the opinion of this court," and reading it in the light of the opinion, we think there is no room to claim that it directed, or intended to direct the District Court to enter a final judgment in favor of the defendant. Insurance Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; In re Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; Hawkins v. Ry. Co., 99 Fed. 322, 39 C. C. A. 538; Mulqueen v. Cordage Co. (C. C.) 108 Fed. 931; Ex parte Union Steamboat Co., 178 U. S. 317, 20 Sup. Ct. 904, 44 L. Ed. 1084. The direction of the mandate to proceed in conformity to the opinion made the opinion a part of the mandate, and it is to be "interpreted according to the subject-matter to which it has been applied." Metropolitan Co. v. Drainage District, 223 U. S. 519, 523, 32 Sup. Ct. 246, 56 L. Ed. 533; Baltimore Building & L. Ass'n v. Alderson, 99 Fed. 489, 492, 39 C. C. A. 609. This court did not decide that defendant had the better title. It expressed no opinion as to whether his tax deed vested in him a better title than that claimed by plaintiff, or any title. It only settled a question of law on assumed facts. The court was not asked to consider the whole record for judgment de novo, as on the second count, or on the cross-petition; and as to the first count it was not within judicial power to take away Whitehead's right to the verdict of a jury on that count. The seventh amendment forbids. Slocum v. Insurance Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. When the cause was reversed and remanded to the District Court with directions for further proceedings in conformity with the opinion of this court, the only command which it carried to respondent was to apply the principle of law established by this court, in its final disposition.

Rule discharged and petition dismissed at petitioner's costs.

CANAL CONST. CO. v. HENSON.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5901.

1. **Appeal and error ⟸1002—Verdict on conflicting evidence conclusive.**
   Finding of jury on a question on which the evidence was conflicting, and in regard to which reasonable men might differ, was conclusive on appeal.
2. **Master and servant ⟸204(3)—Risk of negligence of fellow servant held not assumed under Arkansas statute.**
   Under Crawford & Moses' Dig. Ark. § 7137, a workman employed by a corporation engaged in construction work did not assume the risk of negligence of a fellow servant, felling a tree without a warning required by a rule of the corporation and a custom adopted by its employés.
3. **Evidence ⟸546—Qualification of physician a question for trial court.**
   Qualification of physician to testify as to customary results attending fractures was a question for the trial court.
4. **Trial ⟸76—Not competent for counsel to object until cross-examination concerning knowledge of witness.**
   Where physician testified that he had seen the X-ray of plaintiff's injuries taken by another physician, and that he knew that it was the same X-ray, it was not competent for counsel to object to question as to what witness found from the X-ray, because the witness did not show how he knew it was the same X-ray, until he had by cross-examination, or some kind of an examination, shown that the witness did not have knowledge based on reasonable grounds that the X-ray was the same.
5. **Appeal and error ⟸274(5)—Exception insufficient to raise error in instructions.**
   An exception: "Just one more exception; that is, the first instructions of negligence. I wish to enter my exceptions to the opinion of the court" —could not raise any error as to charge on contributory negligence.

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

Action at law by G. C. Henson against the Canal Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Cooley and Arthur L. Adams, both of Jonesboro, Ark., for plaintiff in error.

J. H. Hawthorne, of Jonesboro, Ark., and L. C. Going, of Memphis, Tenn., for defendant in error.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Henson, hereafter called plaintiff, sued the construction company, hereafter called defendant, to recover damages for personal injuries received, as he alleged, by reason of the negligence of defendant. Plaintiff recovered a verdict, and the defendant assigns five errors as causes for reversal:

[1, 2] 1. The refusal of the court to direct a verdict for defendant because (a) testimony showed clearly and conclusively that plaintiff assumed the risk of the conditions of operation resulting in his injuries; (b) plaintiff himself was guilty of contributory negligence.

It may be stated generally that the defendant, at the time of the

injuries complained of, was engaged in digging what was known as Gum Slough ditch, in Green and Craighead counties, Ark. Plaintiff was one of its employees, engaged in the work of felling trees for the purpose of cutting a right of way, in order to construct the ditch. The evidence showed that it was a rule established by the defendant, and a well-known custom adopted by its employees, to holloa "timber" just as a tree was being felled, for the purpose of warning the coworkers on the job of the danger incident to the falling of a tree, so that they might protect themselves. The negligence complained of, and upon which the case was tried, was the alleged negligence of the fellow servants of plaintiff in permitting a tree to be felled, without due and timely warning to the plaintiff, in the direction of and near the place where plaintiff was engaged in felling a tree. Whether this warning was given in time for plaintiff to have avoided the dangers incident to the falling tree was a question upon which the evidence was conflicting, and in regard to which reasonable men might differ. The jury, upon the evidence submitted, found for the plaintiff, and their finding is conclusive.

The plaintiff did not assume the risk of negligence on the part of a fellow servant. St. Louis Southwestern Ry. Co. v. Burdg, 93 Ark. 88, 124 S. W. 239, construing section 7137, C. & M. Digest of Ark. (Act March 8, 1907); Chapman & Dewey v. Woodruff, 116 Ark. 197, 173 S. W. 188; Caddo River Lumber Co. v. Grover, 126 Ark. 449, 190 S. W. 560. The contention that plaintiff assumed the risk, and also was guilty of contributory negligence, is based upon the erroneous theory that plaintiff was seeking to recover damages for the negligence of defendant and its employees in failing to remove a lodged tree from a position where it might unexpectedly fall. The plaintiff made no claim that the defendant was negligent in regard to the lodged tree. There was no error in our opinion in the refusal of the court to direct a verdict.

2. The request to charge set forth in assignment of error No. 2 was probably correct in the abstract, but was inapplicable to the issues being tried.

[3] 3. This assignment of error is based upon an objection made by counsel for defendant that Dr. Horner, a witness for plaintiff, was not qualified to testify as to the usual or customary results attending fractures such as the witness had described. The qualification of the witness was a question for the trial court, and we see no error in its ruling, and the record barely shows that there would have been no objection at all, had not the trial judge suggested that perhaps some of the evidence was inadmissible. In any event the record does not show that the defendant was prejudiced by the ruling.

[4] 4. Dr. R. H. Willett was a witness for the plaintiff. He testified that he had seen the X-ray of plaintiff's injuries taken by Dr. McCracken and that he knew that it was the same X-ray. The witness was then asked by counsel for plaintiff: "State what you found from that X-ray." Counsel for defendant objected, because the witness did not show how he knew.

We suppose that the question meant that the witness had not shown how he knew that the X-ray he saw was the same X-ray that Dr. McCracken took of the plaintiff. The court overruled this objection. Counsel had not asked the court for the privilege of examining the witness as to his qualifications, and as the record stood the witness had testified that he knew the X-ray was the same. It was not competent for counsel to object to the question asked the witness until he had, by cross-examination or some kind of an examination, shown that the witness did not have knowledge based upon reasonable grounds that the X-ray was the same. As the record stood, it appeared that the witness did have such knowledge. We cannot see that any prejudice resulted to the defendant, assuming for any reason that the court was in error.

[5] 5. The only exception to the charge of the court as given is as follows:

"Just one more exception; that is, the first instructions of negligence. I wish to enter my exceptions to the opinion of the court."

Under this exception error is assigned to the charge of the court upon the question of contributory negligence. Fairness to the trial court compels us to hold that such an exception could not raise the error, if any, complained of. Counsel for defendant did not request the court to charge upon the question of contributory negligence.

Finding no merit in the errors assigned, it results that the judgment below must be affirmed; and it is so ordered.

REEVES v. McWILLIAMS CO., Inc., et al.*

In re HUNT.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1922.)

No. 5834.

Drains ⟸49—Contractor, who advanced funds to subcontractor under agreement for reimbursement from percentages retained by district, held equitably entitled thereto.

Drainage contractor, who advanced subcontractor funds under subcontractor's agreement that reimbursement was to be made out of percentages retained by drainage district, *held* invested with an equitable right and first claim to the fund so retained for reimbursement for amount so advanced.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by the McWilliams Company, Inc., and others, against J. H. Reeves, trustee of the estate of T. D. Hunt, bankrupt. Judgment for plaintiffs, and defendant appeals. Affirmed.

F. C. Mullinix, of Jonesboro, Ark., and F. G. Taylor, of Corning, Ark., for appellant.

Donald B. Craig, of Mattoon, Ill., and L. C. Going, of Memphis, Tenn. (Edward C. Craig, James W. Craig, Jr., James Craig Van Meter, and Fred H. Kelly, all of Mattoon, Ill., on the brief), for appellees.

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

*Rehearing denied August 18, 1922.

Before SANBORN, STONE, and LEWIS, Circuit Judges.

LEWIS, Circuit Judge. In August, 1915, R. H. and G. A. McWilliams (later incorporated as McWilliams Company), contracted with the commissioners of Drainage District No. 2 of Crittenden County, Arkansas, to excavate ditches and make certain improvements for said district. In February, 1916, a part of the work was sublet to T. D. Hunt. The contract with the district provided that 20% of the amount to be paid McWilliams Company on estimates from time to time should be retained until the work was all completed, and the retention of that percentage applied also to the two sub-contracts with Hunt for the work that he agreed to do. In May, 1917, Hunt was adjudged a bankrupt and the trustee of his estate, with the approval of the referee in bankruptcy, determined to adopt and perform the contracts in behalf of the bankrupt estate. Prior to Hunt's failure, McWilliams Company advanced to him from time to time different sums for the payment of bills incurred by Hunt in performance of his dredging operations, and in the settlements that McWilliams Company made with the district from month to month for the work that had been performed, these advances were deducted from the 80% received and the balance paid over to Hunt. The operations of the trustee did not prove successful, and from time to time McWilliams Company, at the request of the trustee and referee, paid many items of indebtedness incurred by the trustee, with the understanding that it should be reimbursed out of the sums turned over to the company monthly by the district, as had been the practice between the company and Hunt. The 80% of the earned amount for the work done by the trustee did not, however, prove sufficient to reimburse the McWilliams Company, and the balance in its favor was increased from month to month; so that McWilliams Company determined in the early part of 1919 that it would not advance further sums to the trustee as against the 80% without additional security.

This brought about negotiations between the trustee and McWilliams Company and resulted in a written agreement of date April 24, 1919, between them, which was approved by the referee, wherein it was recited that the trustee had become indebted to McWilliams Company and would require further advances in order to operate and complete the contracts, and it was agreed that upon the completion of the contracts, if the trustee should still be indebted to McWilliams Company after taking up the completed estimates, he would procure the assignment to McWilliams Company of the retained percentage held back by the commissioners of said district, subject only to the prior rights of certain named creditors. Thereupon McWilliams Company advanced $400.00 to the trustee to meet his payroll and credited him with $1,000.00 more. The right to have the retained percentages, as given to McWilliams Company by this contract, was repeated in a contract between the same parties on August 6, 1919; and it was expressly agreed that any and all necessary assignments, or other instruments necessary to effectuate the agreement, would be executed by either party. Mc-

Williams Company continued to make advances, and the trustee continued to operate. At the time he quit or finished there was $5,727.00 in the hands of the commissioners to be applied on the work performed by the trustee, and there being dispute as to whom it should be paid, it was deposited in court to be held until its proper distribution might be determined.

Thereupon McWilliams Company brought this suit, and asked that it be adjudged entitled to it. After the pleadings were made up a master was appointed to take proof and make report. He found that the trustee was indebted for labor and supplies in an amount exceeding $20,000.00; but it was not all incurred in the trustee's efforts to perform Hunt's contracts with McWilliams Company. At the time Hunt became bankrupt he had a similar contract with another drainage district in that locality, and the trustee, with the approval of the referee, elected to adopt and perform that contract also. He did not keep separate accounts for the work done under the different contracts. The master recommended that the $5,727.00 be applied on the payment of the trustee's indebtedness. On exceptions to his report, which were sustained, the court below entered a decree that the $5,727.00 be paid over to McWilliams Company after deducting a certain specified amount due others, about which there is no dispute, and costs. This appeal is from that decree.

We think there can be no doubt that appellee is equitably entitled to the fund and that the decree was right. The sums advanced by McWilliams Company to the trustee were made on the express agreement that reimbursement was to be made out of the retained percentages, and that the retained percentages would be assigned to McWilliams Company for that purpose. The trustee, with the approval of the referee, undertook to repudiate that agreement and refused to make the assignment. He was unable to go on with the work unless he could obtain funds from some source to meet his payroll and purchase necessary supplies. McWilliams Company had made advances to Hunt, and later to the trustee, and by agreement had reimbursed itself out of the 80% received from the commissioners on monthly settlements, but that percentage did not meet the amounts that the McWilliams Company had advanced to the trustee, and it refused to proceed further on that basis. Then it was that the trustee and referee agreed that if McWilliams Company would continue to make the necessary advancements, all sums in the hands of the commissioners applicable to the Hunt subcontracts would be assigned to McWilliams Company, so far as needed to reimburse it. They put that agreement in writing, and under well settled principles of equity it gave to McWilliams Company an equitable right and first claim to the fund. When the sums specified in the decree are first deducted from the fund in court, the remainder will be far less than the amount of the unpaid advancements made by McWilliams Company to the trustee. In fact, the whole of the fund is not sufficient to reimburse McWilliams Company. The facts appear to us to bring the case clearly within the principle announced in the following: Greif Bros. Cooperage Co. v. Mullinix (C. C. A.) 264

Fed. 391; Sieg v. Greene, 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006; Root Mfg. Co. v. Johnson, 219 Fed. 397, 135 C. C. A. 139; and cases therein cited.

The decree is affirmed.

UNITED STATES v. McCURDY, County Treasurer, et al. *

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5941.

1. **Taxation ⟸5—Lands held by United States in trust not taxable.**
Lands purchased by the United States from the Cherokee Nation for the Osage and Kansas Indians, and allotted under Act June 28, 1906, were not taxable so long as they were held in trust by the United States, especially in view of Oklahoma Enabling Act June 16, 1906.

2. **Taxation ⟸181—Lands not taxable on death of allottee before delivery of deed.**
Under Act June 28, 1906, § 2, subd. 7, and section 8, and the provision for deeds to lands allotted to Osage Indians, it required a deed executed and approved to pass title, and lands did not become taxable on the death of an allottee prior to the execution and delivery of a deed.

3. **Taxation ⟸181—Deed held not to relate back to allotments, so as to make lands taxable.**
Deeds to lands allotted to the Osage Indians under Act June 28, 1906, executed in May and June, 1909, and approved by the Secretary of the Interior July 30, 1909, did not relate back to the time of the approval of the allotments, so as to make the land subject to a tax imposed as of March 1, 1909, as the doctrine of relation is a legal fiction, adopted for purposes of justice, and not to impose a burden.

4. **Taxation ⟸710—Moneys paid to redeem from illegal taxes may be recovered.**
Moneys paid to redeem lands sold for taxes illegally assessed on Indian lands may be recovered.

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

Suit by the United States against Eneas J. McCurdy, County Treasurer of Osage County, Okl., and others. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded, with instructions.

S. W. Williams, Sp. Asst. Atty. Gen. (J. W. Howell, Sp. Asst. Atty. Gen., on the brief), for appellant.

E. E. Grinstead, of Pawhuska, Okl. (C. K. Templeton, E. F. Scott, and Frank T. McCoy, all of Pawhuska, Okl., on the brief), for appellees.

Before CARLAND, Circuit Judge, and TRIEBER and POLLOCK, District Judges.

CARLAND, Circuit Judge. The United States brought this action against appellees to enjoin the sale for taxes for the year 1909 of the lands described in the complaint, to set aside sales already made of such lands on account of taxes alleged to have become due and delinquent for said year, and to recover certain money paid by certain In-

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

*Rehearing denied August 24, 1922.

dians to redeem their lands so sold. The lands were allotted to non-competent members of the Osage Tribe of Indians. The case was heard on the complaint, answer and stipulation of the parties. The trial court dismissed the action, and its ruling is assigned as error.

Reduced to its lowest terms, the question for decision is: Were the Indians named in the complaint the owners of the lands in question on March 1, 1909, that being the date on which real estate in the state of Oklahoma for the year 1909 became taxable? The lands in controversy were originally purchased by the United States from the Cherokee Nation of Indians on June 4, 1883, for the benefit of the Osage and Kansas Indians, and were allotted under the Act of June 28, 1906 (34 Stat. 539). The allotments were completed November 19, 1908. All the allottees died prior to the date last mentioned. The lands were sold November 5, 1917, for the taxes of 1909. Although the allotments were approved by the Secretary of the Interior on or prior to November 19, 1908, deeds for the lands were not signed by the principal chief of the Osage Tribe until in May and June, 1909, and were not approved by the Secretary of the Interior until July 30, 1909.

[1, 2] As long as the lands were held in trust by the United States, they were not taxable. This would necessarily be so, and the Supreme Court in U. S. v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, and Kansas Indians, 5 Wall. 737, 18 L. Ed. 667, has so decided. See, also, the Enabling Act of June 16, 1906 (34 Stat. 267), under which Oklahoma and the Indian Territory were admitted to the Union. Under the Act of June 28, 1906, the lands embraced in other than homestead allotments, which were called surplus lands, were made inalienable for a period of 25 years and nontaxable for 3 years after the approval of the act, subject to the action of Congress. The lands in controversy were surplus lands. Subdivision 7 of section 2 of the Act of June 28, 1906, contains the following provision:

"Provided, that the surplus lands shall be nontaxable for the period of three years from the approval of this act, except where certificates of competency are issued or in the case of the death of the allottee, unless otherwise provided by Congress."

It is contended by appellees that as the lands in controversy were allotted in the name and right of the Osage members who died prior to November 19, 1908, and as section 8 of the act of 1906, provides that the lands of deceased members shall descend according to the laws of Oklahoma that the owners of these lands on March 1, 1909, had received the title to the same by descent, and not by allotment; but, if this is true, the heir would only get such title as the ancestor had. This contention also assumes that title to the lands in controversy passed from the United States by reason of the allotment. To so hold would render that portion of the act of 1906 in regard to deeds of no use. The language referred to reads as follows:

"All deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior."

We are clearly of the opinion that it required a deed executed and approved as provided in the act to pass the title. U. S. v. Reynolds, 250 U. S. 104, 39 Sup. Ct. 409, 63 L. Ed. 873. The lands did not become taxable on the death of the allottee prior to the execution and delivery of the deed that the law declared should convey the title.

[3] Counsel for the appellees, however, urge that, if it is true that the title did not pass until the deeds were executed and approved, that title would relate back to and take effect as of the time of the approval of the allotments. The doctrine of relation, however, is a legal fiction, adopted by the courts for the purposes of justice, and not to impose a burden. Gibson v. Chouteau, 13 Wall. 92, 20 L. Ed. 534; Lykins v. McGrath, 184 U. S. 169, 22 Sup. Ct. 450, 46 L. Ed. 485.

[4] Moreover, the doctrine of relation could not be applicable in this case as there was no basis for it on March 1, 1909. The deeds had not then been executed and approved. That the money paid for illegal taxes may be recovered in this case is established by Ward v. Love County, 253 U. S. 18, 40 Sup. Ct. 419, 64 L. Ed. 751.

The judgment below is reversed, and the case remanded, with instructions to grant the relief prayed for.

CROSLAND v. DYSON, United States Marshal.

(Circuit Court of Appeals, Fifth Circuit. April 27, 1922.)

No. 3843.

1. **Criminal law ⊂⊃242(7)—Evidence of indictment and identity of defendant held to authorize order of removal to another district for trial.**
   In a proceeding for the removal of defendant to another district, in which he had been indicted, for trial, where the indictment was produced and testimony of defendant's identity offered, there was sufficient evidence to sustain the order of removal.

2. **Courts ⊂⊃337—Sufficient that state procedure followed, so far as it applied to proceedings for removal of defendant to another jurisdiction.**
   An order for defendant's commitment for removal to another district, where he had been indicted, for trial, was not invalid because the state laws relating to preliminary hearings and proceedings thereon were not followed, where they were followed so far as they applied to proceedings for removal under an indictment found in another jurisdiction.

3. **Intoxicating liquors ⊂⊃17—Volstead Act is constitutional.**
   The Volstead Act is constitutional.

4. **Criminal law ⊂⊃242(4)—Whether indictment open to motion to quash, or defective in form, not open in proceeding to remove to another district for trial.**
   Where an indictment found against defendant in another district substantially charges a crime against the United States, the questions whether it is open to a motion to quash, or to demurrer for defects in form, are for the court where the indictment is pending, and not for the court ordering defendant's removal to such other district for trial.

5. **Habeas corpus ⊂⊃4—Matters of defense not determined in proceeding by one ordered removed to another district for trial.**
   While, on appeal in a habeas corpus proceeding by one committed for removal to another district in which he had been indicted, greater liberality is exercised than in the usual case of habeas corpus, the writ is not a substitute for a writ of error, and the petitioner cannot have his matters of defense determined thereon.

Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Habeas corpus by John G. Crosland against Benjamin E. Dyson, United States Marshal for the Southern District of Florida. From a judgment denying the writ, petitioner appeals. Affirmed.

Redmond B. Gautier, of Miami, Fla., for appellant.

Wm. M. Gober, U. S. Atty., of Lakeland, Fla., Damon G. Yerkes and Maynard Ramsey, Asst. U. S. Attys., both of Jacksonville, Fla., and Frederic M. P. Pearse, Asst. U. S. Atty., of Newark, N. J., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The appellant, Crosland, a resident of Florida, had been indicted in the United States District Court for New Jersey, and, not being found in said district, an affidavit was made before J. M. Graham, a United States commissioner for the Southern district of Florida, for his commitment for removal from Florida to New Jersey for trial. After a hearing an order committing Crosland was made, and on further hearing before the United States District Judge a warrant for removal was ordered and signed by said judge. After the commitment by the commissioner, Crosland filed his petition to the United States District Court for the Southern District of Florida for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by said order of commitment. On a hearing the writ was denied. Crosland has prosecuted an appeal from this order to this court.

While a number of assignments of error are made, the decision of the points involved requires a ruling on only a few questions. The entire proceedings before the commissioner are in the record, and show a number of exceptions made before him to the affidavit filed, on the ground that it failed to comply with the laws of Florida relating to affidavits, warrants, and proceedings on preliminary hearings of persons accused of crime.

[1] In this case the affidavit, while informal, alleged that a violation of certain criminal laws of the United States had taken place at Atlantic City, N. J., upon which an indictment had been found in the District Court of New Jersey. Upon the hearing before the commissioner, such an indictment was produced, and testimony of the identity of the defendant offered. The record shows no testimony was offered at said hearing by the defendant, Crosland. We think the evidence offered before the commissioner was sufficient to sustain the order rendered by the commissioner. Haas v. Henkel, 216 U. S. 462, 481, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

[2] The objections that the proceedings failed to follow certain requirements of the Florida laws relating to preliminary hearings of persons accused of crime and the proceedings had thereon present no sufficient reason for holding the commitment invalid in the present case. We think that, so far as the committal procedure of Florida applied to proceedings for removal under an indictment found in another ju-

risdiction, they were followed. In a case where the entire proceedings were had before a District Judge, it was held:

"* * * That part of section 1014 of the Revised Statutes of the United States which says that the proceedings are to be conducted 'agreeably to the usual mode of process against offenders in such states,' has no relation to the inquiry on application for removal." Tinsley v. Treat, 205 U. S. 20, 27, 27 Sup. Ct. 430, 431 (51 L. Ed. 689).

[3] The objection that the Volstead Act (41 Stat. 305) is unconstitutional is without merit. National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946.

[4] As to the allegation that the indictment is defective, we think that it charges substantially the commission of a crime against the United States. That it might be open to motion to quash, or to demurrer for defects in form, would not be sufficient. Such questions are for the court where the indictment is pending. Greene v. Henkel, 183 U. S. 249, 261, 22 Sup. Ct. 218, 46 L. Ed. 177; Benson v. Henkel, 198 U. S. 1, 10, 25 Sup. Ct. 569, 49 L. Ed. 919; Hyde v. Shine, 199 U. S. 62, 83, 25 Sup. Ct. 760, 50 L. Ed. 90.

[5] In this case the appeal is from the order of the District Court refusing to grant the writ of habeas corpus, and, while greater liberality has been exercised in cases of this character than in the usual case of habeas corpus, the writ of habeas corpus is not a substitute for a writ of error, and the petitioner cannot have determined thereon his matters of defense to the charge made. They are for decision by the trial court. Henry v. Henkel, 235 U. S. 219, 229, 35 Sup. Ct. 54, 59 L. Ed. 203.

We have carefully considered the assignments of error, and find none of them require a reversal of the judgment complained of.

Judgment affirmed.

STASO LAMINATED SLATE CO. v. STOWELL MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 28, 1922. Rehearing Denied May 10, 1922.)

No. 2743.

1. **Patents ⇐35—Commercial success not always indicative of invention.**
Commercial success, though often indicative of invention, is not always so, as it may be due to other causes.

2. **Patents ⇐328—1,007,146, for prepared roofing, held anticipated.**
The Schroder patent No. 1,007,146, for a prepared roofing with a protective coating of crushed slate applied by rolling, *held* invalid, because anticipated.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Suit by the Staso Laminated Slate Company against the Stowell Manufacturing Company. From a decree for defendant, plaintiff appeals. Affirmed.

Charles Neave and Charles C. Gillson, both of New York City, for appellant.

J. Edgar Bull and George F. Scull, both of New York City, for appellee.

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

DAVIS, Circuit Judge. This is an appeal from the District Court, holding patent No. 1,007,146, issued to Edward J. Schroder, October 31, 1911, and owned by the complainant, invalid. The patent is for a prepared roofing, which consists of a body portion having a coating of adhesive waterproofing material, such as asphalt, and an outer protective coating of crushed slate. The alleged novelty in this patent is two-fold: Material and method of application—crushed slate, applied by rolling in contact with an adhesive coating of asphalt. Ground slate had been used in the John's patent (1872) No. 125,574. Crushed slate is superior to other kinds of slate and material, it is claimed, because slate laminates when crushed and the laminae when rolled and pressed together match and overlap one another so as completely to cover the asphalt coating and give a smooth surface and uniform color which cannot be obtained with a gravel, sand or other crystalline covering. This result cannot be secured, it is contended, by the use of ground or powdered slate because it has no laminae to match and overlap one another.

[1] The enterprise of the patentee and his assignee was commercially successful. The roofing has been applied in large quantities, both in the form of sheets or roll roofing and shingles. Commercial success is often indicative of invention, but it is not always so for it may be due to other causes. The disclosures of the patent, however, seem patentable and the patent is valid unless anticipated.

[2] The defendant in its answer alleges that the patent is invalid because Edward J. Schroder was not the original and first inventor; that A. C. Hall was the inventor of substantially the construction described and claimed in the patent which had been in public use or on sale in the United States more than two years before the application for the Schroder patent.

The defendant refers to the roofing called "slateoid," manufactured by the Trinidad Asphalt Manufacturing Company of St. Louis. This word was registered as a trade-mark by the company July 27, 1906. It appears by undisputed evidence that Mr. A. C. Hall was employed by the Staso Mills, or Staso Milling Company, of Boston, Mass., as its superintendent from March, 1906, until some time in 1913. That company in March, 1906, was manufacturing slate dust which was used in making paint and linoleum. This dust had to be screened, and it occurred to Hall that the larger screenings would make a good material for roofing. He sent samples to various roof manufacturers, among whom was the Trinidad Asphalt Manufacturing Company. It approved the material and ordered two carloads.

The factory of the Staso Company was thereupon equipped for crushing slate ordered by the Trinidad Company. Eight carloads were

shipped to that company. The Staso Company called the material "torpedo slate." The Trinidad Company made and sent samples of "slateoid" to the Staso Company, and these samples were, Hall testified, like the material manufactured by the complainant and submitted to him at the trial. By original records the Trinidad Company showed that it manufactured and sold 9,394 squares of "slateoid" before September 9, 1908, which was two years before the application for the Schroder patent. A "square" is 100 square feet. This was enough, according to the uncontradicted testimony, to cover 1,657 average sized houses.

On March 21, 1907, Frank W. Torpening, secretary and treasurer of the Trinidad Company, filed an application for a patent on the "slateoid" roofing made by that company. In his specification he said:

"After the bond layers have been applied to the body sheet I apply to the bond layer which is to be at the upper side of the roofing sheet when in use, for instance, the bond layer 2, a surfacing 4 of crushed slate which is imbedded into the bond layer and packed firmly therein by a rolling operation."

Claim 2 contains:

"A roofing sheet comprising a pliable body, a nonhardening bond applied to said body, and a layer of crushed slate imbedded in said compound, substantially as set forth."

This application was rejected by the Patent Office on the ground that the substitution of crushed slate for other material did not constitute invention. We have in this application, filed 3½ years before the Schroder application, the identical material, crushed slate, applied in identically the same way, by rolling. These facts are undisputed and seem to be undisputable.

Complainant disposes of the Trinidad Roofing by saying that it was only an experiment and a complete failure; that its manufacture was abandoned, and therefore it should not be held as an anticipation. We think that these conclusions are not a reasonable interpretation of the evidence. Substantially the same roofing was successfully manufactured, out of the same material, by the same method as described in the Schroder patent, more than two years before his application. We agree with the conclusion of the learned judge of the District Court that the patent was anticipated and is invalid.

The decree of that court is accordingly affirmed.

HURWITZ v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5917.

1. Poisons ⟸2—Rule of Commissioner of Internal Revenue, defining when physician is in personal attendance upon patients, held void.

Rule promulgated by the Commissioner of Internal Revenue under Harrison Anti-Narcotic Act, § 1, as amended by Act Feb. 24, 1919, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), requiring a physician to be in personal attendance on patient "away from his office" to come within section 2a, requiring a physician, dentist, or veterinary surgeon to keep record of

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

drugs dispensed or distributed, "except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend," *held* void; such rule being contrary to the unambiguous language of the act, and not being necessary to the enforcement of the act.

2. **Constitutional law ⊜62—Congress cannot delegate legislative power to an executive officer.**

Congress cannot delegate legislative power to an executive officer.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Leon Hurwitz was convicted of selling opium without having registered as a dealer therein, and he brings error. Reversed, and new trial granted.

R. H. Davis, of Joplin, Mo. (Owen & Davis, of Joplin, Mo., on the brief), for plaintiff in error.

W. H. Hallett, Sp. Asst. U. S. Atty., of Nevada, Mo. (Charles C. Madison, U. S. Atty., of Kansas City, Mo., on the brief), for the United States.

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

CARLAND, Circuit Judge. Plaintiff in error, hereafter called defendant, was convicted upon the third count of an indictment which reads as follows:

"And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge that on or about the 24th day of July, 1920, at Joplin, Jasper county, Missouri, in the said division and district and within the jurisdiction of this court one Leon Hurwitz, being then and there a dealer in opium and its derivatives and coca leaves and their derivatives, and being a person required by the laws of the United States of America to register as such dealer in the Sixth internal revenue collection district of Missouri, did then and there, unlawfully, willfully, knowingly, and feloniously sell to one Elenor Zedeker, a certain quantity of a derivative of opium, to wit, about one ounce of morphine without having registered as a dealer in such derivatives of opium and coca leaves his name or style and place of business with said collector of internal revenue of the United States for the Sixth internal revenue collection district of Missouri, and without having paid to said collector the special tax as such dealer in said derivatives of opium and coca leaves as required by the laws of the United States of America, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The defendant claimed as a defense to the charge against him that he had a right to do what he testified he did do as a practicing physician. The evidence showed that he was a practicing physician and duly licensed to dispense opium, etc., by the United States revenue collector for the district in which he resided. Section 2a of the Harrison Anti-Narcotic Act (Comp. St. § 6287h) reads as follows:

"Nothing contained in this section shall apply—(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed showing the amount dispensed or distributed, the date, and the name and address of the

patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend."

Under the authority conferred by section 1 of the act, as amended February 24, 1919 (section 6287g, Comp. St. Ann. Supp. 1919), the Commissioner of Internal Revenue promulgated the following rule:

"*Dispensing by Practitioners.*—Practitioners are permitted to dispense narcotic drugs to bona fide patients, pursuant to the legitimate practice of their professions, without prescriptions or order forms. However, a record of drugs so dispensed must be kept, except when the practitioner is in personal attendance upon the patient. A practitioner is not regarded as in personal attendance upon a patient, within the intent of the statute, unless he is in personal attendance upon such patient away from his office."

The trial court in its charge to the jury said:

"A physician is not in personal attendance unless he is in personal attendance upon such patient away from his office."

[1, 2] The evidence showed that what the defendant did was at his office. We presume the court took the language used from the rule above mentioned. This language of the court was excepted to by the defendant before the jury retired, and we are of the opinion that error was committed by the court in giving such language. The power of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to make all needful rules and regulations for carrying the provisions of the Narcotic Act into effect, did not confer the power to say that a physician could not personally attend a patient at his office. The enforcement of the act did not require any such rule, and it is contrary to the language of the act itself, which is plain and unambiguous, and says nothing about where the patient shall be when personally attended. U. S. v. Alger, 152 U. S. loc. cit. 397, 14 Sup. Ct. 635, 38 L. Ed. 488; Swift v. U. S., 105 U. S. 691, loc. cit. 697, 26 L. Ed. 1108; U. S. v. Graham, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; U. S. v. Tanner, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321. If Congress had intended to exclude personal attendance at office, it would have said so. U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; U. S. v. Wilson (D. C.) 225 Fed. 82. Compare U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. The fact of omission is strong evidence that it did not intend to say so. U. S. v. Railroad Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893. Congress cannot delegate legislative power to an executive officer. Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; U. S. v. Eaton, supra.

In regard to the issues before the jury, the trial court also said in its charge:

"If there is any misapprehension on the part of the jury, the court will say that what is meant is that the defense is that he had a right to do what he did as a physician. If he did not have a right to do what he did as a physician, then he comes in the category of dealer, and sells without license or authority, because he is not registered as such."

Judgment reversed, and a new trial granted.

WING et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. May 2, 1922.)

No. 3837.

1. **Conspiracy ⊂=43(1)—Indictment may be as general as conspiracy.**
An indictment for conspiracy may be as general as the conspiracy it seeks to punish.

2. **Indictment and information ⊂=111(1)—Indictment for conspiracy to bring in Chinese need not allege they did not belong to excepted classes.**
An indictment for conspiracy to bring into the United States Chinese persons, contrary to the Chinese Exclusion Act (Comp. St. § 4290 et seq.), need not allege that the Chinamen intended to be brought in did not belong to the classes excepted from that act.

3. **Criminal law ⊂=113—Need not be formed within district of prosecution, if overt act is committed therein.**
It is not essential that the conspiracy be formed within the district where the indictment was found, if an overt act in pursuance of the conspiracy was committed within that district.

4. **Conspiracy ⊂=47—Evidence held to sustain conviction for conspiracy to land Chinese.**
Evidence in a prosecution for conspiracy to bring in Chinese persons, contrary to the Chinese Exclusion Act (Comp. St. § 4290 et seq.), showing it was the intention of defendants to bring the Chinese to a point outside the territorial jurisdiction of the United States, where they were to be met by another vessel, which would attempt to land them, and that when the latter vessel failed to meet them the defendants came ashore, *held* to warrant the jury in finding that the defendants voluntarily came ashore notwithstanding their claim they were driven into the jurisdiction against their will by stress of weather.

In Error to the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Chester Wing and others were convicted of conspiracy to bring into the United States certain Chinamen, in violation of the Chinese Exclusion Act, and they bring error. Affirmed.

Walter Kehoe, of Pensacola, Fla., for plaintiffs in error.

Fred Cubberly, U. S. Atty., of Gainesville, Fla., and George E. Hoffman, Asst. U. S. Atty., of Pensacola, Fla.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Chester Wing and several other defendants were convicted upon an indictment, under section 37 of the Criminal Code (Comp. St. § 10201), charging a conspiracy to bring into and to land in the United States certain Chinamen not lawfully entitled to enter, in violation of the Chinese Exclusion Act (Comp. St. § 4290 et seq.). The overt act alleged was the navigation of a vessel called the Viola within the waters of the Northern district of Florida. A demurrer, for failure of the indictment to allege that the Chinamen intended to be landed in the United States did not belong to the classes excepted from the provisions of the Chinese Exclusion Act, was overruled.

The evidence shows that the persons indicted, including the defendant, sailed from Havana, Cuba, on board the Viola, and brought with

them on board that vessel 30 or 40 Chinamen who were not lawfully entitled to enter the United States; that it was the intention and agreement of the persons indicted to proceed to a point in the Gulf about 20 miles from Pensacola, Fla., and outside the jurisdiction of the United States, and that there the Chinamen not entitled to enter would be transferred to another vessel, which would then land them in the vicinity of Pensacola; that the second vessel failed to meet them as planned, and that while waiting the Viola became disabled, and was driven within the wafers of the United States by stress of weather, after which she was beached, and all on board came ashore. Within a few hours the vessel was destroyed by fire, the origin of which is not explained by the evidence.

Defendant's motion for a directed verdict because of insufficient evidence was denied. The court refused to charge that it was necessary for the government to prove that the conspiracy was formed within the Northern district of Florida.

[1, 2] An indictment may be as general as the conspiracy it seeks to punish. It was not necessary to allege that the Chinamen intended to be imported did not belong to a class excepted by law, and the demurrer was properly overruled. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 Sup. Ct. 545; Mark Yick Hee v. United States, 223 Fed. 732, 139 C. C. A. 262; Lew Moy v. United States, 237 Fed. 50, 150 C. C. A. 252.

[3] It was not essential to prove that the conspiracy was formed within the district where the indictment was found. It was enough if an overt act in pursuance of the conspiracy, wherever entered into, was committed within the jurisdiction of the court. There was, therefore, no error in refusing to give the charge requested by defendant. Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136.

[4] The contention that the evidence was insufficient proceeds upon the theory that the Viola was not brought intentionally, but was driven by stress of weather, into the waters of the United States, and into the jurisdiction of the trial court. But the jury might well have believed that the conspirators on board the Viola became weary of waiting for their co-conspirators on land to come for them, and that they voluntarily came ashore.

The judgment is affirmed.

JESSURUN v. PEERLESS LIGHT CO.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1922.)

No. 3023.

Patents ⟸328—907,770, for electric light switch, held not to disclose invention.

The Fulton patent, No. 907,770, for an electric light switch to be operated by a pull upon a pendent cord or chain, which differed from a device patented 30 years before only in the shape of the clamp by which it was attached to the key, *held* void for failure to disclose invention.

⟸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 Eastern Division of the Northern District of Illinois.

Suit for infringement of letters patent No. 907,770 by Albert E. Jessurun against the Peerless Light Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

William R. Rummler and Cyrus W. Rice, both of Chicago, Ill., for appellant.

Russell Wiles, of Chicago, Ill., for appellee.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

EVANS, Circuit Judge. Appellant, as the owner of a patent upon an electric light switch issued to Walter W. Fulton, sought to restrain appellee from further infringing claims 1 and 3 of the patent. The District Court held the claims invalid and dismissed the bill.

To borrow the language of patentee:

"The invention relates to such electrical switches as are operated by a pull upon a pendent cord or chain."

Claim 1 reads as follows:

"In combination, a spring clip having arms adapted to embrace the flattened T-head of an electrical switch key from end to end, each arm of the clip being apertured to receive one end of the key head, a crank arm carried by the clip, and a pendent cord carried by the crank arm."

Many prior patents were received in evidence, indicating that the art was well filled with very narrow patents. Only one of them need be considered.

Some 30 years before the issuance of the patent in suit, one Lewis obtained a patent upon an improvement:

"The object being to provide simple and convenient means for turning the current on and off a lamp provided with the usual flat key or thumbpiece, and primarily designed to be operated by hand, but hung or placed so as to be not readily accessible for such operation. With these ends in view my invention consists in a two-armed operating lever having its central portion or body adapted to fit over or embrace an ordinary flat key or thumbpiece."

The single claim reads:

"The combination, with an incandescent electric lamp having a flat key or thumbpiece for turning the current off and on, of a two-armed operating lever having a central body portion provided with an opening adapting it to be slipped over and secured to the thumbpiece or key, and operating chains or cords attached to the outer ends of the arms of the lever and hanging down within easy reach for turning on and off the current, substantially as described."

If we were to restrict the language of the claim ("and secured to the thumbpiece or key") to the single form of structure shown in the drawings; that is, to securement by the elasticity of the central body or portion (a construction which we do not believe we would be justified in adopting), even then the only advance which Fulton made was to provide for the securement of the spring clip to the flat T-head of the electric switch key by bending the clip so as to inclose the end of the key head.

In other words, the patent deals, not with the electric switch as such, but with a very simple device attachable to the switch by a clip. The hanging chains or cords long used in such constructions make operation by people of short stature easy. The asserted novelty in Fulton's combination, that which distinguishes it from Lewis', is restricted to the means for securing the clip to the key head. As Judge Carpenter appropriately said:

"The clip adapts itself to the device to which it is attached, and certainly there is nothing novel in stamping a hole of any shape in the sides of the clip to enable it to fit."

Counsel for appellant argues that, if we should characterize as mechanical skill Fulton's contribution to the art, then numerous patents cited by defendant, including the Lewis patent, were improperly issued by the Patent Office, for none represents greater inventive genius than that manifested by Fulton. This hardly answers the court's position. Assuming that the Patent Office erred in granting other patents of narrow and simple construction, it would hardly justify the issuance of still another patent, dealing with the same art, no more entitled to recognition. But counsel, in making these comparisons, loses sight of the fact that each and every one of the prior patents narrowed the field open to Fulton, and were pertinent upon the only inquiry to which the court was addressing itself, viz.: Was Fulton's contribution invention?

Counsel for appellant has brought to our attention all of the facts presented in this suit which support his contention that invention rather than mechanical skill was displayed by Fulton. We are, however, unable to escape the conclusion, in view of the state of the art here disclosed, that Fulton's device did not rise to the dignity of invention. In other words, we agree with the District Judge in holding both claims invalid for want of invention.

The decree is affirmed.

SWARTZ v. UNITED STATES.

CHUNG v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 3, 1922.)

Nos. 3712, 3787.

Poisons ⊂⊃9—Charge of possession of narcotics without registering must allege accused was required to register.

Harrison Narcotic Act, § 8 (Comp. St. § 6287n), making it an offense for a person not registered as required by section 1 (section 6287g) to have possession of narcotics, applies only to those who are required by section 1 of the act to register, so that an indictment charging failure to register and possession is insufficient if it fails to allege that defendant was one who was required to register, though section 8 makes proof of possession without registration sufficient to cast the burden of proof on the defendant.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

S. Swartz and Charlie Chung were separately convicted of having possession of narcotics without having registered as provided by the Harrison Narcotic Law, and each defendant brings error. Judgment of the District Court in each case reversed.

William K. Jackson and I. A. Zacharias, both of Jacksonville, Fla., for plaintiff in error Swartz.

J. N. Morris and R. T. Dewell, both of Jacksonville, Fla., for plaintiff in error Chung.

William M. Gober, U. S. Atty., Maynard Ramsey, Asst. U. S. Atty., and Damon G. Yerkes, Sp. Asst. U. S. Atty., all of Jacksonville, Fla.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The defendant Swartz was found guilty under two counts of an indictment; the first charging a failure to register and having unlawfully in possession 25 grammes of morphine, and the second a like failure to register and an unlawful possession of a certain amount of cocaine. The defendant Chung was found guilty under an indictment which charged him with not having registered as provided by the Harrison Narcotic Act (Comp. St. §§ 6287g–6287q), and not being authorized to produce, import, manufacture, compound, deal in, dispense, sell, or give away opium or their salts, and having unlawfully in his possession and under his control 10 grains of opium. Neither indictment charged either defendant with doing or intending to do any of the things specified in the act as requiring a license for their lawful performance.

It is insisted in this court that neither indictment, nor count, states an offense against the United States; that the Harrison Narcotic Act is a revenue statute, and the offense consists in the failure of those to register and pay the tax, who produce, import, manufacture, compound, deal in, dispense, sell, or give away opium, etc., as specified in the first section of the act (section 6287g); that the offense denounced in the eighth section is the possession by those who are required to register, and not possession generally by all persons; and that an indictment which charges unlawful possession by one not registered, without alleging that he was one of the class required to register, charges no offense against the United States.

We think that the objection is good and that the indictments are fatally defective. The offense is not the possession of the morphine or cocaine, but the possession for some of the purposes for which registration is required, without having registered and paid the tax; and while proof of possession, under section 8 of the act (section 6287n), casts the burden of proof upon the defendant (Gee Woe v. United States, 250 Fed. 428, 162 C. C. A. 498), the indictment charges no violation of the act, unless it charges that the possession was for a purpose for which registration is required, and that the accused had not registered. This we understand to be the decision of the United States Supreme Court in the case of United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854. To this effect are the following cases: United States v. Bernstein (D.

C.) 255 Fed. 339; United States v. Carney (D. C.) 228 Fed. 163; United States v. Woods (D. C.) 224 Fed. 278.

The judgment of the District Court in each case is therefore reversed.

EBERLE et al. v. STIX, BAER & FULLER DRY GOODS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1922.)

No. 5788.

Patents ⇐328—1,304,951, for swing, held anticipated.

The Eberle patent, No. 1,304,951, for a child's swing, *held* anticipated; the patentee having combined old elements in substantially the same way, for the same purpose, as was done by others, and having produced no greater or better or different results.

Appeal from the District Court of the United States for the Eastern District of Missouri; Jacob Trieber, Judge.

Suit by John A. Eberle and others against the Stix, Baer & Fuller Dry Goods Company and others for infringement of patent No. 1,304,951, issued May 27, 1919, to John A. Eberle, for an improvement in swings. From a judgment dismissing the bill, plaintiffs appeal. Affirmed.

Howard G. Cook, of St. Louis, Mo., for appellants.

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

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

LEWIS, Circuit Judge. This is a patent infringement case brought by Eberle, the patentee and his licensee, appellants. The defense of anticipation was sustained and the bill dismissed; and with this we fully agree. The mechanical device is a child's swing, and the one and only claim runs thus:

"A child's swing comprising a single rigid rectangular seat frame, a rectangular fabric pocket having its upper margins folded over and secured to said rigid rectangular seat frame, suspension members secured to the corners of said rigid rectangular seat frame, and a rigid rectangular spreader separating said suspension members at points above said rigid rectangular seat frame, the corners of said spreader corresponding to the corners of said rigid rectangular seat frame."

But before Eberle, Thompson 58,510, Higham 472,351, Davidson 736,826, Carley 1,063,956, and Blain 1,104,609, each shows a single rigid rectangular seat frame, in suspended swinging baby jumpers or swings; Hawk 1,055,975, Patten 1,057,360, Carley and Davidson each shows a fabric pocket seat attached to the seat frames, and in Davidson, Blain and Carley the pocket seats are rectangular, and in Patten the fabric is folded over and secured to the rigid seat frame. All of the earlier patents just noted necessarily show suspension members, in most of them there are four of these members secured to the seat frame, all but Hawk which has three, and in Carley, Blain, Thompson and Hig-

ham rigid spreaders overhead of the suspension members are shown. Nothing new or novel was brought in by Eberle. He used old elements, combined in substantially the same way for the same purpose as was done by those who preceded him, and the results from the use of his swing are no greater, or better, or different, or more easily or cheaply obtained than were the results obtainable from the use of like devices of baby jumpers and child swings disclosed in prior patents above referred to.

Affirmed.

In re HALLBAUER.

(District Court, S. D. Florida. June, 1921.)

1. **Exemptions ⟸19—Deserted wife cannot claim benefit of exemption to widow.**
   The provision of Const. Fla. art. 10, § 2, that the exemption to the head of a family, given by section 1, shall inure to the widow of the party entitled thereto, does not entitle a deserted wife to claim the exemption, since there can be no widow to a live man, though he is an absconder.
2. **Exemptions ⟸19—Deserted wife, without children, cannot claim exemption allowed "head of a family."**
   A wife, who had been deserted by her husband and was dependent on her own earnings for her support, but who had no children dependent on her, is not the "head of a family," entitled to the exemption of $1,000 in the personal property of her husband, given by Const. Fla. art. 10, § 1.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of a Family.]
3. **Bankruptcy ⟸151—Trustee holds position of creditor with lien.**
   The trustee in bankruptcy occupies the position of a creditor holding a lien by equitable or legal proceedings on the property coming into his hands.

In Bankruptcy. In the matter of the estate of A. L. Hallbauer, bankrupt. On petition to review an order of the referee allowing a claim by the wife of bankrupt for the exemption of certain personal property. Petition to review and revise granted.

See, also, 275 Fed. 125, 126.

Jackson & Withers, of Tampa, Fla., for petitioner.

Phillips & Phipps, of Tampa, Fla., for respondent.

CALL, District Judge. The parties stipulated among others the following pertinent facts: Hallbauer and his wife constituted a family residing in Hillsborough county on and prior to April 22, 1920; Hallbauer was the head of such family; that on said date Hallbauer left his home promising to return in a few days, since which time the wife had heard nothing from him or of his whereabouts except two telegrams purporting to have been sent from Los Angeles; that the wife is ignorant of any and what property belonged to said Hallbauer, and was left no money by said Hallbauer, except a few dollars, which were expended in the payment of some of Hallbauer's debts, and is now dependent upon her own efforts for a livelihood. Upon these facts the wife's petition is based, to have the exemption in personal property set aside to her.

The trustee filed exceptions and demurrers to this petition, both of which were overruled by the referee, and therefore the trustee set aside said exemption and reported same to the referee, and filed on behalf of the creditors exceptions to such action, and on December 17, 1920, an order was made allowing such claim for exemption so made by the wife and overruling the trustee exceptions. It is this order which is sought to be reviewed in this proceeding.

The question to be decided on this review is whether the wife, without children, of an absconding debtor, can claim the exemption of $1,000 provided for the head of a family residing in this state by section 1 of article 10 of the Constitution of Florida. If answered in the affirmative, the petition to review should be dismissed; if in the negative, it should be granted.

[1] Section 1, art. 10, of the Constitution, provides for the exemption from forced levy and sale to the head of a family residing in this state of personal property to the value of $1,000. Section 2 of the same article provides that this exemption shall inure to the widow and heirs of the party entitled to such exemption. If it is upon this last section that the petitioner bases her claim, the answer is that there is no widow to a live man, although he is an absconder.

[2] Nor do I think the case made by the petitioner is helped by the case of Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 South. 440, 51 L. R. A. (N. S.) 1121, in which case a deserted wife with children was allowed to claim the exemption in two automobiles which belonged to her or her husband, probably her husband, which constituted the combined property of both. Here, as I understand the case and decision of the court, the deserted wife stood in the place and stead of the husband, having two children dependent upon her for support, and was viewed as the head of the family.

In the instant case the wife constituted the entire family dependent upon the absconding husband. She can in no sense occupy the position of head of a family residing in this state, and it is to such head the Constitution grants this exemption. I recognize the rule that exemption laws should be liberally construed for the benefit of the family, but it seems to me that it would verge upon judicial legislation for the courts to construe these constitutional provisions to mean that, in a contest between creditors and the wife of an absconding debtor, the wife could come in and take from such creditors $1,000 of the personal property in the hands of the trustee for administration, to be applied to her personal use, and this with no showing of how much property was taken by the absconding husband, or what he might possess in addition.

[3] The Legislature, under the mandate contained in section 6, article 10, have passed laws providing for the setting apart of exemptions. None of the requirements, upon which such setting apart of such exemption is made, have been complied with in this case, and it must be remembered that the trustee occupies the position of a creditor holding a lien by equitable or legal proceedings upon the property coming to his hands.

None of the cases to which I have been referred sustain the contention of petitioner. I am therefore of opinion that the referee erred in overruling the exceptions of the trustee and granting the petition of petitioner.

The petition to review and revise will be granted.

UNITED STATES v. SAN JUAN COUNTY, WASH., et al.

(District Court, W. D. Washington, Northern Division. January, 1922.)

No. 258.

Internal revenue ⟸26—Taxes due from insolvent have priority over state taxes.

Under Const. art. 6, providing that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land," and Rev. St. § 3466 (Comp. St. § 6372), enacted in 1797, providing that, "whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied," taxes due to the United States from an insolvent corporation have priority over taxes due under the laws of the state.

In Equity. Suit by the United States against San Juan County, Washington, John L. Murray, County Treasurer, and C. E. Hackett, Sheriff, of said County. Decree for the United States.

Thomas P. Revelle, U. S. Atty., and John A. Frater, both of Seattle, Wash., for the United States.

Samuel R. Buck, of Friday Harbor, Wash., for defendants.

NETERER, District Judge. The San Jaun Canning Company, an insolvent corporation, is indebted to the United States by reason of income tax and penalties for year 1917. On the 28th of May, 1921, after demand and refusal to pay, a warrant of distraint was levied upon the personal property of the Canning Company, located in San Jaun county, and sale advertised for June 15, 1921. Thereafter the sheriff of San Juan county levied upon the property to collect the state and county taxes for year 1918, 1919, 1920, and advertized the property for sale June 10, 1921. On application of plaintiff the restraining order was issued and served upon the sheriff.

The issue now for determination is the priority of the claims. The plaintiff claims that under section 3466, R. S. (section 6372, C. S.; Act of March 3, 1797, the United States has priority. The county contends the contrary, and cites United States v. Nicholls, 4 Yeates (Pa.) 251, at page 259, where the court says:

"The rights of the general government to priority of payment, and the rights of individual states, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This only can be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured."

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

The Constitution of the United States (article 6) provides:

"This Constitution and laws made in pursuance thereof shall be the supreme law of the land in every state, and the judges shall be bound thereby."

Section 8, art. 1, of the Constitution empowers the Congress to list and collect taxes, duties, etc., which shall be uniform throughout the United States. The Supreme Court, in United States v. Snyder, 149 U. S. 210, 214, 13 Sup. Ct. 846, 848 (37 L. Ed. 705), says:

"The grant of the power and its limitation are wholly inconsistent with the proposition that the state can by legislation interfere with the assessment of federal taxes."

In Murray v. Hoboken Land & Improvement Co., 18 How. 281, 15 L. Ed. 372:

"The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution."

Section 3186, R. S. (section 5908, Comp. St.), provides:

"If any person liable to pay any tax neglects or refuses to pay same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, * * * that may accrue in addition thereto, upon all property and rights to property belonging to such person."

The lien, however, is not valid against the judgment creditors, mortgagees, etc., unless notice is filed in the clerk's office of such county. Neither the state nor county are judgment creditors, mortgagees, or purchasers, and hence are not affected by the provisions of section 5908, Comp. St. (section 3186, R. S.).

The power of taxation is an indispensable incident to sovereignty, and by the provisions of the Constitution and laws a grant in favor of the United States is paramount in the event of the insolvency of the debtor. Section 6372, Comp. St.; section 3466, R. S.:

"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."

The Supreme Court in United States v. Fisher, 2 Cranch (6 U. S.) 358, 2 L. Ed. 304, Justice Marshall, writing for the court, said:

"This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the Constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends."

The United States is entitled to a decree.

DOCK CONTRACTOR CO. v. NIAGARA FALLS POWER CO.

(District Court, W. D. New York. February 14, 1922.)

No. 1845.

1. **Pleading ⟸49—Cause of action on quantum meruit held not changed to action on contract by allegations.**

   The essential character of the action under a complaint seeking to recover on quantum meruit for work, labor, and materials, and for the reasonable monthly rental for plant and use of tools and appliances, was not changed or converted into an action for rescission of contract or for recovery of profits and damages for breach of an express contract by alleging the making of a contract in form which did not meet with the assent of the plaintiff, or by recitals of facts tending to show material alterations in the contract by defendants.

2. **Work and labor ⟸22—Allegations relating to mistake and fraud not objectionable in action in assumpsit.**

   Allegations, in a complaint to recover on quantum meruit for reasonable value of work, labor, and materials furnished, of mistake, fraud, and misrepresentation, were not objectionable where they tended to explain the circumstances under which an asserted contract was executed by the plaintiff part performance of work under it, and its nonfulfillment, termination, and discontinuance.

3. **Courts ⟸347—Subordinate provision of state statutes not followed in federal court.**

   Under Rev. St. § 954 (Comp. St. § 1591), a subordinate provision in a state Code relating to pleading need not be followed by the federal District Court, where, if applied, it would deprive plaintiff from giving essential evidence at the trial.

At Law. Action by the Dock Contractor Company against the Niagara Falls Power Company. On motion to require plaintiff to make complaint more definite and certain and to strike out irrelevant allegations. Motion denied.

See, also, 274 Fed. 852.

Griggs, Baldwin & Baldwin, of New York City (Adelbert Moot, of Buffalo, N. Y., and Peter F. McAllister, of New York City, of counsel), for plaintiff.

Cohn, Chormann & Franchot, of Niagara Falls, N. Y. (Edward F. Franchot, of Niagara Falls, N. Y., of counsel), for defendant.

HAZEL, District Judge. [1] 1. The complaint alleges causes of action to recover on quantum meruit for the reasonable value of work, labor, and materials furnished to the predecessor of the defendant company, and for the reasonable monthly rental for plant and for use of tools and appliances. The essential character of the action is not changed or converted into an action for rescission of contract or for recovery of profits and damages for breach of an express contract by alleging the making of a contract in form—a contract which did not, as alleged, meet with the assent of the plaintiff Dock Contractor Company, or by any recital of facts tending to show material alterations in the contract by defendant, from which it may be determined that for the work partly performed plaintiff is entitled to compensation on a basis of reasonable value. There are, it is thought, unnecessary recitals and sur-

plusage in the complaint; for example, pages 13 and 14, specifying the profits which the assignee of plaintiff would have made. But that is not believed sufficient ground for striking out, since it is not perceived that such matters are likely to interfere with the rights of the defendant, or preclude any evidence in opposition it may wish to offer at the trial. The recitals of facts apparently have substantial relation to the issues and therefore may be pleaded. Indeed, in view of the rather unusual circumstances, it was perhaps necessary to set out the facts with more than ordinary detail in support of the theory of the pleader, to wit, that the written contract of June 29, 1918, between the parties as to the amount of work to be done subsequently became a nullity because of the acts of the defendant company and because of the taking of the plant, tools, and material, the basis of recovery sought is the reasonable value of the work done and of the use of the instrumentalities.

[2] 2. Nor is the allegation relating to mistake, fraud, and misrepresentation objectionable, since it tends to explain the circumstances under which the asserted contract was executed by the plaintiff, the part performance of work under it, and its nonfulfillment, termination, and discontinuance.

[3] 3. The second cause of action, properly interpreted, does not allege separate causes of action. Reference to the contract is made necessary by the facts disclosing the manner in which the defendant obtained the plant and tools and appliances for doing the work. Defendant, to sustain its motion, relies on the Code of Civil Procedure and interpretative decisions; but the state law, conceding its application in the state court, need not it seems to me be followed by this court, since the rule relating to pleading is a subordinate provision which may, if applied here, deprive plaintiff of giving essential evidence at the trial. See section 954, R. S. (Comp. St. § 1591), and Southern Oil Corp. v. Waggoner (C. C. A.) 276 Fed. 487.

The motion of the defendant is denied.

In re CATES et al.

(District Court, S. D. Florida. December, 1921.)

1. **Bankruptcy ⟸114(1)—Receiver not appointed in involuntary proceeding because of pendency of conflicting proceedings.**

Where, pending a proceeding by creditors to have five persons, alleged to be partners, adjudicated bankrupts, two of such persons, claiming to be partners under a somewhat similar name, were adjudicated bankrupts on their voluntary petition, a receiver will not be appointed in the involuntary proceeding because of the alleged danger that the petitioning creditors may be estopped if they participate in the meeting of creditors called in the voluntary proceeding.

2. **Bankruptcy ⟸51—Adjudication on voluntary petition not set aside because of pendency of involuntary proceeding.**

Where, pending a proceeding to have five alleged partners adjudicated bankrupts, two of them, claiming to be partners under a somewhat similar name, were adjudicated bankrupts on their voluntary petition,

and it had not yet been established that the five persons named in the involuntary proceeding constituted the partnership, an adjudication on the voluntary petition will not be set aside.

In Bankruptcy. In the matter of Clement D. Cates and others, alleged bankrupts. On petition for the appointment of a receiver and motion to set aside the adjudication. Petitions denied without prejudice.

J. N. Morris, of Jacksonville, Fla., for petitioning creditor.
George M. Powell, of Jacksonville, Fla., for bankrupts.

CALL, District Judge. On December 1, 1921, an involuntary petition was filed by certain creditors against C. D. Cates, Frederick S. Cates, Julian G. Cates, Edwin H. Cates, and Fred E. Thompson, individually and as copartners doing business under the firm name and style of C. D. Cates & Co. On December 5th service of the petition for the appointment of a receiver was made upon C. D. Cates. On December 5, 1921, Clement D. Cates and Julian G. Cates, as copartners as Clement D. Cates & Co. filed a voluntary petition, and on December 9th each of the parties filed his petition to be adjudicated a bankrupt. Upon these last petitions adjudications were had, without notice to the creditors filing the petition first above noticed. On December 12th a motion was made by the creditors filing the first petition to set aside the adjudication in bankruptcy of the copartnership made upon the voluntary petition filed December 5th and this motion was heard at the same time with the petition for a receiver.

[1] Clement D. Cates and Julian G. Cates answered the involuntary petition and the petition for a receiver, denying that Frederick S. and Edward H. Cates and Fred E. Thompson were associated with them in the copartnership of Clement D. Cates & Co., and affidavits were filed by the parties supporting their several contentions. It was made known to the court at the hearing that the first meeting of creditors of the firm of Clement D. Cates & Co. was called for the 17th prox. The movants contended that the receiver should be appointed, principally because of the danger of an estoppel being worked against them, should they participate in the meeting of creditors on the 17th. This contention does not impress me with much force. By the appointment of a trustee the assets of the partnership will be conserved to a better extent than by a receiver with his limited powers. The main contest in this matter will eventually be the membership of the firm. If this issue is decided in favor of the petitioning creditors, it will then be time to appoint a receiver of such property as has not been brought into the bankruptcy court by the three voluntary petitions, should such appointment be proper.

[2] The petition for a receiver will therefore be denied. The motion to set aside the adjudication of the partnership of Clement D. Cates remains to be disposed of. The Bankruptcy Act (Comp. St. §§ 9585-9656) provides for such an adjudication. Such an adjudication is sought in the involuntary petition. While the creditors filing the petition seek to have the copartnership of Cates & Co. declared bankrupt, the entity, if such a word can be used in regard to a partnership,

is not the same. The petitioners contend that five persons constitute the copartnership, and this is a fact not yet established, as to which I as yet will not express any opinion.

Under the condition I now find of the cases I am of opinion that the motion to set aside the adjudication should be denied. In denying the petition for a receiver and to set aside the adjudication, the orders will be made without prejudice to the renewal of same, if at any time such motions should be proper.

KIEREJEWSKI v. GREAT LAKES DREDGE & DOCK CO.

(District Court, W. D. New York. November 26, 1921.)

No. 2127.

1. **Death ⊂=39—Right of action under federal act accrues on appointment of administrator.**
   Under the provision of Employers' Liability Act, § 6 (Comp. St. § 8662), requiring an action thereunder to be commenced "within two years from the day the cause of action accrued," a right of action for the death of an employé does not accrue until the appointment of an administrator who may maintain the action.

2. **Seamen ⊂=29(5)—Action at law for death held maintainable under Seamen's Act.**
   An administratrix appointed in 1921 for the estate of a seaman who died in 1919 *held* entitled to maintain an action at law for his death under the provisions of Seamen's Act, § 20 (Comp. St. § 8337a), as amended by Act June 5, 1920, § 33.

At law. Action by Sophia Kierejewski, administratrix of the estate of Leo Kierejewski, against the Great Lakes Dredge & Dock Company. On motion to amend complaint. Granted.

Matthew W. Bennett, of Buffalo, N. Y. (Irving W. Cole, of Buffalo, N. Y., of counsel), for plaintiff.

Ulysses S. Thomas, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. [1] The plaintiff must show that her cause of action was brought within two years from the time of the accrual of the cause of action, and, under section 6 of the federal Employers' Liability Act (Comp. St. § 8662), an action does not accrue from the date of the death, but from the date of the appointment as administratrix. American R. Co. v. Coronas, 230 Fed. 545, 144 C. C. A. 599, L. R. A. 1916E, 1095. That decision is based upon the view that the right of action by the personal representative of the deceased does not spring from the act of negligence by which the employee was killed, but arises from the pecuniary loss or damages sustained by the beneficiaries in consequence of the death. It is not required in the statute that such an action be brought within two years of the death, and manifestly there must first be appointed a representative of the beneficiaries before an action may properly be brought. Sanford v. Sanford, 62 N. Y. 553.

[2] Plaintiff's proposed amendment to the complaint is founded on the Act of Congress of June 5, 1920, c. 250, § 33 (41 Stat. 1007), which confers the right on seamen who suffer personal injury in the course of their employment, or their representatives in case of death, to maintain an action at law, with the right of trial by jury, and the right to the personal representative to have applied the Railway Federal Employers' Liability Act.

Defendant's contention, that action under this provision is barred on the ground that the act is not retrospective or retroactive, is not maintainable, since it appears that the intestate died on April 24, 1919, and plaintiff was not appointed administratrix until March 7, 1921; the action being begun on April 16 following. Hence it is unnecessary to determine whether the Merchant Seamen's Act in question was retroactive or not. The action was commenced within the limited period and after the passage of the act establishing the remedy invoked by the proposed amendment to the complaint. It may, however, turn out at the trial that the submission to the jury of defendant's liability should be on one of the two causes of action only, upon either the common-law liability or exclusively under the statutory Seamen's Act (Comp. St. § 8337a).

The question wholly depends upon the proofs as to whether the deceased was injured while employed in the capacity of a seaman or not. It is even conceivable that the jury may be called upon to determine the issues of both causes of action, but any questions with relation to severing the causes of action or their submission to the jury are reserved to the trial. I think plaintiff has a right to amend her complaint by including the second cause of action.

So ordered.

UNITED STATES v. EVERSON.

(District Court, S. D. Florida. February 27, 1922.)

No. 883.

Intoxicating liquors ⇐211—Information charging unlawful possession held sufficient.

An information charging defendant with "unlawful" possession of intoxicating liquors *held* sufficient to state an offense under National Prohibition Act, tit. 2, § 25.

Criminal prosecution by the United States against T. W. Everson. On motion to quash information. Denied.

William M. Gober, U. S. Dist. Atty., of Lakeland, Fla.

W. K. Zewadski, Jr., of Tampa, Fla., for defendant.

CALL, District Judge. In the above-entitled case the information contains three counts. The first charges the possession of a distilling apparatus for the production of intoxicating liquor; the second, the manufacture of intoxicating liquors; and the third, the possession of intoxicating liquors. In each of said counts the charging part of the

count contains the word "unlawfully"; i. e., the possession of the distilling apparatus, the manufacture and possession, in each instance is charged to be unlawful, and seems to me to be sufficient to rescue the information from attack by demurrer or motion to quash.

Reading Judge Clayton's opinion in the four cases heard in Jacksonville, the difference in the question decided in those cases and in the case at bar is apparent. It is not a mere possession, as was charged in that case, but an unlawful possession. Under the provisions of the Volstead Act (41 Stat. 305) this in my judgment is sufficient to place upon the defendant the onus of proving such possession lawful.

There are a number of cases in which the same questions are raised, and orders denying the motions to quash and overruling the demurrers, where same have been filed, will be entered.

Order.

This cause coming on to be heard upon the motion to quash each count of the information filed herein, and the same having been argued and submitted: It is considered by the court that said motion be and the same is hereby denied.

In re TAYLOR.

(District Court, D. Wyoming. May 6, 1922.)

No. 478.

1. **Bankruptcy ⟸482(1)—Allowance of attorney's fees one of right.**
Under Bankruptcy Act, § 64a (3), being Comp. St. § 9648, the matter of an allowance to a bankrupt's attorney is one of right; the amount only being left to the discretion of the court.

2. **Bankruptcy ⟸317—Attorney's fee held not allowable as preferred claim.**
An item covering services rendered by bankrupt's attorney for the bankrupt in connection with a suit pending in the state court prior to the commencement of the bankruptcy proceeding was not allowable as a preferred claim.

3. **Bankruptcy ⟸327(1)—Bankrupt's attorney's claim for prior services must be filed.**
A claim of a bankrupt's attorney for services rendered in a suit prior to commencement of the bankruptcy proceeding should be filed as a claim against the estate either in the secured or preferred class, where the attorney claims a lien on some particular fund, and where it has not been so filed the validity of such lien cannot be passed on on certificate by referee in connection with such attorney's fee to be allowed as attorney in bankruptcy proceeding.

4. **Bankruptcy ⟸482(1)—Claim of attorney for services to receiver and creditors must set forth services rendered.**
On certificate of referee in connection with fee to be allowed attorney for the bankrupt, an item in the attorney's claim of a certain amount for making a trip in the interest of general creditors in order to have a receiver with authority to operate appointed by the court, and an item for services in acting as attorney for the receiver and rendering all services that the receiver required to be performed, without attempting to set forth what these services were, were insufficient.

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5. **Bankruptcy ⟨⟩482(1)—Services performed for receiver should be presented separately by bankrupt's attorney.**
Any claim for services by bankrupt's attorney performed for a receiver should be presented separately from the attorney's claim for services as attorney in the bankruptcy proceeding.

6. **Bankruptcy ⟨⟩482(1)—Compensation for legal services to bankrupt in having exemptions allowed not allowable.**
Legal services to a bankrupt in having his exemptions allowed is a matter between the bankrupt and his attorneys, and a claim therefor is not allowable.

7. **Bankruptcy ⟨⟩482(2)—Attorney's fees allowable.**
Bankrupt's attorney is entitled to an allowance for preparing and filing the petition and schedules of the bankrupt and for a trip to attend a meeting of creditors, including necessary expenses in making the trip.

8. **Bankruptcy ⟨⟩482(2)—Allowances made for bankrupt's attorney.**
Attorney for a bankrupt with an estate of about $6,000 allowed $50 for preparing and filing schedules and $100 for other services, including a trip in attending a meeting of creditors, and expenses of the trip.

9. **Bankruptcy ⟨⟩477—Time held opportune to fix fees of bankruptcy attorney.**
Where bankruptcy proceeding reached that stage where it would be difficult to understand how any further services from attorney on behalf of the bankrupt would be beneficial to the estate, the time was opportune for allowance of his fees.

10. **Bankruptcy ⟨⟩482(1)—Bankrupt's attorney entitled to retain only proper charge for services.**
Where bankrupt's attorney was paid money and assigned a claim, immediately preceding his filing of the bankruptcy proceeding, to cover his services performed or to be performed in the proceeding in behalf of the bankrupt, the money rightfully belonged to the bankrupt estate, and the attorney could only be permitted to retain so much of it as was a legitimate and proper charge for the services performed.

In Bankruptcy. In the matter of O. C. Taylor, bankrupt. Certificate of referee in connection with attorney's fees. Amount fixed.

Walter T. More and J. M. Roushar, both of Torrington, Wyo., for objecting creditors.

John L. Sawyer, of Torrington, Wyo., for bankrupt.

KENNEDY, District Judge. The above-entitled cause is before the court at this time upon the certificate of the referee in connection with an attorney's fee to be allowed the attorney for the bankrupt in said matter. It may be said in passing that under a special order of the District Court in this district all claims for attorney's fees must be presented to and allowed by the District Judge.

The certificate of the referee and the record in the case disclose the following facts: Schedule B (4) annexed to the voluntary petition recites, in the place designated for including sums paid to counsel for services rendered or to be rendered in the bankruptcy cause, that the attorney for the bankrupt had been paid the sum of $395 in cash and $200 by virtue of an assignment of an account due and owing to the bankrupt, which was assigned November 7, 1921. The petition in bankruptcy, together with the schedules, appears to have been filed in the office of the clerk on November 7, 1921. On November 25, 1921, after the proceeding had reached the referee in bankruptcy under the

customary order of reference, two creditors of the bankrupt, who had filed their unsecured claims against the estate of the bankrupt, which claims had been allowed by the referee, filed with the referee a motion praying that an attorney's fee for the bankrupt's attorney be fixed by the referee upon the ground that the amount received by the said attorney was unreasonable, considering the circumstances of the case.

The referee's certificate discloses that on February 5, 1922, the attorney for the bankrupt filed his answer to said motion, in which said attorney seeks to justify the amount received in advance for his services performed and to be performed in said proceeding. Said answer is submitted to the court in connection with the referee's certificate. It further appears that on April 24, 1922, the said bankrupt's attorney filed a plea in abatement to the motion aforesaid, by which plea said attorney claims that the time is not opportune for disposing of the matter of attorney's fees, in that it is impossible at the time of the consideration of the motion to determine with any degree of accuracy what services it will be necessary to perform as attorney for the bankrupt in the proceeding. To this plea is attached a statement purporting to set forth the items of service performed by the attorney, aggregating $850.

The referee's certificate further discloses that the sum marshaled by the trustee in the bankrupt estate is $6,287.13, and that the estimated aggregate expense of administering the estate will amount to $2,220, that a dividend of 7 per cent. has already been paid the general creditors, and that it is estimated there will be an additional dividend of approximately 8 per cent. to these creditors. Under the rule before suggested as to the allowance of all counsel fees by the judge, the referee has certified the matter here.

[1] It might be well to examine briefly the matter of the allowance of counsel fees in bankruptcy cases, including the provisions of the bankrupt act, its theory and the policy of the courts in connection with the matter in hand. Allowances of attorney's fees are provided for by section 64a (3), Bankruptcy Act (Comp. St. § 9648). It has been generally held, in construing this provision of the act, that the matter of the allowance of an bankrupt's attorney is one of right; the amount only being left to the discretion of the court. While there are authorities to the contrary, it may be said generally that this has been the policy of the courts in administering this portion of the law.

As to the rule governing the class and kind of services to be performed which may be included in the claim of the bankrupt's attorney and allowed by the court, it may be said that courts have not been in complete harmony. Collier, one of the leading authorities on bankruptcy law, lays down the rule as follows:

"The safer rule is that the bankrupt's attorney is only entitled to compensation out of the estate for services which, although performed for the bankrupt, are really in aid of the estate and its administration."

This view is supported by In re Brundin et al. (C. C.) 112 Fed. 306, which case also cites In re Mayer (D. C.) 101 Fed. 695, and may be taken, therefore, as fairly expressing the views of this court upon that phase of the subject.

As to what should be the policy of the courts in making allowances for services of attorneys in bankrupt cases, which in the case at bar would come within the limitation laid down in the foregoing paragraph, Collier also lays down the rule as follows:

"Economy in the administration of estates is the policy of the present law and is to be strictly enforced. This principle should be kept in mind in fixing compensation of attorneys."

In support of this rule the author cites In re Frank Meis, 18 Am. Bankr. R. 104. This rule is discussed in the following language, as found in the case of In re Curtis et al., 100 Fed. 784, at page 792, 41 C. C. A. 59, at page 68, a decision by the Circuit Court of Appeals of the Seventh Circuit, as follows:

"The policy of the present Bankruptcy Act, in contrast with the provisions of the previous law, discloses clearly the design of Congress that the administration of bankrupt estates should be had at the minimum of expense. Under the former law much scandal had arisen because of the large cost of administering estates. The present act, so far as it specifies the amount of fees of officers whose services may be required in execution of the law, fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of Congress, however inadequate we may think the compensation allowed. This thought is well expressed by the court below in the opinion filed. It is there said: 'The present Bankruptcy Law was evidently intended to reduce to the lowest minimum the costs of administration, as regards fees of officers created by the act, as well as those of attorneys who may be called to assist the court in the preservation and distribution of the bankrupt estate.'"

[2, 3] Keeping these two rules, or rather policies, in mind we come to an examination, first, of the statement of services rendered by the attorney as attached to the so-called plea in abatement filed in the proceeding. The first item of $100 appears to cover services rendered by the attorney for the bankrupt in connection with a suit pending in the state court prior to the commencement of the bankruptcy proceeding. This amount is clearly not allowable as a preferred claim for attorney's fees in the bankruptcy proceedings. In this item it appears that the attorney claims a lien upon some particular fund. Whether or not such a lien is valid is not before the court, as in order to present it properly it should have been filed as a claim against the estate, either in the secured or preferred class.

[4] Another item in the claim is one for $250 for making a trip from Torrington to Cheyenne in the interest of general creditors, in order to have a receiver with authority to operate appointed by the court, and also an item of $250 for services in acting as attorney for the receiver and rendering all services that the receiver required to be performed. There has been no attempt to set forth what these services were, which would render that portion of the claim insufficient, even though it found a proper place in the claim here.

[5] Any claim for services performed for a receiver should be presented separately, and therefore cannot be properly allowed as it at present appears in the claim under consideration.

This brings up the question as to whether employment at the same time in one proceeding by the same attorney as an attorney for the

bankrupt, and also as attorney for the receiver, is consistent or otherwise. As it appears upon its face, however, in this case, that this portion of the claim cannot be allowed in its present form, it will not be necessary to pass upon this phase of the attorney's employment.

The item included in making trip from Torrington to Cheyenne in the interest of the general creditors to have a receiver appointed also comes within the same class, and therefore cannot be considered in passing upon this claim.

[6] Another item of the attorney's account represents a charge made for the trip from Torrington to Cheyenne to represent the bankrupt at a hearing, at which a portion of the exemptions claimed by the bankrupt was attacked. In regard to this, Collier lays down the rule as follows:

"Legal services to a bankrupt in having his exemptions allowed is a matter between the bankrupt and his attorneys and are not allowable."

[7] Eliminating the above-described items, only two are left which represent services properly chargeable against the bankrupt estate. The first is the preparing and filing of the petition and schedules of the bankrupt, for which a charge of $100 is made, and the second is a trip from Torrington to Cheyenne to attend the first meeting of creditors, for which a charge of $150 is made. Included in this trip, of course, would be the necessary expenses of disbursements of the attorney in making the trip.

[8] It is difficult for a court to fix with a degree of accuracy counsel fees in bankruptcy proceedings, as cases vary greatly in respect to the services to be performed. As attorney's fees have generally been allowed, however, in this district, since the enactment of the Bankruptcy Law, the charge of these two items is considerably in excess of the general allowances of bankrupt's attorney's fees in similar cases. The court is disposed, however, to make as liberal allowances for these items as the circumstances and the condition of the estate would seem to justify. Under these circumstances, as viewed by the court, upon the meager record before it, taking into consideration the well-defined rules of economy contemplated by the act and the size and condition of the estate, the court is of the opinion that an allowance of $50 for preparing and filing the schedules and $100 for the other services, including the trip in attending the first meeting of creditors, and an additional amount of $15 to cover the expenses of the attorney in making his trip to Cheyenne, making a total of $165, would be ample under the circumstances.

[9] As to the contention of the attorney in his plea in abatement that the time is not opportune to fix his fees, it may be said that the point thereby raised is not well taken. The record clearly discloses that the proceeding has reached that stage where it would be difficult to understand how any further service from the attorney on behalf of the bankrupt would be beneficial to the estate, and this point cannot, therefore, be sustained.

[10] The record shows that the attorney was paid the money and received the assigned claim immediately preceding his filing of the

bankruptcy proceeding, and to cover his services performed or to be performed in the proceeding on behalf of the bankrupt. This money, therefore, rightfully belongs to the bankrupt estate, and the attorney can only be permitted to retain so much of it as may be held to be a legitimate and proper charge for the services performed.

The order of the court will therefore be that the trustee make proper demand of the said attorney for the return of the amount received in excess of the amount herein allowed, and pursue such remedies in securing the return of that portion of the estate into his hands as trustee as he may be advised.

If the attorney may desire to file with the referee a claim for his services performed on behalf of the receiver, that matter will be taken up and passed upon in its proper order and place.

MATHIESON ALKALI WORKS v. ARNOLD, HOFFMAN & CO., Inc.

(District Court, D. Rhode Island. May 3, 1922.)

No. 129.

1. **Reference ⟸50—When proceedings before master will be interrupted on interlocutory application.**

   While it is the ordinary rule not to interrupt proceedings before a master by interlocutory applications for review of his rulings, yet this rule is subject to exception when the decision of some question of fact may be of practical assistance in limiting the scope of further proceedings before the master.

2. **Corporations ⟸318—Presumptions against validity of transactions between corporations conducted entirely through agency of officers acting for both.**

   There is a strong presumption against the validity of transactions between corporations, where conducted entirely through the agency of officers acting at the same time for both corporations, and the burden is on those who would maintain the transactions to show their entire fairness.

3. **Corporations ⟸318—Settlement requires independent representation of party.**

   A settlement or acceptance of accounts rendered requires independent representation of the party to whom they are rendered, and there can be no account rendered as between corporations, where the transactions are conducted entirely through the agency of officers acting at the same time for both.

4. **Corporations ⟸519(1)—Corporation, seeking an accounting from buyer and sales agent, presumed to know disposition made of its products.**

   In a controversy between two corporations, wherein plaintiff corporation sought an accounting from defendant corporation, which was both a buyer and an agent for sale, with a limited agency, plaintiff is presumed to know what disposition was made of its own product and what it received for it from defendant, both as buyer and as sales agent, it being the duty of plaintiff, its officers and directors, to conduct its business with ordinary care, and the burden of explanation rests on it which cannot be sustained by a mere general claim that it confided implicitly in defendant, so as to require defendant to assume the burden.

5. **Principal and agent ⟸75—Principal charged with knowledge of reports of agent.**

   When a business transaction is closed by an agent and his report is made thereon, the principal is charged with knowledge of what is re-

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

ported, and cannot excuse himself from responsibility for action or inaction by continued reliance on one who is no longer a fiduciary as to completed transactions.

6. Discovery ⇐13—Defendant held entitled to protect self from discovery by showing matters closed.

On application by plaintiff for production of documents covering long period of time and numerous transactions, defendant *held* entitled to protect itself from discovery by proving, if able, that matters to which it related were finally settled and closed, and not open to re-examination.

In Equity. Suit by the Mathieson Alkali Works against Arnold Hoffman & Co., Inc. On application for instructions to the master. Master instructed to proceed on hearing of defense.

Huddy, Emerson & Moulton, of Providence, R. I., and Rushmore, Bisbee & Stern, of New York City, for plaintiff.

Edwards & Angell, of Providence, R. I., and Hughes, Rounds, Schurman & Dwight, of New York City, for defendant.

BROWN, District Judge. [1] While it is the ordinary rule not to interrupt proceedings before a master by interlocutory applications for review of his rulings, for the reason that such a practice is likely to be productive of great delay, and because it is difficult for a judge to decide an isolated point without examination of a large part of the record (Union Sugar Refining Co. v. Mathiesson, 3 Cliff. 146, 151, 153, 154, Fed. Cas. No. 14,398), yet the ordinary rule is subject to exception when the decision of some question of fact or law may be of practical assistance in limiting the scope of further proceedings before the master.

The plaintiff has made application for a production of documents covering a very long period of time, and relating to the details of transactions which the defendant contends are finally closed and not open to re-examination.

The defendant asks that the master be instructed to try the defense of accounts stated and of acquiescence, claiming that a decision in its favor upon this question would dispose of the plaintiff's claim to production of documents and further discovery.

[2, 3] From an examination of the extensive briefs, in which are discussed the authorities relating to discovery, as well as the evidence already before the master, it is apparent that a principal question in the case is whether, as matter of fact, the transactions between the plaintiff and defendant corporations were conducted entirely through the agency of officers acting at the same time for both corporations. If this is the fact there is a strong presumption against their validity, and the burden is upon those who would maintain the transactions to show their entire fairness. Geddes v. Anaconda Mining Co., 254 U. S. 590, 599, 41 Sup. Ct. 209, 65 L. Ed. 425; Corsicana National Bank v. Johnson, 251 U. S. 68, 90, 40 Sup. Ct. 82, 64 L. Ed. 141. If it appears that there was a dual agency, as alleged, this may open up a wide range of inquiry into the fairness of accounts that have been rendered. A settlement or acceptance of accounts rendered requires independent rep-

resentation of the party to whom they are rendered. On the other hand, if this is not the fact—if, in the dealings between the two corporations there was independent representation and independent action of both—then the defendant's objections to discovery or production of documents, if now disposed of, may materially shorten the hearings before the master.

As the plaintiff asserts a right to production on the ground that the relation of the parties was that of principal and agent, it becomes necessary to determine, as matter of fact, the extent of this relation.

The contracts, Exhibits A and B, which are not questioned, relate to two distinct topics: First, a sales agency; and, second, the purchase by the defendant of products for the purpose of reselling the same for its own account. Here are established two relations—buyer and seller, and principal and agent. Under Exhibits A and B the defendant was not authorized to fix prices either upon its sales as agent or upon purchases on its own account.

The relation of buyer and seller is not a fiduciary relation. The scope of the defendant's sales agency is limited in subject-matter to the extent of the defendant's purchases on its own account. While one may not unite the two opposite characters of buyer and seller (U. S. v. Carter, 217 U. S. 286, 308, 309, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594), the present is a case in which, under the express terms of the contract, the defendant is to be both a buyer and an agent for sale, but with a limited agency.

The provision that all prices shall be fixed by the plaintiff obviates the principal field of conflict between the positions of buyer and agent. If there was in fact independent representation of the plaintiff, purchases by the agent on its own account reduced the subject-matter of the agency, and gave the defendant, as purchaser, the right to make profits on its own account. In defining the scope and subject-matter of the agency the relations were not fiduciary. The parties must be assumed to be acting independently, each in its own interest. The plaintiff seems to be proceeding on the theory that the defendant was a fiduciary both as purchaser and as selling agent.

The plaintiff's contention that, as matter of fact, it did not, as provided in the contract, fix the prices at which the defendant should buy for its own account, or at which it should sell as agent, but left this entirely to the defendant, which thereby became charged with the duty of acting as a fiduciary in buying for itself as well as in selling for the plaintiff, is at least an unusual contention. If accepted as a basis for an order for discovery, it would lead to an investigation of very wide extent.

[4, 5] If the hearings before the master are to proceed upon the theory that the plaintiff reposed entire confidence in the defendant as to the entire selling end of the plaintiff's business, including the fixing of the amounts and prices at which the defendant should buy for itself, and that this confidence was betrayed by the defendant in all its dealings with the plaintiff's product during a long period of years, this will doubtless require a very extensive examination of documentary evidence and the disturbance of many matters which apparently have long

since been treated as settled. It must not be forgotten that the plaintiff corporation, its officers and directors, were under an obligation to conduct its business with ordinary care at least; that it had means of informing itself, and is presumed to know, what disposition was made of its own product, and what it received for its product from the defendant, both as buyer and as sales agent. If, as defendant contends, accounts have been rendered which, on their face, disclose what amount of goods the defendant had bought on its own account, and what amount of goods it had sold as agent, as well as the prices, this should put upon the plaintiff a burden of explanation which hardly can be sustained by a mere general claim that it confided implicitly in the defendant. When a business transaction is closed by an agent, and his report is made thereon, the principal is charged with knowledge of what is reported, and cannot excuse himself from responsibility for action or inaction by continued reliance upon one who is no longer a fiduciary as to completed transactions.

I am of the opinion that the application to advance the trial of the question of accounts stated is not too late. It seems to have been made seasonably after the application for extensive discovery. I can see no reason for an examination of all the details of sales which have been made on the plaintiff's account to assist in the trial of the question whether the two corporations were under a single control. In view of the long period of time which the plaintiff seems to cover in its requests for production of documents, and of the presumption arising from lapse of time, it seems highly probable that the defendant will be able to establish a defense of accounts stated, or of acquiescence, as to many of the transactions concerning which the plaintiff seeks discovery. It must be presumed that the directors of the plaintiff corporation exercised some supervision over the affairs of the company. Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 650, 651, 653, 22 Sup. Ct. 240, 46 L. Ed. 366.

[6] I am of the opinion that the defendant should have the right to protect itself from discovery by proving, if it is able, that the matters to which it relates are finally closed, and not open to re-examination. Further consideraiton of the question of discovery may be reserved until the determination of the questions of accounts stated and of acquiescence.

The defendant's request that the master be instructed to proceed to a hearing on the defense of accounts stated and of acquiescence is granted, and the defendant may present a draft order accordingly.

In re DAVIS & TROUSDALE.

(District Court, S. D. Texas, at Galveston. April 28, 1922.)

No. 1449.

1. **Bankruptcy ⟨⟩354—Notes held to evidence "individual debt" of partners, within Bankruptcy Act.**
   Notes reading, "I, we, or either of us promise to pay," two of which were signed by both partners individually, and the other of which bore the name of the partnership by one of the partners, and all of which represented debts incurred for the benefit of the partnership, *held* to evidence the "individual debt" of the partners, within Bankruptcy Act, § 5f (Comp. St. § 9588), entitling the individual debts of the partners to be first paid out of the partners' individual property on bankruptcy of partnership.
   [Ed. Note.—For other definitions, see Words and Phrases, Individual Debts.]

2. **Partnership ⟨⟩217(1)—Burden is on firm to show it is not liable on paper bearing partnership name.**
   Whenever a partnership name apears on commercial paper, the firm is presumably bound, and the burden is on the firm to show that it is not liable.

3. **Partnership ⟨⟩146(1)—Obligation signed or indorsed in firm name, for benefits accruing to firm, a partnership debt.**
   Any note or other obligation, signed or indorsed in the firm name, the benefits of which accrued to the firm, is a partnership debt.

4. **Partnership ⟨⟩146(1)—Note or obligation for sole benefit of firm, though signed or indorsed by individual partner, is a partnership debt.**
   Where the note or obligation, though signed or indorsed by an individual partner, is for the sole benefit of the firm, it is a partnership debt.

5. **Evidence ⟨⟩459(3)—Parol evidence admissible to show notes signed by individual partners to be partnership obligations.**
   Parol evidence is admissible to show that notes signed by individual members of a firm are partnership obligations.

In Bankruptcy. In the matter of Davis & Trousdale, bankrupts. On petition to review certificate of referee. Question answered, and cause remanded to referee, with directions.

Love, Wagner & Wagner and Wm. M. Nathan, all of Houston, Tex., for Houston Nat. Exch. Bank.

HUTCHESON, District Judge. The certificate of the referee, W. B. Lockhart, is as follows:

"At Galveston, in said district, on the 4th day of April, A. D. 1922, before W. B. Lockhart, referee in bankruptcy:

"I. W. B. Lockhart, one of the referees of said court in bankruptcy, do hereby certify that in the course of proceedings in said court before me, the following question arose pertinent to said proceedings: The Houston National Exchange Bank of Houston, Texas, filed its claim for $6,727.92, the consideration for said debt being three certain promissory notes dated January 29, 1920, for the sum of $3,000; February 18, 1920, for the sum of $2,000, less a credit of $500; December 6, 1920, for the sum of $1,380. The first two of said notes each bore the signature of A. B. Trousdale and J. F. Davis, Jr., and the third of said notes bore the signature of A. B. Trousdale, by Davis, and J. F. Davis, Jr.; the said notes on their face reading: 'For value received, I, we or either of us promise to pay,' etc. The said notes were all transferred, for a valu-

able consideration, to the Houston National Exchange Bank, and said Houston National Exchange Bank is now the legal owner and holder of said notes.

"I find from the evidence before me (see the signed statement of facts) that the notes executed by the said A. B. Trousdale and J. F. Davis, Jr., constitute partnership obligations of the said A. B. Trousdale and J. F. Davis, Jr. I have accordingly ruled that the claim of the said Houston National Exchange Bank shall be classed a claim against the bankrupt partnership consisting of A. B. Trousdale and J. F. Davis, Jr., and I have denied the said Houston National Exchange Bank the right to share ratably in the individual assets of the bankrupt, J. F. Davis, Jr., holding that the individual assets of J. F. Davis, Jr., must go first to the payment of his individual debts, and the remainder, if any, to the payment of his partnership debts. The Houston National Exchange Bank has filed a petition for review of the foregoing ruling. And the said question is certified to the judge for his opinion thereon."

The agreed statement of facts referred to in the certificate shows that the indebtedness evidenced by the notes sued on was incurred for the benefit of the partnership, and the money advanced on said notes was used by the partnership. The Houston National Bank, by exceptions, challenges these findings, urging that the debt evidenced by the notes constituted the joint and several obligations of the makers, J. F. Davis, Jr., and A. B. Trousdale, and that the referee erred in holding that it was not entitled to share in the individual assets of the bankrupt, J. F. Davis, Jr., until after his individual debts had first been paid.

The action of the referee, if the debts sued on are merely partnership debts, is in accordance with section 5f of the Bankruptcy Act (Comp. St. § 9588), which is merely declaratory of the equitable rule that partnership property is primarily a fund for the payment of partnership debts, and that the individual debts of the partners are entitled to be first paid out of the individual property. If, on the other hand, the obligations evidenced by the notes are also to be treated as the individual obligations of the partners, then the referee erred, because in that event it would be the right of the creditor to prove against both estates, and to have his claim adjudicated in the capacity of creditor of both the individual and the partnership estates.

[1] That the obligations were claims against the partnership seems to be conceded by the agreed statement of facts, and the only question is whether they were also individual obligations. I am of the opinion that the debt is clearly the debt of the individual as well, and that the referee erred. Questions of this kind usually arise where it is undertaken to establish that a debt apparently individual in form is in fact a partnership obligation; this, in order that partnership assets may be subjected to it. In these cases the rule seems to be that the question of whether it is or is not a partnership debt depends, not solely upon the form, but also upon the facts which underlie it.

[2-5] The following seem to be the general rules governing these matters: Whenever a partnership name appears on commercial paper, the firm is presumably bound, and the burden is on the firm to show that it is not liable. Any note or other obligation, signed or indorsed in the firm name, the benefits of which accrued to the firm, is a partnership debt. The note or other obligation of one of the individual partners, although given for a consideration moving to the partnership, may nevertheless be treated as an individual debt. In re Jones (D. C.)

116 Fed. 431. But where the note or obligation, although signed or indorsed by an individual partner, is for the sole benefit of the firm, it is a partnership debt, and it may be shown by parol evidence that notes signed by the individual members of a firm were partnership obligations. Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669; In re Culver (D. C.) 176 Fed. 450; In re Stoddard Bros. Lumber Co. (D. C.) 169 Fed. 190.

The question as to the character of the debt will also arise when each member of the firm has in its behalf incurred an individual liability by signing his name instead of the firm name. The debt thereby becomes individual only. Strause v. Hooper (D. C.) 105 Fed. 590. The fact that the proceeds of a loan to a partner went into the partnership business, and was utilized by the partnership for partnership purposes, does not make the loan a partnership debt. The question is, in each individual case: Was credit given to a partner or to a partnership? Collier on Bankruptcy, p. 194 et seq.

In this case there is no dispute that the partnership was bound. That is admitted. It was apparently the opinion of the referee that, because the debt was a partnership obligation, it was not an individual one, which could be proven against the individual estate. That this is not the law I think appears from the authorities, which establish that a debt may be jointly and severally the obligation of the partnership and of the individual members of the firm, in which case proof may be made both as partnership and as individual creditor. In re McCoy, 150 Fed. 106, 80 C. C. A. 60; In re Kuhn & Co. (D. C.) 241 Fed. 935. In Reynolds v. New York Trust Co., 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391, it is held that, where a partner converted property, the liability is that of the partnership, and not of an individual member, who did not participate in the conversion nor benefit thereby. The court in its opinion stated:

"Where there are separate and distinct * * * contracts of the firm and of a copartner to pay a debt contracted by the firm, the right to prove against both estates may be conceded. If one dealing with a firm procures also the individual undertaking of a partner to answer for the firm debt, there are substantial reasons for permitting him to resort to both estates."

To the same effect, see Buckingham v. First National Bank, 131 Fed. 192, 65 C. C. A. 498.

It should be borne in mind that here is not the case of a claim to the right to double proof, where an obligation was made in the firm name, without an additional independent obligation or undertaking on the part of the individual partners; but it is the case where the obligation was in the name of the individual partners, and the partnership was held liable, because the funds were procured for it. This kind of case seems to come clearly within the class of cases where, in addition to the firm obligation, there was a separate individual obligation of the partners.

It is true that Lamoille County National Bank v. Stevens' Estate (D. C.) 107 Fed. 245, opinion by District Judge Wheeler, holds to the contrary of this, and that it is there stated that the distinction between a partnership debt and individual debts turns upon the question of wheth-

er the debts were at the time of the adjudication, as between the individual and the firm, the separate debts of the individual or the joint debts of the firm, and not whether the individual was anyhow liable for the debts, and that if the debt was in fact a partnership debt, though indorsed by the partners, there could be no proof against the individual estate, and that substantially the same thing, is held by him in Re Mosier (D. C.) 112 Fed. 138. If might be just enough as between the partners and the partnership to hold this way, but where it involves the creditor it would not be, since the creditor taking the note of an individual, even though the proceeds were for the partnership, would have the right to rely upon both the obligation of the partnership and the individual.

The question certified by the referee is therefore answered adversely to his finding, and the cause is remanded to the referee, with directions to permit the proof of claim against both the individual and the partnership estates.

In re ROSENBLOOM.

Petition of CONSOLIDATED RUBBER CO.

(District Court, E. D. Michigan, S. D. April 14, 1922.)

No. 4556.

1. **Bankruptcy ⟸140(3)—No absolute sale, when goods to be resold and proceeds to be remitted, less commission.**
   Where the bankrupt was to sell goods shipped him by the claimant at a price fixed by the claimant, collect the money, and remit the price, less a commission of 12½ per cent. and these provisions were carried out there was no absolute sale to the bankrupt.

2. **Bankruptcy ⟸228—Referee's finding not disturbed, unless without basis or contrary to evidence.**
   A finding of fact by a referee in bankruptcy, after personal observation of the witnesses, will not be disturbed, unless without basis in the record, or clearly contrary to the evidence.

3. **Bankruptcy ⟸163—Settlement between bankrupt and party sending it goods for resale held not a "voidable preference."**
   Whether an agreement, made more than four months before bankruptcy, by which goods were sent to the bankrupt for sale and payment of the proceeds, less a commission, to the claimant, was one of absolute sale, with attempted retention of title, a contract of conditional sale, or a pure agency agreement, where the parties before bankruptcy made a settlement under which goods were stored by the bankrupt for the claimant, such agreement was supported by a present consideration, and not a voidable preference, under Bankruptcy Act, § 47a(2), being Comp. St. § 9631.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Voidable.]

4. **Corporations ⟸661(6)—Foreign corporation, doing business through agent without obtaining license, not thereby deprived of right to recover goods.**
   A foreign corporation selling goods in Michigan through an agent without obtaining a license, under Pub. Acts Mich. 1915, No. 64, is not thereby deprived of its right to recover goods in the agent's possession on his bankruptcy, under Michigan decisions as to the rights of such a corporation.

In Bankruptcy. In the matter of Morris A. Rosenbloom, doing business as the Rosenbloom Leather Company, bankrupt. On review of an order of the referee denying the petition of the Consolidated Rubber Company, seeking to reclaim certain merchandise. Order set aside, and petition granted.

Willis, Streeter, Murphy & Berns, of Detroit, Mich., for petitioner.
Anderson, Wilcox, Lacy & Lawson, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition to review an order of one of the referees in bankruptcy, denying a previous petition of the Consolidated Rubber Company, petitioner herein, seeking to reclaim from the trustee in bankruptcy certain merchandise in the physical possession of the bankrupt at the time of the filing of the involuntary petition in bankruptcy herein. From the record before me, and from the findings of the referee, I am satisfied, and I find, that the material facts are as follows:

More than four months prior to the filing of the bankruptcy petition, the petitioner in the reclamation petition here involved (an Ohio corporation, located in that state and there engaged in manufacturing rubber heels and other rubber goods, and not at any time authorized to do business in Michigan) entered into a verbal arrangement with the bankrupt (a resident of Michigan, and there engaged in the retail sale of shoes and rubber heels), under which arrangement petitioner shipped to the bankrupt from time to time, and up to and within four months prior to the filing of the aforesaid bankruptcy petition, rubber heels, which were to be sold by the bankrupt in the regular course of his retail trade. The shipments referred to were accompanied by invoices showing the quantity and kind of merchandise shipped, which invoices contained also the words, "Sold to Rosenbloom Bros., Detroit, Mich.," underneath which language were the words, "Terms, consigned." No other terms or conditions were referred to in such invoices. It appears from the brief of the trustee, and is not disputed, that the invoices furnished by petitioner to the bankrupt, and used by the latter in billing this merchandise to his customers, contained the words "M. A. Rosenbloom, District Manager and Distributor for Michigan."

The bankrupt testified, without contradiction, that the rubber heels involved belonged to the petitioner, and never to the bankrupt; that such merchandise was billed to him on consignment; that in taking orders for such merchandise he used an order book furnished him by the petitioner; that all of the money collected by him from the sale of such merchandise was turned over to the petitioner; that he (the bankrupt) kept records of the accounts due petitioner on such sales, and of commissions due him from the petitioner; that such accounts were turned over to the petitioner; that while he and the petitioner were doing business the latter furnished to him a truck, which he was allowed to use in delivering his own goods as well as those of the petitioner; that shortly, and within four months, prior to bankruptcy he ceased selling the product of the petitioner, and had a final accounting and settlement with the petitioner, and it was agreed between them that the rubber heels which then remained on the premises of the bankrupt should be

stored there by the bankrupt for the petitioner. These are the heels involved herein.

[1] The referee, who had the benefit, not available to me, of hearing this testimony and judging the credibility and weight to be given thereto, evidently believed it, as he made the following finding in his return:

"The bankrupt was to sell the goods when and where he could, at a price fixed by the Consolidated Rubber Company, collect the money, and remit the price, less his compensation, which was fixed as a commission of 12½ per cent. These provisions were strictly carried out. It is also true that, some few weeks before bankruptcy, the petitioner and bankrupt had a final accounting and his employment ceased. There was no money to be collected, no sales were made, and the goods, under agreement, were to be transferred to such person or persons as the Consolidated Rubber Company might designate."

This, of course, is a distinct finding that the transaction in question was not an absolute sale to the bankrupt.

[2] It is a familiar rule that a finding of fact made by a referee after personal observation of the witnesses will not be disturbed, unless shown to be without any basis in the record or clearly contrary to the evidence. My examination of this record satisfies me that there was sufficient evidence to warrant the findings of fact of the referee, and I adopt such findings, including that just quoted. This disposes of any argument or theory that the title to these goods passed absolutely from the petitioner to the bankrupt.

The referee, as already stated, denied the reclamation petition, holding that, according to petitioner's own contention, this transaction was a conditional sale to the bankrupt, for resale by him, and therefore void, as regards the reservation of title, because not filed for public record, as required by Act 64 of the Michigan Public Acts of 1915, and that, if such agreement created an agency in the bankrupt to sell such property for petitioner, the latter would be barred from recovery by reason of its failure to obtain a license to do business in Michigan, as required by the Michigan statute invalidating the contracts of foreign corporations violating such statute in this respect.

[3] In view of the considerations hereinafter pointed out, it becomes unnecessary to determine whether the agreement involved was one of absolute sale with an attempted retention of title, operating as a chattel mortgage lien, in the petitioner, a contract of conditional sale, with title remaining in the petitioner until resale by the bankrupt, or an arrangement of pure agency. As this agreement, valid between the parties thereto and based upon a present consideration, was mutually settled and rescinded by such parties before the filing of the petition in bankruptcy, that settlement, by which the petitioner received and accepted his own property, was also for a present consideration. The trustee, although now having the status of a creditor, armed with the rights conferred upon him by section 47a (2) of the Bankruptcy Act (Comp. St. § 9631), did not acquire such status until the filing of said bankruptcy petition, and only as of that time. Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 276. The effect of the settlement mentioned was to release both the petitioner and the

bankrupt from their respective obligations under such agreement, and to restore them to the positions occupied by them before the making thereof. After such settlement, therefore, if not before, the title to this merchandise was vested in the petitioner.

It cannot be successfully contended that the result of this settlement was to effect a voidable preference in favor of the petitioner. The contract under which the goods were delivered to the bankrupt having been made prior to the statutory four months period before bankruptcy, for a present consideration, and the rights of the parties with respect thereto being valid and enforceable as between them, the surrender of possession of this property was merely a delivery thereof to its owner, to which the latter was entitled, and was not a transfer by the bankrupt of his property to one of his creditors, and hence such transfer did not constitute a preference. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; In re East End Mantel & Tile Co. (D. C.) 202 Fed. 275; Sieg v. Greene (C. C. A. 8) 225 Fed. 955, 141 C. C. A. 79, Ann. Cas. 1917C, 1006; Robinson v. Roe (C. C. A. 2) 233 Fed. 936, 147 C. C. A. 610; Stennick v. Jones (C. C. A. 9) 252 Fed. 345, 164 C. C. A. 269; Illinois Parlor Frame Co. v. Goldman (C. C. A. 7) 257 Fed. 300, 168 C. C. A. 384; Britton v. Union Investment Co. (C. C. A. 8) 262 Fed. 111.

[4] The referee was clearly in error in holding that, if the relation between the parties should be treated as that of principal and agent, and not of vendor and vendee, petitioner would be deprived of the right to recover herein by its failure (as a foreign corporation) to comply with the statute of Michigan requiring such corporation to obtain a license to do business in this state, and making void all contracts entered into by any such corporation so in default. It is the settled rule of the Michigan Supreme Court, by which, of course, this court is here bound, that a foreign corporation, which has not obtained the necessary license to do business in Michigan, does not thereby lose the right to protect and recover its property from loss or injury, where such right does not depend upon a contract made in violation of this statute, but arises irrespective and regardless of any contractual rights, and that under such circumstances it does not forfeit such property, but may recover possession thereof, if otherwise entitled thereto, in a proper tort action, such as replevin. Rex Beach Pictures Co. v. Garson Productions, 209 Mich. 692, 177 N. W. 254; Klatt v. Wayne Circuit Judge, 212 Mich. 590, 180 N. W. 625; Hallet & Davis Piano Co. v. Droste, 213 Mich. 383, 182 N. W. 123.

It does not appear, and is not claimed, that any fraud was intended or was present in connection with the making of either the original agreement, the performance thereof, or the settlement thereunder, and no questions arising from any such contention are involved or have been considered.

It results that the order of the referee, complained of, must be set aside, and an order entered granting the petition, in conformity to the terms of this opinion.

LILLEY BUILDING & LOAN CO. v. MILLER, Collector of Internal Revenue.

(District Court, S. D. Ohio, E. D. April 12, 1922.)

No. 2105.

1. **Internal revenue ⟸7—Corporation dealing principally with nonmembers is not "mutual building and loan association."**
Even though a building association is permitted by Gen. Code Ohio, §§ 9648, 9657, to receive deposits from nonmembers, and make loans to nonmembers, a corporation whose business consisted principally in such dealings with nonmembers for the profit of its stockholders, is not a mutual building and loan association within Revenue Act 1918, § 231 (4) being Comp. St. Ann. Supp. 1919, § 6336⅛o, exempting domestic building and loan associations from the corporate income tax, since the leading feature of such association is that it is conducted on a co-operative basis, with mutual advantages and benefits to its members who share alike in the profits and sustain their proportionate share of the losses.

2. **Internal revenue ⟸7—Choice of name under state statute does not determine whether organization is building or savings association.**
Under Gen. Code Ohio, § 9643, permitting the organization of a corporation to raise money to be loaned to its members and to be known as a building and loan association, or as a savings association, the fact that a corporation chooses the designation of building and loan association does not affect its liability for a corporate income tax, from which building and loan associations are exempt, but such liability must be determined from the nature of the corporation's business.

3. **Internal revenue ⟸7—Qualifying clause requiring corporations excepted from act of 1918 to be mutual applies to building and loan associations.**
Within Revenue Act 1918, § 231 (4), being Comp. St. Ann. Supp. 1919, § 6336⅛o, exempting domestic building and loan associations and co-operative banks without capital stock organized and operated for mutual purposes and without profit, the qualifying clause as to mutual purpose applies to building and loan associations as well as to co-operative banks, though there was no comma preceding such clause in the original statute, since the contrary interpretation would violate the intention of the act.

4. **Internal revenue ⟸7—Fact that building and loan association dealt with nonmembers does not subject it to income tax.**
The fact that a building and loan association makes loans to nonmembers or receives deposits from them does not defeat its exemption from corporate income tax, so long as such transactions are simply incidental to the primary business of operating a mutual building association.

At Law. Action by the Lilley Building & Loan Company against Newton M. Miller, as Collector of Internal Revenue, to recover corporate income taxes paid under protest. Petition dismissed.

Andrew J. Hess, of Sidney, Ohio, Thomas L. Pogue, of Cincinnati, Ohio, and Oscar W. Newman, of Columbus, Ohio, for plaintiff.

James R. Clark, U. S. Atty., of Cincinnati, Ohio, and William J. Ford, Asst. U. S. Atty., of Columbus, Ohio, for defendant.

PECK, District Judge. Action to recover corporate income taxes paid under protest for the years 1918, 1919, and 1920, under the Revenue Act of 1918. 40 Stat. 1057 (Comp. St. Ann. Supp. 1919, § 6336⅛a et seq.). Submitted on the evidence, without jury. The essential question is whether the plaintiff was exempt from the tax.

Section 231(4) exempts "domestic building and loan associations and co-operative banks without capital stock, organized and operated for mutual purposes and without profit." Comp. St. Ann. Supp. 1919, § 6336½o. It is claimed by the government that the plaintiff does a banking business under the guise of a building association; by the defendant, that its activities are no broader than those permitted to be exercised by such associations organized under the laws of Ohio. General Code of Ohio, § 9643 et seq.

The facts are not in dispute. Plaintiff does not hold meetings at stated intervals, as such associations frequently do, but keeps its place of business open during the usual business hours of the day. It receives deposits from nonmembers, evidenced by entries in books such as are ordinarily used by savings banks. Withdrawals may be made on presentation of books. On these accounts (which constitute the bulk of its business) it pays interest at the stated rate of 4 per cent. It also receives time deposits, for which it issues certificates bearing interest at the rate of 5 per cent. It has paid-up stock; also "running stock" on which installment payments are made. Both classes of stock receive semiannual dividends at the rate of 5 per cent. per annum.

Its statement for the year 1920, which may be taken as typical of the period of time involved, shows running stock of $121,000, paid-up stock of $123,000, deposits of $830,000, borrowed money $20,000, and a reserve fund of $18,500 (odd figures are omitted). Its stockholders numbered 301; its borrowers 495 of whom but 2 were stockholders; and its savings depositors were 2,239. Its loans were all made upon homes, the average amount of each being about $3,500. It had no checking accounts. A depositor, wishing to make a withdrawal, presented his passbook and for the amount was given a check to his own order, which he indorsed and returned to the association, receiving thereon the cash. The association then put the check through its bank. Its mortgage loans were usually payable in monthly installments. The few loans made to members took the same course as those to nonmembers. The borrowing members gave their notes and paid them off in installments, such obligations being entirely disassociated from their obligations to pay for stock. The ordinary building association method of subscribing for stock to the amount of the loan, the stock, when paid up, extinguishing the loan, was not pursued.

It will be observed that about 80 per cent. of its receipts and 97 per cent. of its loans are transactions with nonmembers. Thus by far the greater number of those with whom it does business have no interest in its profits, and as long as it remains solvent, they have none in its losses. The earnings accrue to the stockholders. Mutuality of interest between the stockholders, on the one hand, and the depositors and borrowers, on the other, is lacking.

[1] This course of business seems to be within its charter powers as prescribed by the statutes of Ohio, particularly sections 9648 and 9657, General Code of Ohio. It does not, however, conform to the general conception of the functions of such an association.

"Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to be loaned

among themselves, or such as may desire to avail themselves of the privilege." Eversmann v. Schmitt, 53 Ohio St. 175, 184, 41 N. E. 139, 141 (29 L. R. A. 184, 53 Am. St. Rep. 632).

"The leading feature of such an association is that its members are kept upon a strictly co-operative basis, with mutual advantages and benefits, sharing alike in the profits and sustaining their proportionate share of the losses." 4 R. C. L., "Building and Loan Associations," p. 344.

In Halsell v. Merchants' Insurance Co., 105 Miss. 268, 62 South. 235, 645, Ann. Cas. 1916E, 229, a concern organized under the Building Association Act of the state of Mississippi, with powers similar to those exercised by the plaintiff, was held not to be such an association in the real meaning of the term. Having regard, therefore, to its general character, as distinguished from its mere charter powers, there is no doubt that the business conducted was in the main not that of a building association as ordinarily conceived.

[2] Plaintiff's counsel, however, contend that the definition adopted by the statutes of Ohio of the term "building association," and not that of general usage, is controlling. But it must be remarked that the statutes referred to do not attempt to define a "building association," as distinguished from a "savings association":

"A corporation for the purpose of raising money to be loaned to its members shall be known * * * as a 'building and loan association' or as a 'savings association.'" G. C. § 9643.

The statutes carry the distinction no further. Both are treated alike. The same powers are conferred on each. Such a corporation may combine both phrases or parts thereof in its name. It may as truly be said that the corporation is designated a "savings association" as a "building association" by the laws of Ohio. Plaintiff has named itself a "building association." It might have named itself a "savings association." Its powers, liabilities, structure, character, and place in the law would have been the same. It may even now change its name to a "savings association." Would it be exempt as a "savings association"? If not, would it secure exemptions by such change of name; its character remaining precisely the same?

[3] It is pointed out that the Revenue Acts of 1909 (36 Stat. 11) and 1913 (38 Stat. 114) exempted domestic building and loan associations "organized and operated exclusively for the mutual benefit of their members"; that these qualifying words were omitted in the act of 1918; that they were restored in the act of 1921 in this phraseology:

"* * * Domestic building and loan associations, substantially all the business of which is confined to making loans to members."

And it is argued that the omission of such language in the 1918 statute indicates a purpose of Congress to exempt all corporations organized as domestic building associations under the laws of the several states, without any condition or qualification whatsoever; that Congress took them with their charter powers and their activities as they existed, and exempted them from the tax; and it is further insisted that the intention of Congress to tax them must clearly appear, and that they are not to be taxed by implication. Gould v. Gould, 245

U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211. But did Congress omit the qualifying language in the act of 1918?

Having resort to the text of the act itself, it is to be noticed that the exception concludes with the words "organized and operated for mutual purposes and without profit." In Holmes, Federal Taxes (1922 Ed.) p. 318, the author puts a comma before this clause, indicating an interpretation that would make these words modify, not only co-operative banks, but building associations. While the comma is not found in the act, and the usual presumption is that a phrase modifies its immediate antecedent, yet there is good reason for taking these words as referring to both antecedents. By so doing, the act is in conformity with the general policy of the acts of 1909, 1913, and 1921. Furthermore, there seems to be just as much reason for requiring that building associations, to be exempt, must be organized and operated for mutual purposes and without profit as there is for applying that requirement to co-operative banks.

Plaintiff's interpretation is that corporations organized under building association laws are exempt, although operated not for mutual purposes and with a profit to a limited number of stockholders, be they ever so few. Such an interpretation would seem to violate the intent of the act. Recurring to the matter of nomenclature under the Ohio statutes, if we regard the plaintiff as a "savings association," we would have a mutual bank, with capital stock, not organized and operated for mutual purposes, and not without profit. The matter certainly cannot rest so lightly as on the arbitrary choice of a name. The facts must control. But if it be linguistically inaccurate to take the adjective phrase in question as modifying "building associations," nevertheless the rule of "noscitur a sociis," which, in this instance, it seems proper to apply, would lead to the same interpretation.

[4] It is not thought that the making of loans to nonmembers, or borrowing from nonmembers, or receiving deposits to be withdrawn on demand or on time, so long as such transactions are simply incidental to the primary business of operating a mutual building association, would defeat the exemption. In Central Building, Loan & Savings Co. v. Bowland (D. C.) 216 Fed. 526, the question was whether the existence of such powers necessarily put the corporation out of the exempt class, and it was concluded that it did not, and that conclusion is thoroughly concurred in. But here the association has put aside the attribute of mutuality; indeed, it is most difficult to distinguish its activities from those of the ordinary savings bank. Its primary design no longer is to be an instrumentality of mutual helpfulness among its contributors in saving and borrowing for home owning; but its object now is the receiving of deposits from, and lending money on interest to, the public for the profit of the stockholders.

Counsel argue that the people are better served thus; that mutuality is inefficient; that a concern of ten stockholders and many customers is more beneficial to the public than one containing in its body corporate all of its depositors and borrowers. This may be true. But the statute has not exempted all corporations that receive deposits and loan money on homes. It may not be possible to define precisely how

far a building association may go in extraneous activities without losing its essential character; but it seems clear that, when it ceases to be substantially mutual and adopts as its chief business dealing for profit with the general public by the methods of an ordinary savings bank, it is no longer a building association, entitled to be exempted from income taxation under the statute in question.

It is therefore concluded that the petition must be dismissed

M. A. QUINA EXPORT CO. v. SEEBOLD.

(District Court, S. D. Florida. April 8, 1922.)

No. 569.

1. **Shipping ⊂=104—Vessel owner may contract to carry contraband goods to blockaded port.**
   A vessel owner may contract to carry contraband goods, and may also contract to carry such goods to a blockaded port.
2. **Shipping ⊂=51—Submarine activities of Germany constituted blockade of English ports, amounting to restraint of rulers.**
   The activities of the German submarines off the coast of the British Isles for the avowed purpose of sinking all vessels entering the forbidden zone was an effective blockade of the English ports, which excused a vessel owner from performing his charter agreement, under the clause exempting restraint of rulers.
3. **Shipping ⊂=51—Warning of intention to sink all vessels was extraordinary occurrence, beyond control of parties to charter.**
   The published warning by the German government that it intended to sink all vessels entering the forbidden zone around the British Isles was an extraordinary occurrence, beyond the control of either party to a charter, entered into before the warning was published, for the carrying of a cargo to England.
4. **Shipping ⊂=51—Charter is frustrated only when change is so great no reasonable man would contract under the circumstances.**
   A charter agreement to carry a cargo is frustrated only when the change in circumstances is so great that no reasonable man would have entered into the contract under the new circumstances.
5. **Shipping ⊂=51—Charter held frustrated by notice of Germany's intention to sink all vessels in forbidden zone.**
   A charter agreement to carry a cargo of lumber to England in a small sailing vessel was frustrated by the German warning of intention to sink all vessels in the forbidden zone around the British Isles, and by the effective efforts of the submarines to carry out the purpose, since no reasonable man would have contracted to perform such a voyage under those conditions, unless the amount of freight would fully repay the value of the vessel.

In Admiralty. Libel by the M. A. Quina Export Company, a corporation, against Theodoro Seebold, to recover damages for breach of a charter party. Libel dismissed.

James F. Glen, of Tampa, Fla., for libelant.
Whitaker, Himes & Whitaker, of Tampa, Fla., for respondent.

CALL, District Judge. In this cause libel was filed June 19, 1918, claiming damages for breach of a charter party between libelant and

the shipowner, dated 16th of February, 1916, whereby the Maria Lorenza, of 299 tons register, after discharging cargo with which she was then loading at Bilboa for Lisbon, should proceed in ballast to a gulf port, subsequently designated as Pensacola, to load for libelant "deals and/or boards" at £23. 15s. per ton St. Petersburg standard hundred, and, being loaded, shall therewith proceed to any port in the United Kingdom not east of Southampton.

The respondent answered on July 2, 1917, and subsequently on May 20, 1921, filed an amended answer by consent of parties, in which the defenses set up in the original answer were to some extent set out more fully. As I understand the matter, the defense is based upon the declaration by Germany of unrestricted submarine warfare against the English, French, and Italian ports, defining a zone of the sea in which any vessel, neutral or otherwise, would be sunk without warning.

The charter party provided that, should the vessel not be at the port of loading on or before June 15, 1916, the charterer should have the option of canceling the charter. January 24, 1917, the time was extended to April 15th following. After the promulgation by Germany of the unrestricted submarine warfare, notice of which was given January 31, 1917, to take effect February 1st following, the respondent refused to have his vessel proceed to Pensacola to load, but sent her to Tampa to load a cargo for him bound to a Spanish port. The charter party contains the following:

"The act of God, restraints of princes and rulers, the king's enemies, fires, floods, frost, droughts, strikes, combinations, or extraordinary occurrence beyond control of either party, * * * mutually excepted, including negligence clause as attached."

The clause attached is as follows:

"The act of God, perils of the sea, fire, barratry of the master or crew, enemies, pirates, thieves, arrests and restraints of princes, rulers, and people, collision, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner."

In 1915 the German government published its list of contraband goods, declaring that articles and materials susceptible of use in war as well as for purposes of peace should be considered contraband of war, under the name of conditional contraband; the twentieth item being all kinds of lumber, rough or treated, etc. In 1916 an additional list was promulgated, in which lumber was again included under the eleventh item. In this paper a hostile port is to be presumed: (a) If goods are destined to be delivered in a hostile port; (b) if the ship is to call at a hostile port.

The respondent claims he was justified in not sending his ship to Pensacola to load because first, there was a restraint of rulers; second, there was an extraordinary occurrence beyond the control of either party; and third, because the contract was frustrated.

The libelant insists that respondent was not excused, because he contracted to carry this cargo during the existence of a state of war, knowing that this cargo was conditional contraband and that under the German rule a vessel carrying contraband up to a certain propor-

tion of her cargo was forfeited, and therefore the vessel's danger, even if there was a blockade, was no greater than she had contracted to assume; but it further insists there was no blockade.

[1] It is recognized law that a vessel owner may contract to carry contraband goods, and in such event he is not excused from complying with his contract because the goods are contraband. He may also contract to carry goods to a blockaded port, and such blockade would not excuse him, provided such contract is not illegal for some reason.

In the instant case the contract was undoubtedly to carry conditional contraband goods, and if, in pursuit of the voyage, the vessel had been captured by the Germans, he might have lost his ship; but, as I understand the contention of respondent, such a contract did not and could not contemplate the dire results to be reasonably expected from penetrating the prescribed submarine zone proclaimed by the Germans around the islands of England, Ireland and Scotland.

[2] Did the submarine activities in the waters of this zone constitute a blockade of the English ports? Without stopping to discuss the definitions given in the law books and the decided cases, I think it was, and judging from the number of ships, both steam and sail, sunk subsequent to February 1st, the day proclaimed for it to go into effect, it was efficiently maintained. Of course, some ships, both steam and sail, got through and reached their destinations; but this is not sufficient to declare the blockade ineffective. The lists attached to the stipulation show the proportion of sailing vessels lost, but that to my mind is of no particular moment.

Here was a power which had been since August, 1914, successfully withstanding the attacks of England, France, and Italy on land, the fighting being in the enemy territory, except for a short time on the Eastern frontier, proclaiming to the world that subsequent to February 1, 1917, it proposed to sink all ships loaded with contraband or otherwise, neutral or enemy, without notice, found within the zone described, and carrying out the warning. Suppose the vessel had been loaded and proceeded on her voyage, and had been notified of this change in conditions since leaving port; would any one be found to say her owner would not have been justified in ordering her to abandon the voyage, or that the master would have been unjustified in abandoning it without such orders? I think not, although she was not a passenger ship with an assorted cargo. That such a condition, brought about by the orders of a government able and willing to maintain such inhuman orders, constitutes a restraint of rulers, I think cannot be gainsaid.

[3] Again, the contract provides that an extraordinary occurrence beyond the control of either of the parties excused the performance of the contract of affreightment. There is no question that such a proclamation as was made by Germany on January 31, 1917, was extraordinary and beyond the control of either party. Was it sufficient, under the terms of the contract, to excuse the performance? It must be borne in mind that at the time of the making of the contract only the ordinary perils of the sea, superinduced by the state of war then existing, such as a danger of capture, etc., were in the contemplation of

the parties. By this proclamation a danger to life by the unwarned sinking of the vessel was added; and that this danger was great, even before warning to the world was given, is evidenced in the sinking of the Lusitania. I think such proclamation was such an extraordinary occurrence, beyond the control of either of the parties, as excused performance of the contract.

[4, 5] Was the contract frustrated? The rule governing in such cases, as I understand it, is that the change in circumstances must be so great that no reasonable man would have entered into the contract in the new circumstances. In addition to what I have said above, it is only necessary to point out that here was a small sailing vessel, of 299 tons burthen, unarmed, with no means of defending herself, and dependent on the wind for her propulsion through the water. The German government, with hundreds of submarines slinking below the surface, with periscope afloat at the approach of a vessel, with high speed on the water and power of propulsion below, carrying the deadly torpedo, was determined to destroy the vessels of all nations, neutral as well as enemy.

It seems to me patent that no reasonable man would under the circumstances enter into such a contract, unless the freight reserved was in such an amount as would fully repay the value of the vessel so risked, and this leaving out of consideration the lives of the crew endangered. That there were men found to take the risk on vessels, steam and sail, is a monument to the men whose patriotism and heroism, or in some instances it might have been cupidity, made it impossible for Germany to carry out her avowed intentions.

I find that the respondent was justified in declining to carry out the charter party. The libel will be dismissed, at the cost of the libelant. It will be so ordered.

PAYNE v. JACKSONVILLE FORWARDING CO.

(District Court, S. D. Florida. April 6, 1922.)

No. 1295.

1. **Admiralty ⇐66—Trial amendment, alleging negligence of fellow servant, allowed.**

An answer in libel for personal injuries may be admitted, after the testimony was taken, to allege that the negligence, if any, was that of a fellow servant, since such allegation would be material to a full presentation of respondent's case, if the negligent servant was a fellow servant, and, if he was not, the amendment would not affect the result.

2. **Seamen ⇐29(5)—In suit for injury, evidence showing facts different from those on which negligence is based is admissible.**

Where the engineer of a steamship sought recovery for personal injuries, and alleged that the respondent tug owner was negligent in the manner of attempting to float the steamship, which had stranded, any evidence tending to show a state of facts different from that alleged in the libel on which the claim of negligence was based is pertinent and admissible.

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3. Seamen ⟸29(1)—Engineer of vessel, voluntarily assisting in carrying out orders of tugs, held servant of tug owner.

Where the engineer of a vessel which had stranded was voluntarily assisting in carrying out an order given by the captain of the tug, in charge of the work of floating the vessel, when he was injured, he was, while so engaged, a servant of the owner of the tug, though he was employed and paid by the owner of the vessel, and owed no duty to assist in that operation.

4. Seamen ⟸29(3)—Captain of tug held "fellow servant" of engineer of vessel carrying out captain's orders.

The captain of a tug, in charge of the work of floating a stranded vessel, was not performing any of the duties imposed by law on his master in directing the placing of the towline and the movement of the tugs during the operation, and therefore was not a vice principal, but was a fellow servant of the engineer of the vessel, who was injured while carrying out the orders of the tug's captain.

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

In Admiralty. Libel by Marion L. Payne against the Jacksonville Forwarding Company to recover for personal injuries. Libel dismissed.

A. H. & Roswell King and W. H. Harwick, all of Jacksonville, Fla., for libelant.

Marks, Marks & Holt, of Jacksonville, Fla., for respondent.

CALL, District Judge. On February 14, 1921, the libel was filed in personam for personal injuries. May 6th an amended libel was filed, in which it is alleged that on the 3d day of May, 1919, the libelant was on board the Harrish as chief engineer; said ship was aground in St. Johns river near the municipal docks of the city of Jacksonville; that respondent had full charge of operations to float said ship, and employed in said operations two tugboats, the St. John and Ruth E., pulling in tandem; that the tugboats surged upon the line, whereupon it parted, and a portion of it struck the libelant with great force, injuring him; and for damages from these injuries this libel was brought. The negligence alleged is: The manner in which the line was rigged; surging upon it while so rigged; failure to warn libelant of the intention to surge upon the line; and failure to parcel the line at the points of contact with the chocks, bitts, and capstan base.

The respondent answered May 10, 1921, admitting that libelant was aboard said ship as chief engineer; further alleging that he was in command of said ship; admits it had full charge of floating the steamship with two tugs in the manner mentioned in the libel. Article 6 of the answer avers that the line used in attempting to float the steamship was rigged as follows, and not otherwise: One end of the hawser was made fast to the municipal dock, then led through a stern chock on one side of the steamship; thence past a bitt, through a stern chock on the other side of the ship; thence to the stern of the St. John and made fast. The answer denies that the respondent placed said hawser against sharp angles, etc., of the base of the capstan or permitted said hawser to chafe; denies that it failed to warn the libelant that

the tugs would surge upon the line; avers that the libelant had full opportunity to know and should have known that the tugs would surge on the line; avers, further, that to surge on said line was proper and usual under the circumstances; admits the parting of the hawser and injury to libelant; avers libelant was guilty of negligence by placing himself and remaining too near said line, and failing to exercise the care for his safety required of a prudent person under the circumstances; denies negligence in not parceling the hawser, and the other acts of negligence alleged in the libel.

At the hearing application was made by respondent to amend its answer by inserting the words:

"And if any other negligence proximately contributed to said injury it was the negligence of a fellow servant, of which the libelant assumed the risk."

The last of the testimony was taken on the 10th of August, 1921, and transcribed and filed in the court on November 19, 1921, and the hearing had within a few days after, when the motion for amendment was made. Objections were made to allowance of the amendment, but I do not think such objections should be sustained.

[1] If Capt. Potter was a fellow servant, as contended by respondent, such amendment would be material to a full presentation of respondent's case. If he was not, such amendment would not in any manner affect the final disposition of the case. The amendment will therefore be allowed.

[2] There was a motion to strike certain evidence, and also objections to certain evidence. In regard to the motion to strike will say that the issue in the case is the negligent performance of the work in floating the ship; the acts of negligence being the way the hawser was rigged, the surging on the hawser in this condition, and the failure to warn libelant that the tugs would surge on the line, as well as the failure to parcel the line. Each of these acts of negligence was put in issue by the answer. Any evidence tending to show a state of facts different from that set up in the libel upon which the negligence is based is pertinent and admissible. The motion to strike will be denied.

A list of objections to evidence was also filed. Some of these I think are well taken. The objections reserved on pages 233, 234, 241, 292, 293, and 294 will be sustained. The others will be overruled. The undisputed facts of this case may be stated as follows:

The steamship Harrish, owned by the Shipping Board, was not in commission, had no crew aboard, and only a watchman in charge. The libelant was employed by the Shipping Board as a marine engineer to look after the machinery of this steamship and others owned by the Shipping Board not in condition. On May 2, 1919, the steamship was moved by tugs from her berth preparatory to taking her to the dry dock for repairs, and in such movement grounded on a sand bar some 300 feet from the municipal docks in the St. Johns river. Having failed on May 2d to float the ship from this sand bar, efforts were renewed on May 3d to float her by means of two tugs pulling in tandem, the line, a hawser nine inches in circumference, being fastened to the municipal dock, or some stationary object near thereto, carried aboard the steam-

ship on the starboard side through a chock near the stern, thence around or through the stern bitts on the starboard side, thence across the poop deck through the chock near the stern on the port side to one of the tugs, and made fast. That on that morning libelant had gotten up steam on said steamship at the request of the general manager of respondent, in order that the steam capstan might be used in the operation, if its use was deemed advisable in floating the ship. That while the libelant was assisting in placing a stop on the hawser leading to the municipal dock, the two tugs surged on the line, it parted, and a portion of the line struck libelant and injured him.

There are conflicts in the testimony as to how the line was run across the deck, its position on the starboard stern bitts, and whether any warning was given before the surge was signaled. The testimony is uncontradicted that the steamship was equipped with a Hyde steam capstan, engine inclosed in the base, and steam pipe leading from boiler room, by which steam was supplied to capstan engine and exhaust pipe. This steam pipe and engine cylinders projected from the capstan base forward; the pipes being higher than the base of the cylinder. The contention of libelant is that the hawser passed through the starboard stern chock, around the starboard stern bitts, aft of and around the base of the capstan, and out of the port stern chock; this arrangement placing the line against the corner of the capstan base at a considerable angle. Thus there was a bend in the line, and the negligence charged is thus running the line, and also surging upon the line by the two tugboats while thus rigged. The respondents, on the other hand, contend that the hawser was run forward of the capstan, then out through the stern chock, giving a straight lead to the line.

A large amount of testimony was taken upon this issue, and is conflicting; but, taking it altogether, the positions of the witnesses, their opportunities for observation, their interest or otherwise, I am of opinion that the libelant has sustained his contention of the way the line was run. The testimony of the expert witnesses establish that such an arrangement of the hawser was unseamanlike, and that, while such surging upon the line to float a stranded ship is the usual and ordinary method of procedure, yet that, with the line in such a position, such a proceeding should not be had, or, if it is done, warning should be given all parties engaged in the work before the order for surging is given, in order that they might seek places of safety, as it would be liable to part the line. The preponderance of the evidence is that no such warning was given.

From the testimony I find that it was not negligence not to parcel the line. As I understand the way the line was rigged, the line would move through the chocks and around the bitts, in the event the ship was moved by the tugs, and that parceling is only used when a rope is liable to chafe at a particular point.

Upon whether the doctrine of "fellow servant" applies in this case hinges the right of the libelant to recover. This question naturally divides itself into two considerations: First, was the libelant a servant of the respondent at the time he was hurt; and, second, if he was, was Capt. Potter a fellow servant or a vice principal.

[3] As to the first consideration, it appears without contradiction that libelant was employed to care for the machinery, etc., of the Shipping Board ships not in commission; that the respondent was engaged in getting the ship off the bank and that libelant was aboard that morning for the purpose of having up steam to work the capstan in case it was needed in the operation; that Hagan, one of the men engaged in the work, was ordered to put a stop line on the hawser leading to the municipal dock and was engaged in trying to do that service when libelant came from the engine room to warm up the capstan engine that it might be in condition to use; that, when libelant saw Hagan proceeding in a wrong manner to put on such stop line, he went to his assistance and while doing this act he was injured by the parting of the hawser; that Capt. Potter was in charge of the work of floating the ship and giving the orders to the tugs from the stern of the stranded ship.

The fact that libelant was employed by the Fleet Corporation is not the criterion alone, by which this question is to be decided. The true test is whether both, at the precise time of the accident, were working in a common employment, under the same general control and direction, no matter by whom their wages are eventually paid, or in whose general employment they may be. In the instant case it seems to me uncontrovertible that the libelant at the time of the accident was attempting to carry out the order theretofore given Hagan to put a stop line on the shore end of the hawser. The fact that he was voluntarily assisting in this particular work does not alter his status. It was no part of his duty to his employers to render such assistance to Hagan. The respondent owed no higher or greater duty to him than to others engaged in the work. So it seems clear to me that the libelant must be held to have been acting as the servant of the respondent at the time of his injury.

[4] As to the second consideration, whether Capt. Potter was a fellow servant, the facts are that Capt. Potter was in control of the work for the respondent, directing the placing of the line, the movement of the tugs and giving the signals controlling their movements. This as I understand the law, does not make him a vice principal or alter ego, making his negligence the negligence of the employer, thereby making it responsible for injuries resulting from such neglience.

"The solution of this question depends upon the implied obligation assumed by an employer to his servant. Unless there is a breach of that obligation there is no negligence. Briefly stated, this obligation is that the employer will not expose the servant to any unreasonable hazards, in view of the nature of the services to be performed. As to those things to be done by the employer personally he undertakes not to be negligent. As to those things which he is not to do personally, he undertakes to use due care to see that they are properly done, and as incidents of this obligation he is to use due care to provide safe appliances and facilities for the servant in the service to be performed, and to employ competent fellow servants to assist him, if fellow servants are required. Those things which are to be done by the employer personally are employer's duties, and, if he delegates them to others, he undertakes for their proper discharge precisely as though he personally were to discharge them." Quinn v. N. J. Lighterage Co. (C. C.) 23 Fed. 364.

One to whom these employer's duties are delegated, no matter what may be his designation, is a vice principal or alter ego and his negligence is the negligence of the employer.

In the instant case, the placing of the line, the giving of signals to the tug boats, whether the line should have been parceled to prevent chafing are all acts to be performed by employees and form no part of employers' duties. They are incidents of the work of floating the ship; temporary conditions occurring during the operation. I therefore find that Capt. Potter and the libelant at the time of the libelant's injury were fellow servants of the respondent engaged in the performance of a common undertaking.

Reference has been made to section 20, 38 Stat. 1185 (Comp. St. § 8337a), and the amendment thereto in 1920 (41 Stat. 1007, § 33) as controlling to some extent in this case. It is sufficient to say that the amendment to section 20 was approved in June, 1920, and this cause of action accrued in May of 1919, and cannot affect libelant's rights, even if said amendment had not by its very terms been applicable to actions at law. Section 20 of the act of 1915 does not apply to cases of this kind.

I therefore find for the respondent. The libel will be dismissed.

OPELIKA SEWER CO. v. CITY OF OPELIKA.

(District Court, M. D. Alabama, E. D., at Opelika. April 3, 1922.)

Municipal corporations ⇐711—City held without power to make contract fixing unchangeable rates for sewer company.

Under Const. Ala. § 22, providing that "every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment," the Legislature cannot confer on a municipal corporation power to make a contract fixing unchangeable rates to be charged by a public service corporation, and rates fixed by an ordinance granting a franchise to a sewer company are not enforceable when shown to be confiscatory.

In Equity. Suit by the Opelika Sewer Company against the City of Opelika. On motion by complainant for preliminary injunction and by defendant to dismiss bill. Motion to dismiss denied, and injunction granted.

Barnes & Walker, of Opelika, Ala., and Steiner, Crum & Weil, of Montgomery, Ala., for plaintiff.

N. D. Denson & Sons, of Opelika, Ala., for defendant.

CLAYTON, District Judge. The plaintiff, Opelika Sewer Company, a public utility corporation, alleges in its bill that the defendant, city of Opelika, in April, 1902, adopted an amended ordinance granting to the Sanitary Sewer Company of Philadelphia, and its successors, permission to construct, operate, and maintain a sanitary sewerage system in the city for a period of 30 years. Section 6 of the ordinance provided that the sewer company, and its successors, are "authorized to

charge not in excess of the following annual rates for sewerage service, which said rates may be collected quarterly in advance." Then follows the schedule of rates. The ordinance contains other provisions usual in such case and is made an exhibit to the bill.

It is also alleged that the plaintiff, having acquired all the rights of the Sanitary Sewer Company under the ordinance, in the year 1902 constructed and has since operated and maintained in the city of Opelika a sanitary sewerage system and disposal works, serving the city and its inhabitants, and charged until January 1, 1922, the rates specified in the ordinance. It is averred that the fair and reasonable value of the plaintiff's investment is approximately $170,000, and that it has issued and has outstanding $70,000 of 5 per cent. interest-bearing bonds; that during the period from January, 1904, to December, 1920, the gross receipts of the company were approximately $58,800, while its actual operating expenses for the same period were something over $38,000, and the accumulated interest on the bonded indebtedness amounted to about $59,500; that its gross operating receipts during the year 1921 were about $5,300, and its operating expense about $3,200; and that the receipts and operating expenses would be practically the same for the current year. It is further stated that the accrued and unpaid interest on its bonded indebtedness amounts to more than $36,000, and that the plaintiff is otherwise indebted for current expenses for the maintenance and operation of the sewer system in the sum of $7,500, and that, although this system has been managed and operated as economically as possible, the plaintiff has at no time during its operation been able to earn any dividend whatever on its investment of $170,000, or on its capital stock of $50,000.

The rates prescribed in the ordinance of April 22, 1902, are alleged to be confiscatory, because inadequate to afford a fair return upon the reasonable value of plaintiff's property employed in the service, and that, if compelled to continue the service under the rates named in the ordinance, it would result in the taking of the plaintiff's property without just compensation, in violation of the Fourteenth Amendment of the Constitution of the United States.

Further, it is alleged that in an effort to relieve the situation, and in a measure provide for revenue commensurate with the service, and to insure in some degree a fair return upon the plaintiff's property employed in the service, and with the hope of obtaining the co-operation of the city and its authorities, plaintiff petitioned the city council of Opelika for permission to increase its rates according to the schedule set forth in its petition, which is made an exhibit to the bill, and that, although the facts stated therein were not controverted, the petition was denied, and that thereupon the plaintiff, upon advice of counsel, promulgated and put into effect the rates named in its petition, and these are alleged to be fair and reasonable to the city and its inhabitants, and necessary to the continued operation of the plaintiff's system or plant.

It is charged that thereupon the mayor of the city of Opelika caused notice to be published in the newspapers, advising and warning the citizens of Opelika not to pay plaintiff's increased rates, and that as a

consequence practically none of the plaintiff's patrons are paying anything; that the only feasible way for collecting for the plaintiff's service is to discontinue the service, which it is averred would result in innumerable suits for damages, great annoyance, and expense, and that in order to shut off any such customers it would be necessary to dig up the sewer connections in the streets or alleys in the city, and that the mayor has ordered the police officers to arrest any of the plaintiff's employees who attempt to dig up any portion of the streets of the city for such purpose; that the city is threatening to take steps to annul the plaintiff's franchise, which would destroy or greatly impair its credit and seriously embarrass its financial operations, and would result in irreparable injury to the plaintiff.

The prayer of the bill is for injunction pendente lite, which is asked to be made perpetual on the hearing, restraining the City of Opelika, its officers, agents, and servants, from interfering with the plaintiff in the enforcement of the rates prescribed by it, and for general relief. The defendant has not answered, but moves the dismissal of the bill upon the ground that it is without equity, and upon the further ground that the plaintiff by its continued service has acquiesced in the ordinance rates, and is therefore estopped from questioning the rates.

Plaintiff's contention is that the ordinance does not constitute a contract between the plaintiff and the defendant, in so far as it relates to the rates, and for the reason that (1) the city had no charter power to thus contract; and (2) that, if the Legislature has granted such power, the grant is in conflict with section 22 of the Constitution of 1901 of Alabama, and therefore ineffective. And the defendant insists that the ordinance constituted a valid and binding contract, and that the rates therein stipulated cannot be changed without its consent. The Public Service Commission of the state has no jurisdiction over utilities of the character here involved.

The jurisdiction of this court is invoked under the Fourteenth Amendment of the Constitution of the United States, which prohibits the taking of property without just compensation. Columbus Ry., L. & P. Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648. The charter of the city of Opelika provides that the municipality has the power—

"to establish and build drains, sewers, conduits and reservoirs and to regulate the same," and "to authorize the use of the streets of the city for horse, steam or electric railroads, and to regulate the same and to attach conditions to any franchises, and to compel such companies to make and to keep in repair such parts of the streets, bridges and crossings upon which their cars run as the board may deem proper, to regulate the use of the streets for the erection of telegraph, telephone, electric and all other systems of wires, and conduits and to require the same to be placed under ground if deemed necessary for public convenience or safety," and "to maintain the health and cleanliness of the city, and to this end, to adopt and maintain an efficient system of sewerage, to adopt such ordinances and regulations as the board shall deem necessary or expedient for the protection of health and to maintain a good sanitary condition in public places and on private premises."

The plaintiff insists that the rates specified in the ordinance granting the franchise is not a contract, but merely a schedule of rates, subject to change, and that these rates are so low as to be confiscatory. On

the other hand, the defendant insists that the rates stipulated in the ordinance are an inseparable part of the franchise contract and are binding upon the plaintiff.

The rule, well established in reported cases, is that, if the rates fixed in a statute, ordinance, or order of a commission are so inadequate that their enforcement would be equivalent to the taking of property for public use without just compensation to the owner, they should not be observed, and because there must be afforded a fair return upon the property at the time of its use for the public benefit. In recognition of this rule the Supreme Court said in Newton v. Consolidated Gas Co. of N. Y. (March 6, 1922) 257 U. S. —, 42 Sup. Ct. 264, 66 L. Ed. —, that:

"The general doctrine applicable when rates are alleged to be confiscatory has been so often stated that present discussion of it is unnecessary. Knoxville v. Water Co., 212 U. S. 1; Willcox v. Consolidated Gas Co., 212 U. S. 19; Des Moines Gas Co. v. Des Moines, 238 U. S. 153; Rowland v. St. Louis & S. F. R. R. Co., 244 U. S. 106; Denver v. Denver Union Water Co., 246 U. S. 178; Lincoln Gas Co. v. Lincoln, 250 U. S. 256."

In Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176, the Supreme Court had under consideration the question here presented. There the charter of Los Angeles granted to the city the power to "regulate telephone service in the use of telephones within the city and to fix and determine the charges for telephones and telephone service and connections," and other comprehensive powers in this connection were contained in the charter. In that case the court held that, while these provisions were sufficient to authorize the exercise of the governmental power of regulating charges, they gave no authority to enter into a contract to abandon the governmental power itself. This case has been repeatedly followed. Milwaukee Ry. Co. v. Commission, 238 U. S. 181, 35 Sup. Ct. 820, 59 L. Ed. 1254; Winchester v. Winchester Waterworks, 251 U. S. 192, 40 Sup. Ct. 123, 64 L. Ed. 221. In the case of Knoxville Gas Co. v. City of Knoxville (C. C. A.) 261 Fed. 283, where the question is fully discussed and authorities collated, the Circuit Court of Appeals, in discussing the provision of the charter, broader than those here involved, said:

"The power to fix rates to be charged by public service corporations * * * is governmental, and resides primarily in the state, and municipalities cannot exercise such power, unless the state has in fact surrendered its power in that behalf. It is the settled * * * rule that a state's surrender to a municipality of power irrevocably to fix rates for a public service corporation must appear in explicit and convincing terms, and all doubtful expressions are to be resolved in favor of the state and against surrender of the power."

This was also the holding of the court in the case of O'Keefe, Receiver, v. City of New Orleans (D. C.) 273 Fed. 560, affirmed 280 Fed. 92. In Ottumwa Ry. & Light Co. v. City of Ottumwa (Iowa) 178 N. W. 905, the court said:

"In fewer words the cases proceed on the general theory that it is against public policy to contract for unchanging rates; that there must be no such contract because its enforcement might, on the one hand, fasten what proves to be an exorbitant charge upon the patrons, or, on the other, prove a rate that will confiscate the property of the service corporation. While there are

other lines of reasoning advanced in the authorities, in the main and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the Legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy."

In that case it was held that a 5-cent fare provision in the franchise ordinances did not constitute a binding contract, and the court restrained the city from interfering with the railway in increasing its rate of fare. It seems to me that the reasoning in Denver v. Stenger (decided by the Circuit Court of Appeals, Eighth Circuit, December 29, 1921) 277 Fed. 865, must be followed in the instant case. There the District Court, whose ruling was affirmed, enjoined the city of Denver from enforcing a maximum fare fixed by ordinances and the city insisted that:

"The acceptance of the ordinances and franchises under which the tramway company * * * operates a street railway in the city * * * constituted contracts binding upon both parties, * * * and that * * * there was power to make them, * * * and that they are valid and binding as contracts until the city * * * thinks proper to change the rate."

And the appellate court said:

"* * * The only important question raised upon the record * * * 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. * * * 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. * * * 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. * * * 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. * * * If however, the appellant can at any time change the fares—in other words, refuse to be bound by the contract—how does more 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; Puget Sound Traction Co. v. Reynolds, 244 U. S. 574; Rogers Park Water Co. v. Fergus, 180 U. S. 624; San Antonio Public Service Co. v. City of San Antonio, 257 Fed. 467; City of San Antonio v. San Antonio Public Service Co., 225 U. S. 547; Central Power Co. v. City of Kearney, Court of Appeals, Eighth Circuit, opinion filed July 13, 1921; City of Dallas v. Dallas Telephone Co., 272 Fed. 410.

And numerous other cases are cited.

In the same case, Denver v. Stenger, supra, the provision of the Constitution of Colorado is quoted in these words:

"The right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking 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."

And the court concludes that:

"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 statutes 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 is to be found in San Antonio Traction Co. v. Altgelt, 200 U. S. 304; 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, construes the Missouri Constitution. Southern Electric Co. v. City of Chariton, 255 U. S. 539, construes the Iowa Code. Central Power Co. v. City of Kearney, supra, construes the statute of Nebraska. O'Keefe v. City of New Orleans, 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."

The settled rule in Alabama is that:

"Municipal corporations can exercise only such powers as are expressly granted in their charter, or such as may be necessary and proper to carry such express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created. And any reasonable doubt as to the existence of a power claimed to be conferred by the charter will be resolved by the courts against the corporation, and in favor of the public." Birmingham, etc., Co. v. Birmingham, etc., Co., 79 Ala. 465, 58 Am. Rep. 615.

If, however, the Legislature had granted or attempted to grant such power to the municipality as here claimed, manifestly, its act would have been in violation of section 22 of the Constitution of Alabama, which provides:

"That no ex post facto law, nor any law impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment."

The language employed in this provision of the fundamental law of the state is comprehensive, and its purpose as well as its meaning is plain. The Supreme Court of Alabama in discussing this provision, intimated, in some of its decisions, that legislative power might be granted to contract for fixed rates for a reasonable period, but in City of Mobile v. Mobile Electric Co., 203 Ala. 574, 84 South. 816, considering the power to make grants and contracts of this character, declared that:

"This power can neither be abdicated nor bargained away, and it is inalienable, even by express grant; that all contracts and property rights are held subject to its fair exercise."

In the former appeal of this case, 201 Ala. 607, 79 South. 39, L. R. A. 1918F, 667, the court said:

"The municipality cannot, in the exercise of its delegated contractual right, perpetually or for an unreasonable time fasten upon the taxpayers and inhabitants rates and obligations that cannot be changed or regulated during reasonable intervals so as to meet changed conditions and thereby avoid extortion and oppression."

And in Birmingham, etc., Co. v. Birmingham, etc., Co., supra, wherein the Supreme Court was considering section 23 of the Constitution of 1875—a companion to section 22 of the present Constitution though not so comprehensive as the latter section—it was held that neither the charter of the city of Birmingham, nor the general statutes conferred on that corporation the power to grant by ordinances in the nature of a contract, the exclusive franchise in perpetuity for running a street railway through certain designated streets and avenues of the city, and that, if such power were granted by its charter or any public statute, it would be violative of that constitutional provision against the passage of any law "making any irrevocable grant of special privileges or immunities."

There is nothing in Weller v. Gadsden, 141 Ala. 642, 37 South. 682, 3 Ann. Cas. 981, cited by counsel for defendant, opposed to this view. The question here presented was not under consideration there, and while it was said in that case that the latter clause of section 22 of the Constitution had reference to grants and the revocations, alterations, and amendments thereof by "the Legislature," it is difficult to perceive how, if the Legislature is prohibited from making such grants directly, it would have the power to make them indirectly by delegating the authority to the municipality. The court in that case recognized that the Constitution reserved in the Legislature the power to revoke, alter, or amend such franchises.

Decisions of state courts relating to matters of local law, such as the construction of a state Constitution and statute, and the power of local municipal corporations, must be regarded by the federal courts as controlling, when their application involves no infraction of any right granted or secured by the Constitution of the United States (Old Colony Trust Co. v. City of Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410), except, of course, as has been aptly said:

"It cannot be expected that this court will follow every such oscillation, from what ever cause arising, that may possibly occur." Gelpcke v. Dubuque, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520.

The case of San Antonio v. San Antonio Public Service Company, supra, is in point, and would seem to be conclusive of this question. The court in that case had under consideration a provision of the Texas Constitution, practically the same as section 22 of the Alabama Constitution, except that the latter is perhaps more rigid. The court unequivocally held that the Legislature of the state of Texas was prohibited by the organic law of that state from granting a municipality power to contract for fixed rates to be charged by a public utility corporation, and in Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 41 Sup. Ct. 400, 65 L. Ed. 764, that court said:

"The right of a municipality to regulate street railway fares gives no power to violate the United States Constitution, Fourteenth Amendment, by enforcing a confiscatory rate."

Section 228 of the Constitution of Alabama, cited by counsel for the city, has no application. That section is a limitation upon the power of cities and towns of more than 6,000 population (a class to which the city of Opelika does not belong) to grant certain franchises for a longer period than 30 years, and does not in any manner conflict with section 22. I am therefore constrained to hold that the city of Opelika did not make or have power to make irrevocable rates to be charged by this public utility, and it appears that the ordinance rates are unreasonably low.

It follows that the motion to dismiss the bill must be denied (see footnotes to rule 29 [3d Ed.] Hopkins' New Fed. Eq. Rules), and that interlocutory injunction must issue. Accordingly it will be so ordered.

THE LUDLOW.

JAMES v. WHITNEY & BODDEN et al.

(District Court, N. D. Florida. March 30, 1922.)

1. **Seamen ⟸30—Seaman held not guilty of willful disobedience, which justified his imprisonment by the master.**
   A seaman *held* not chargeable with willful disobedience, which would authorize his imprisonment by the master, and awarded $100 damages for confinement in irons for 16 hours.
2. **Seamen ⟸30—Shipowner not liable for punitive damages for assault by master.**
   Shipowners are not liable for punitive damages for malicious assaults by master on seamen.
3. **Seamen ⟸30—Shipowner may be liable for punitive damages for abuse of seamen, authorized or ratified.**
   Shipowners may be liable for punitive damages for abuse of seamen, if authorized or ratified by owners.
4. **Seamen ⟸30—Punishment at sea only for willful disobedience.**
   Punishment may be legally inflicted at sea only when there is willful disobedience of lawful command.

In Admiralty. Suit by Dalmond James against Whitney & Bodden, a corporation, as owner, and W. A. Cummings, as master, of schooner Ludlow. Decree for libelant.

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

The facts of this case are substantially stated in the libel filed herein, except as to maliciousness on the part of the master, which allegation was not sustained by proof, to wit:

(1) That the defendants Whitney and Bodden, owners, are residents of Mobile, Ala.; that they are incorporated as Whitney & Bodden; that they are the owners of a certain schooner, to wit, the Ludlow; that the defendant W. A. Cummings is the captain of said schooner, and is in Pensacola, Fla., and within the jurisdiction of this court; that the libelant is in Pensacola, Fla., and within the jurisdiction of this court; that the schooner Ludlow is in the port of Pensacola, and within the jurisdiction of this court.

(2) That on or about the 28th day of January, 1922, the libelant shipped on board the said schooner in Porto Rico as cook; after the vessel was out about 10 days at sea, the said W. A. Cummings, who was captain of said schooner, unjustly accused libelant of being a thief and stealing food supplies from the storeroom; that said master, while on the high seas, ill treated, abused, and kicked libelant, * * * and without just cause or provocation maliciously and unlawfully arrested libelant, put him in rusty irons, and there kept him for the period of 16 hours; that he was confined for that period of time in a dark, dirty, damp, and unsanitary dungeon on said vessel, without food, drink, light, or air during the entire time, and by reason of such brutal and ill treatment of libelant he was chilled, bruised, and made very weak, suffered severe pain and soreness, and continues to suffer much pain in his legs, arms, and chest; that by reason of said false accusations libelant will be greatly handicapped about getting work hereafter.

Libelant alleges that the said W. A. Cummings was prompted to such action by malice; that the said captain had no reason to believe that the libelant would steal, or did steal on that occasion. Libelant claims $3,000 damages.

The answer of the respondent was in the nature of general denial of maliciousness, which answer was sustained by the proof. The answer of respondent further pleaded that the conduct of the master aboard ship was disciplinary and authorized by law.

Walter Kehoe and Alto Adams, both of Pensacola, Fla., for libelant.
Philip D. Beall, of Pensacola, Fla., for respondent.

SHEPPARD, District Judge (after stating the facts as above). This case involves the responsibility of the master for the tort of the agent, growing out of a libel in personam against the master and owners of a ship, for an alleged abuse of the master's authority at sea. There is a clear distinction in the admiralty law between the liability of the owner or principal as a consequence of the tort of the agent, when the act of the agent was in the exercise of delegated authority, or when the voluntary act committed by the agent was prompted by malice or other caprice.

The test of the responsibility of the owner, as recognized in the admiralty law, is whether the tort was committed in the scope of the owner's business or authority, as distinguished from the voluntary act of the servant incident to temperament or impulse, as when the deed may be said to have been done maliciously. When malice actuates the injury, liability of the tort-feasor himself may be twofold: First, for the actual damage sustained; secondly, that which may be awarded as exemplary or punitive. Pacific Packing & Navigation Co. v. Fielding, 136 Fed. 577, 69 C. C. A. 325. The owner or employer is exempt from punitive damages, unless it may be shown that the owner acquiesced in or ratified the wrong, or that the deed was perpetrated in the line

of the agent's authority. Otherwise, he is liable only for actual damages suffered.

The second paragraph of the libel alleges malicious conduct upon the part of the master. Even if the evidence supported this aspect of the controversy, still the owners of the Ludlow, by the weight of authority, would not be liable, since the injured party may look no further for responsibility than to him who committed the malicious act. Pacific P. & N. Co. v. Fielding, supra.

There is present, however, the charge that the conduct of the master placing the libelant in irons was in the course of the owner's employment, in charge of the vessel at the time; unless, therefore, the conduct of the seaman was such provocation to justify the lawful exercise of the master's authority, or if that authority was abused, liability of the owners would follow. To determine that fact, whether the master was in the execution of authority delegated to him by the nature of his employment, or whether the alleged tort was the voluntary malicious act of the master, we must turn to the testimony, which as usual in such cases is conflicting, and more or less unreliable. Parenthetically, it may be observed that about all that is left to the dominion of the master of a ship at sea, to enforce discipline, or to suppress recalcitrant sailors, since the adoption of the Seamen's Act (38 Stat. 1164), is to place the offending seaman in irons. This punishment may follow the willful disobedience of a lawful command of the master; but, to justify it, both elements necessary to the seaman's offense, I take it, should be shown by the evidence; that is, a precedent lawful command and willful disobedience.

It is not clearly or satisfactorily shown what happened between the master and the steward on the poop deck, where the controversy began, for the stories of the occurrences there are conflicting. The master claims the steward pinned him against the wall of the house, and the latter insists that he was only engaged in holding the master's foot, to prevent the master from kicking him. After the master extricated himself from this contact, according to his version, he ordered the steward below, and the steward followed him to the cabin; when it was reached, the master ordered the steward to stop at the door. The latter complied, while the master procured and returned with a gun and irons, and personal conflict between the two was renewed, due, as the master claims, to the steward's physical resistance to the master's efforts to manacle him. The steward's claim is that he objected to the abrasion caused by the rusty surface of the iron on his wrist.

At this juncture it appears the master was not very considerate of the steward's protest, and to subdue the latter the master threatened the use of the gun which lay close by on the table, when it was that the steward sang out, "Get the gun;" it was this exclamation that brought the mate, who entered the cabin and found the steward holding the master by the arms, and O'Garro, one of the seamen, holding the master's revolver, which, according to the testimony of both the master and O'Garro, the latter took from the table. O'Garro and two others of the crew, attracted by the loud talking in the cabin, had preceded the mate by a few seconds; both the mate and O'Garro ordered

the steward to take the irons, which he did readily and without further protest.

The responsibility of the shipowner for anything which may have followed the rencounter between the master and the steward depends upon whether the misconduct was in willful disobedience of the command of the master to take the irons. It may have been a disobedience, and still not willful; his conduct in not submitting to the irons may have been influenced by fear of the master carrying out his threats previously made that he would kill him. The court may properly look at the situation confronting the libelant. The master had a gun in his hand, or within easy reach. He had repeatedly threatened the libelant, if he did not submit to his orders. The court is impressed with the unseemly manner the master went about enforcing discipline on this ship. The dignity of his authority would be best preserved by directing the mate to place the irons, or to at least summons his presence in the performance of such a task. The circumstances confronting the seaman may have reduced him to a feeling of future helplessness, if he submitted to the master's demands. The master was excited, and, if any of the witnesses are to be believed, was quite angry with the steward. When the mate and seaman arrived, there was no further show of resistance upon the part of the libelant. It may be that libelant felt more security in the presence of the crew than when alone with the indignant master, who admittedly had access to the gun.

Furthermore, the provisions of the La Follette Seamen's Act (paragraph 4, c. 8, Annotated Statutes of U. S. [2d Ed.] vol. 9, p. 215 [Comp. St. § 8380]) are reciprocal, and the duty of the master to make note of and to follow the redress afforded by the statute for any willful disobedience at sea is as imperative as is the duty of the seaman to obey lawful commands. The seaman was subject to court trial and punishment after the vessel reached port, but the master made no complaint of the affair. If any log of the incident was preserved, it was not produced at this hearing. The best evidence of the good faith of the master. as well as of the occurrence itself, is the entry in the log, No reason is given why this entry was not made or reported to the proper officials when the vessel arrived in port, nor is any sufficient excuse proffered why the master, assumed to be both lawgiver and executioner at the same time, especially when it concerned a seaman, of whom he was suspicious, and who had been "ugly" before on the voyage. In the circumstances of the case, the court is inclined to the view that the master was unduly hasty in the premises, and probably proceeded upon the assumption that the libelant would disobey him, and his faith in this conjecture needed no evidence.

The steward's story that he was not disobeying, but merely preventing the master from executing his threats, is entitled to some credence, in view of the master's personal assumption of a duty, when he could just as well have delegated it to another, who entertained probably less feeling against the libelant. The conduct of the steward in wrangling with the master or laying hands on the master at sea is not to be condoned, and the only excuse for any disobedience, which may be tolerated, is the state of fear or apprehension in which the inexcusable

conduct of the master may have placed him. At any rate the willful disobedience, which alone would justify the punishment inflicted, is not established by the preponderance of the evidence adduced here. However, the damage to the steward recoverable by this libel being limited to injury to his health or person, of which the evidence shows none, the only thing for which he may be compensated is the discomfort of 16 hours' confinement in the lazarette. I conclude that nominal damages is sufficient reparation.

For this inconvenience, $100 will be awarded; each party paying his costs.

JAY et al. v. IRELAND & MATTHEWS MFG. CO.

(District Court, E. D. Michigan, S. D. March 30, 1922.)

No. 395.

1. **Patents ⊂=328—1,132,273, claims 9 and 14, for vacuum feed tank for automobiles, held valid and infringed.**
   The Jay patent, No. 1,132,273, for vacuum tank for feeding gasoline to the carbureter of an automobile engine, claims 9 and 14, *held* valid and infringed.
2. **Patents ⊂=240—Improvement of patented device does not avoid infringement.**
   Neither the impairment nor improvement of a patented construction, even though the new structure may embody a patentable improvement, will avoid infringement so long as it contains all the elements called for by the patent claims, functioning together in the same manner as in the patented structure.

In Equity. Suit by Webb Jay and the Stewart-Warner Speedometer Corporation against the Ireland & Matthews Manufacturing Company. Decree for complainants.

Edward N. Pagelson, of Detroit, Mich., and Charles S. Burton, of Chicago, Ill., for plaintiffs.

William M. Swan, of Detroit, Mich., for defendant.

TUTTLE, District Judge. The bill in this case charges infringement by the defendant, Ireland & Matthews Manufacturing Company, of United States letters patent, No. 1,132,273, granted to the plaintiff Webb Jay, March 16, 1915; the coplaintiff, Stewart-Warner Speedometer Corporation, being exclusive licensee under said patent. The article of commerce involved, is a vacuum tank used for feeding gasoline to the carbureter of an automobile engine.

This case having come on to be heard upon the plaintiffs' motion for preliminary injunction, and the defendant's motion to dismiss, and the parties having presented their respective affidavits and exhibits, and it appearing that nothing additional by way of evidence would be desired by either party for hearing on the merits, the parties have agreed in open court that the present hearing should be a final hearing on the merits and that decree shall be rendered accordingly.

There have been put before me, in connection with the claims of which infringement is charged, being claims 9 and 14 only of plaintiffs'

patent, the opinion rendered by the United States District Court of the Northern District of Ohio in the suit of the same plaintiffs against Sparks-Withington Company (258 Fed. 45), and the opinion of the Circuit Court of Appeals of this Sixth Circuit, confirming the decree of said District Court, reported in 270 Fed. 449, and my attention has been directed to the specific construction involved in that suit and therein held to infringe said claims 9 and 14, which claims were held to be valid.

There has also been put before me the present defendant's structure charged to infringe said claims, and I have witnessed the operation of the plaintiffs' commercial structure, which, as to all that said claims 9 and 14 relate, is substantially the structure of the patent in suit. Defendant contends that there is substantial difference between the structure of the patent in suit and plaintiffs' commercial structure, but with this contention I do not agree. I have also witnessed the operation of the defendant's device charged to infringe said claims.

My attention has further been directed to the decision of the United States District Court for the Northern District of Illinois, affirmed by the Circuit Court of Appeals for the Seventh Circuit, in a suit by the present plaintiffs against Frederick Weinberg, said opinions reported, respectively, in 250 Fed. 469, and 262 Fed. 973. I have also examined the construction and witnessed the operation of the device of the defendant in that suit, referred to as the "Weinberg tank," and found in the decree therein rendered and affirmed by the Circuit Court of Appeals of the Seventh Circuit, to be not an infringement of said claims 9 and 14, although both of said claims were held to be valid. All of the operated devices were the commercial structures with glass bodies substituted for the metal, so that the interior operation could be clearly observed.

I have also considered certain parts of the record in said suit in the Seventh Circuit, which have been brought to my attention at the present hearing by Weinberg personally, who, upon his statement in open court that he is under contract with the defendant, Ireland & Matthews Company, to defend this suit, has been allowed without objection by the plaintiffs to appear at this hearing substantially as a witness as to certain demonstrations stated by him to have been made in said Seventh Circuit suit, and as to the operation, on an automobile in service, of the said Weinberg device involved in said Seventh Circuit suit, and of the defendant's device involved in the instant suit. My present conclusions are derived from consideration of all the devices, demonstrations, records, and decisions brought to my attention in conjunction with the claims sued on.

[1] According to the interpretation which the Circuit Court of Appeals of this Sixth Circuit has put upon claims 9 and 14 of the plaintiffs' patent, as I understand the opinion rendered in the suit of Jay et al. v. Sparks-Withington Co., supra, and in view of the structure therein held to infringe said claims, they cover broadly a vacuum feed device characterized, as to the vacuum chamber and appurtenances, by three features defined by certain relations, viz.: (1) A suction-controlling valve; and (2) an atmosphere inlet-controlling valve, which valves are

alternately opened; and (3) a liquid outlet valve which is opened by gravity flow of the liquid. To these elements there is added in claim 14, differentiating it from claim 9, the element of an atmosphere vent or inlet to the second or auxiliary chamber, into which the liquid is delivered by gravity flow from the vacuum chamber.

This understanding of the scope given to these claims by the Circuit Court of Appeals of this Sixth Circuit I derive from the following language of the opinion of that court, designed to point out, as I understand, what that court found to be the differentiation of these claims from the prior art:

"With respect to claims 9 and 14: * * * Claim 9 contains the elements of 'means for alternately connecting said supply receptacle (the vacuum chamber) with the exhaust means and with the atmosphere, and means controlling communication between said (vacuum chamber) and said (lower tank), adapted to be opened by gravity flow from said supply to said auxiliary receptacle (lower tank).' Claim 14 also contains the substance of this last element."

The addition of the vent pipe in claim 14 is recognized as distinguishing between the two claims in the concluding sentence of the opinion:

"It does not seem denied that, defendant employs the atmospheric pipe called for by the fourteenth claim."

I am bound by the opinion thus indicated by the Circuit Court of Appeals of this Circuit, correctly interpreted, and, furthermore, I find the same in accordance with my own independent judgment from the material evidence before me in this case.

Upon examining and witnessing the operation of the defendant's device, I am convinced that it contains all the elements of these two claims 9 and 14, constructed and co-operating for the same functions and to the same results as in the structure in the patent in suit. It has the vacuum chamber and the auxiliary chamber into which the vacuum chamber discharges by gravity flow. It has a suction communication and atmosphere communication in the vacuum chamber, and valves controlling these two communications, which valves are opened alternately, and this opening is effected by the identical means and in the identical way as in the patent structure, viz. by a float operated by change of liquid level in the vacuum chamber. It has also the outlet or delivery from the vacuum chamber to the auxiliary chamber, controlled by a valve which is opened by the gravity flow or pressure of the liquid in the vacuum chamber.

It is contended on behalf of the defendant that, by reason of the fact that in the defendant's device the seat of the vacuum chamber outlet valve is three degrees out of perpendicular, being undercut to that extent, and that the valve suspended in front of this slightly inclined seat when hanging in vertical position, as it tends to hang by gravity, is separated from the seat by this three degree angle, said valve is opened by gravity, or, as it is otherwise expressed, is "normally open," and cannot be truly said to be opened by gravity flow or pressure of the liquid.

I have carefully watched the operation of the defendant's device in this respect, and it is to be noted, first, that the opening of this valve due to gravity, or to the "hang" of the valve, as distinguished from and

apart from the opening caused by flow of the liquid, is almost negligible in amount, and wholly inadequate for any practical operation of the device as a whole for its purpose of furnishing fuel to the carbureter, and that in fact, in actual practical operation of the device, the valve is always opened by gravity flow or pressure of the liquid, its total opening for the slowest discharge or delivery of the liquid which occurs in the ordinary normal operation of the device, being several times the maximum opening which can be caused by gravity or "hang" of the valve without flow. It is clear to me, therefore, that, even if there is at any time some opening by gravity alone, there is at all times in operation also opening as called for by the claim, caused solely by gravity flow, and this latter opening is the effectual opening for the purpose of the functioning of the device, while the gravity opening is ineffectual for such functioning.

It was also clearly demonstrated by the operation of the defendant's device that while the parts—the valve and its seat—are wet with gasoline, as they must be in actual operation, if at any time there is no liquid in the vacuum chamber, and consequently no flow of liquid therefrom, the outlet valve does not leave its seat when the suction is relieved and the atmosphere admitted to the vacuum chamber, unless the lower chamber is so nearly full of gasoline that the valve and its seat are immersed, but, on the contrary, that valve remains fully seated, being evidently held by capillary attraction, due to the film of moisture between the valve and its seat, and under these circumstances I have observed that, if the valve is jarred or blown open, it returns to its seat, from which I conclude that the three degree divergence between the valve seat and the normal gravity-caused position of the valve yields a crevice so small that very slight moisture on the surface—the imperceptible amount which remains after blowing the valve open—spans the gap between the valve and its seat at the nearest point, and over a sufficient area to produce the capillary action which fully seats the valve. In fact, the only times in which the valve normally hung free and was open for this small space of three degrees was when the valve and its seat were both entirely dry, or when the lower chamber was so full of gasoline that the valve and its seat were immersed in the fluid. During such periods that it was open the three degrees this valve was not performing either the function of stopping the upward flow of air or permitting the downward flow of liquid. Whenever the liquid was flowing from the upper chamber to the lower chamber, the valve was held open by the flow of the liquid.

Regardless of this capillary seating, it is certain that the effectual opening at all times is caused solely by the gravity flow or pressure of the liquid, and that any otherwise caused opening is an ineffectual opening of the valve. It appears that the same contention as made by the present defendant with respect to the so-called normally open valve between the two chambers as constituting an avoidance of the claims in suit was made with respect to the Weinberg tank, involved in the Seventh Circuit suit. Apparently this feature was not mainly relied upon by the District Court in the Seventh Circuit for supporting the finding of noninfringement. But the difference between the valve involved in

that suit and in the instant suit is so marked, as I have learned from examining and witnessing the operation of the two devices, that consideration of the opinions by the District Court and the Circuit Court of Appeals of the Seventh Circuit in respect to the device there involved affords no assistance for my conclusion in the instant suit as to whether claims in suit are avoided by the character of the valve involved in this suit. My conclusion is that, whether or not the valve construction of the Weinberg tank in the Seventh Circuit case avoids the claims, the valve construction of the present defendant's device does not avoid these claims.

The defendant directs attention to a feature of construction of the defendant's device which is not found in the patent in suit, consisting in connecting the air inlet passages of the two chambers, so that they both derive air from outside through one and the same ultimate opening and passage, which passage is branched; one branch connecting with the immediate air inlet of the vacuum chamber at a point above the float-controlled air inlet valve, and the other branch leading to the lower chamber, a small check valve, which opens for inlet of air and seats against air outflow, being interposed between said ultimate opening to the atmosphere and the point at which the passage is branched as stated, so that said valve operates identically as to the air inflow and outflow of both chambers. It is urged that this construction causes the vacuum chamber to derive the air for relieving the vacuum, not from the atmosphere, but from the other chamber, to the extent at least of equalizing the pressure in the two chambers, and that this differentiates the defendant's device from the patent in suit and avoids claims 9 and 14, which call for alternate connection of the vacuum chamber with the suction and with the atmosphere, whereas (it is urged) that by reason of the check valve mentioned in the defendant's device the alternation caused by the shifting of the float-operated valves is an alternation between communication with the suction and communication with the lower chamber, and not an alternation between communication with the suction and communication with the atmosphere.

I am not impressed with this contention. It seems certain that upon reduction of pressure (or production of vacuum) in the upper chamber to 10 pounds (a vacuum of 5 pounds), which I understand is the ordinary or average condition of the device in service on a car, the pressure in the lower chamber being substantially atmospheric, 15 pounds, when the atmosphere valve of the upper chamber is opened by the float, the outer atmospheric pressure will at once force past the slight weight of the little check valve and relieve the vacuum in the upper chamber, and if at the same time the atmospheric pressure, or approximately atmospheric pressure, in the lower chamber reacts to assist in this relief, it will be only to a very slight extent, because, to the extent that the air might pass out of the lower chamber into the upper chamber, the pressure in the lower chamber would be reduced, and, upon the slightest reduction of that pressure, the unreduced outer atmospheric pressure would become the greater, and the air from outside would take precedence of the air from the lower chamber in relieving the vacuum in the upper chamber. But, in any event, the air, if any, which might

pass from the lower chamber to the upper chamber under those conditions would be instantly replaced from the atmosphere; so that in the last analysis the upper chamber is in communication with the atmosphere as to the entire air supply that reaches it; only, so much of that supply as comes through the upper chamber follows a longer path from the atmosphere to the vacuum chamber than the remainder which comes in directly.

Weinberg's contention that the access of the outer air is generally prevented by development of gas from the heating of the fuel in the lower chamber does not impress me. The connection for access of outer air is necessary, and it is here available for use, whether operating at all times or only sometimes. It was insisted by Weinberg that the expedient of connecting the air inlet passages for the two chambers, and interposing the check valve between their junction and the ultimate air inlet, results in an equalization of the pressure in the two chambers, as the first effect of closing the suction valve and opening the atmosphere valve in the vacuum chamber, and that, after this equalization has occurred, both chambers derive their additional air supply from outside through the air opening common to them both. He undertook to demonstrate this by closing this ultimate air inlet.

It is obvious, of course, that without any access of exterior air, and with communication open between the two chambers, the pressure in the two would be equalized by the transference of air from the chamber under the higher pressure to the chamber under the lower pressure, and that the liquid in the upper chamber would descend into the lower chamber until the liquid level in the two chambers, as well as the pressure in the two chambers, became equalized, or until the liquid was all drained out of the upper chamber or the suction valve reversed by the float. This is, of course, what followed upon the operation of the device with the air inlet plugged tight. But under these conditions, clearly, eventually there would be a maximum degree of vacuum in the upper chamber—that is, the highest vacuum which could be produced by the suction producing means—and because of equalization of suction between the two chambers this vacuum would extend to the lower chamber in so far as the same was not filled with the liquid. Thus all the liquid in the device would be under condition of partial vacuum, which would tend to prevent its delivery by gravity to the carbureter.

It is clear to me, therefore, that the conditions under which the equalization of pressure between the two chambers, which constitutes the characteristic mode of functioning of the so-called "closed system" occurs, are conditions of inoperativeness of the device when considered as a whole for its entire purpose. This demonstration made in my presence has completely confirmed the conclusion which I was previously inclined to reach, as above expressed, to the effect that in actual operation of the defendant's device, with the connected air passages and the little check valve, the upper chamber derives its air supply for relieving the vacuum, not to any material extent from the lower chamber, but directly from the atmosphere, and not even indirectly through the lower chamber.

This feature of the defendant's device, I understand, is what is referred to in the opinion of the District Court in the Seventh Circuit as the "Weinberg closed system." Whatever merit this closed system, or the features which constitute it, may have, as to which, for the purposes of this case, I have no occasion to form an opinion, it is clearly a feature added to, and not a subtraction from, the invention called for and covered by claims 9 and 14. The feature of alternate communication of the vacuum chamber with the suction and with the atmosphere is present not the less because (or if) part of the atmospheric communication is obtained through the lower chamber. I have carefully considered the portion of the opinion of the Seventh Circuit District Court which refers to this "closed system" feature; but I find my opinion, as above expressed, unchanged upon such consideration.

[2] The two features above considered, namely, the supposedly normal open outlet valve from the vacuum chamber to the auxiliary chamber, and the air communications constituting the so-called "closed system," are relied upon by the defendant for differentiating its structure from the patent structure in respect to the claims sued on. In my opinion, neither of these features of claimed differentiation involves any omission of the elements of these claims, or any alteration of the functions of the elements or their combination. At most, they may be regarded as additions, and perhaps improvements. But it is well settled that neither an impairment nor an improvement of a patented construction is necessarily an avoidance of the patent, and even if these expedients which characterize the defendant's structure impair or improve the operation, so long as the structure contains all the elements called for by the claims, functioning together in the same manner as in the patented structure, the claims are infringed. This principle has been authoritatively stated as follows:

"The fact, if it be a fact, that the infringing machine is superior, more useful, and more acceptable to the public than that of the appellant, does not avoid infringement, so long as the essential features of the appellant's patented machine are used, unless its superiority is due to a difference in function or mode of operation or some essential change in character." Smith Cannery Machines Co. v. Seattle-Astoria Iron Works (C. C. A. 9) 261 Fed. 85, citing Morley Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713; Lourie Implement Co. v. Lenhart, 130 Fed. 122, 64 C. C. A. 456; Diamond Match Co. v. Ruby Match Co. (C. C.) 127 Fed. 341; Whitely v. Fadner (C. C.) 73 Fed. 486.

Beside the difference in the outlet valve between the two chambers, and the difference in the air inlet passages involved in arranging for the little check valve referred to, there are noticeable detail differences in the valve operating connections in the vacuum chamber. But these detail differences do not change the mode or principle of operation, nor the result in operation, and, as said in Hobbs v. Beach, 180 U. S. 383, 401, 21 Sup. Ct. 409, 416 (45 L. Ed. 586):

"As the two machines are alike in their functions, combination, and elements, it is unnecessary to go further and inquire whether they are alike or unlike in their details."

I have also in mind that the defendant manufactures the infringing device under patents granted as for improvements, consisting in the

features upon which the defendant here relies for distinguishing the defendant's structure from the claims in suit. But it is well settled that the mere fact that a patent embodies a patentable improvement upon the device of a prior patent has no tendency to negative infringement of such prior patent by the structure of the later patent. Munising Paper Co. v. American Sulphite Pulp Co. (C. C. A. 6) 228 Fed. 700, 143 C. C. A. 222; Murray v. Detroit Wire Spring Co. (C. C. A. 6) 206 Fed. 465, 124 C. C. A. 371. In International Time R. Co. v. Bundy R. Co., 159 Fed. 464, 86 C. C. A. 494, the Circuit Court of Appeals of the Second Circuit said, to the same intent:

"All these modifications and additions may be improvements, meritorious enough to secure a patent for them, but they will not negative infringement if a defendant uses the broad invention which a prior patentee has described and covered by his claims"—citing Electric Smelting Co. v. Pittsburgh Reduction Co., 125 Fed. 933, 60 C. C. A. 636.

In Cannery Machines Co. v. Seattle-Astoria Iron Works, above cited, it was held, upon the authority of Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945, that:

"Where a combination patent marks a distinct advance in the art to which it relates, as does the appellant's invention here, the term 'mechanical equivalent' should have a reasonably broad and generous interpretation."

This principle may properly be invoked is this case, in view of the finding by the Circuit Court of Appeals of this Circuit in Jay et al. v. Sparks-Withington Co., supra, in the following language:

"Jay's double tank system was an entire novelty to the automobile manufacturing world, commercially speaking. Nothing substantially resembling it had ever been offered to that market. * * * The Jay tank met with very great, and we may reasonably say extraordinary, trade acceptance and success."

In so far as the departures of the defendant's device from the patent in suit can be considered otherwise than as additions, which do not defeat or change the functions of the original combinations, they may be regarded as "mechanical equivalents" for corresponding features of the patented structure, and as fairly within the range of equivalents to which the patentee is entitled in accordance with the principle above stated, and the finding of the Circuit Court of Appeals in Jay et al. v. Sparks-Withington Co., supra.

Decree may be drawn, finding claims 9 and 14 valid and infringed, and granting injunction and reference to master for accounting.

THE NISSEQOGUE.

(District Court, E. D. North Carolina. March 24, 1922.)

Nos. 169–179.

1. Salvage ⟸27—Salvage award made for services to leaking schooner off Cape Fear bar.

A salvage award of $2,000 made for the services of three tugs rendered to the schooner Nisseqogue, which was anchored off Cape Fear river bar, in a leaking and dangerous condition. One of the tugs went out to the bar in the usual course of business to get a tow, and brought the schooner in and beached her at Southport; this service requiring 2½ hours, with no particular danger to the tug. There the three tugs partially pumped the schooner out, and then towed her to Wilmington, where the pumping was continued, in all 39 hours. The schooner and cargo were appraised at about $71,000, and sold by the court for about $22,000.

2. Seamen ⟸27—Election to accept discharge terminates right to lien for wages.

A schooner became disabled on a voyage, and while in a port awaiting repairs was libeled for salvage and other claims, and seized by the marshal. The owners notified the master that the voyage, and in effect that the vessel, would be abandoned, which notice was read to the crew. The master having no funds, the crew filed a libel for wages, alleging their discharge, but remained on board until the vessel was sold, performing such duties as were required. *Held*, that their filing of the libel was an election to accept the action of the owners as terminating the voyage, and that, as against other lien claimants, they were entitled to a lien for wages only to that time.

3. Maritime liens ⟸37—Furnisher of supplies to crew of vessel under nominal arrest only held entitled to lien.

Where, in a suit in rem against a schooner then undergoing repairs at a way port in the course of a voyage, the marshal took only nominal possession, leaving the master and crew in charge, in the expectation that the owner would furnish bond and continue the voyage, until notified to the contrary, libelant, who furnished supplies for the crew in the meantime on orders of the master and without knowledge of the attachment, *held* entitled to a lien therefor with the same rank as to priority as that for wages of the crew.

4. Maritime liens ⟸37—Repairer held entitled to lien as against other lien claimants.

At the time a vessel was seized under a libel she was undergoing repairs at a way port in the course of a voyage, made necessary by damage caused primarily by leakage through a split sea suction pipe. The repairs were contracted for by the master with approval of the owner, and were continued and completed after the seizure, which was only nominal, without objection by the marshal or libelant; the crew remaining on board and the intention being to resume the voyage when they were completed. Other libels were filed, however, and the vessel was sold. *Held*, that the repairer was entitled to a lien, and that, in the absence of any evidence to the contrary, it would be presumed that the repairs, which were necessary, enhanced the value of the vessel to the extent of their reasonable cost.

5. Maritime liens ⟸14—Libelant held entitled to lien for advances.

Libelant, who on request of the master and on the credit of the vessel made advances to pay the necessary expenses to enable a vessel, which had secured a cargo in a foreign port, to clear and proceed on his voyage, *held* entitled to a lien therefor, and acceptance of a draft drawn by the master on the owners for the amount, which was dishonored, *held* not a payment, in the absence of evidence that it accepted as such.

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6. Maritime liens ⇐37—Marshaling of liens; voyages of tramp vessel.

Where a vessel, after leaving her home port with a cargo, before returning, carried other cargoes between different ports, as between claimants who made advances to her in different ports, for the carriage of different cargoes, her voyage must be held a continuing one, until her return to her home port, and their liens stand on an equality.

In Admiralty. Suit by Phillip Shore and others against the schooner Nisseqogue. Decree determining liens and their priority.

Robert Ruark, of Wilmington, N. C., for Phillip Shore.
Robert W. Davis, of Southport, N. C., for R. R. Stone.
E. K. Bryan, of Wilmington, N. C., for Wilmington Iron Works.
John D. Bellamy & Son, of Wilmington, N. C., for seamen.
Rountree & Carr, of Wilmington, N. C., for Furness Shipping Co. and Diamond Steamboat Wrecking Co.
George L. Peschau, of Wilmington, N. C., for C. E. Collins.
Thomas W. Davis, of Wilmington, N. C., and John T. Tucker, of Baltimore, Md., for Davison Chemical Co.
John D. Bellamy & Son, of Wilmington, N. C., for Bar Pilot Ass'n.

CONNOR, District Judge. The Nisseqogue is an Americon four-masted schooner of 194 feet length, 39 feet beam, 14 feet depth, carrying a crew of 14 men, built in Brunswick, Ga., in 1917, 971 tons gross, 859 tons net, owned by Smith Navigation Corporation, with her home port at New York. At the time and upon the voyages hereinafter set forth, her master was Sven G. Berglund. While she was at the port of Rotterdam, November 27, 1919, the Furness Shipping & Agency Company, of that city engaged in the business of shipping brokers, at the request of her master, between November 27, 1919, and January 2, 1920, furnished and delivered supplies, services, and disbursements to the said schooner to the amount of 14,451.11 guilders, as nearly as can be ascertained, amounting to $5,420.29 in American money, as shown by the statement approved by the master and attached to the libel filed herein.

The schooner sailed from Rotterdam, January 12, 1920, for Oporto, where she was to deliver a part of her cargo, and the balance at Cadiz. From Cadiz she sailed, light, to Norfolk, Va., reaching there the first part of June, 1920. She sailed from Norfolk, Va., to St. John, New Brunswick, light; thence to Queenstown, where, under orders, she sailed to Runcorn, England, with a cargo which she discharged, and sailed, light, to Tampa, Fla., where she arrived on October 28, 1920, at which place she took a cargo of lumber for Cienfugos, Cuba. Upon her arrival at Tampa, libelant Phillip Shore was employed to act as the agent of the schooner, and alleges that, at the request of the master, he advanced to the said master, upon the credit of the schooner, for the purpose of furnishing him funds wherewith to pay the wages of the crew of said schooner, on October 29, 1920, the sum of $5,000. Thereafter, and while said schooner remained at Tampa, on November 23, 1920, at the request of the said master and owner and from time to time during said period, said Phillip Shore alleges that he advanced

and furnished to the said schooner and her master and owners, for the purpose of enabling master and schooner to obtain necessary work, supplies, and funds wherewith to discharge valid obligations incurred by said schooner, the sum of $5,974.36, which sums were necessary on behalf of said schooner, as shown by statement which has been approved by the master and furnished to the owners.

While at Tampa, November 28, 1912, George F. Bowen and the other seamen, libelants herein, shipped, under shipping articles, form B, as prescribed by the Department of Commerce Bureau of Navigation, Shipping Service, on the said schooner. The shipping articles signed by the seamen described the voyage as:

"From the port of Tampa, Florida, to Cienfugos, Cuba, and such other ports and places, in any part of the world, as the master may direct, and back to a final port of discharge in the United States, for a term not exceeding six calendar months."

After her arrival and discharge of cargo at Cienfugos, the schooner, under the same master and crew, took on a cargo of 1,000 tons of pyrites ore, and on January 26, 1921, sailed for Baltimore. On February 9, 1921, while on her course to Baltimore, and "about half way between Cape Lookout and Cape Hatteras, in the Gulf Stream, with squally weather and strong winds and rough seas," it was discovered that she was leaking, having made 19 inches of water from noon on that day to 4 o'clock, in four hours' time. On account of the condition of the weather and of the schooner, the master, on the evening of February 10, 1921, brought her under her own sails off the Cape Fear bar, and anchored four miles from the bar; the master thinking that he was "up to the bar." When the fog lifted, he moved her, under her own sails, within a mile of the bar. At that time it was raining, and the wind was from the south, blowing strong.

During the night the wind changed to the westward, "with a strong breeze, and the sea increased from the south, so that the vessel was rolling in the trough of the sea." At 7 o'clock a. m., February 11th, a pilot was received. Preparations were commenced to get under way for crossing the bar in to Southport, with 30-fathom shackle outside hawsepipe, the foresail was hoisted and other preparations made, when the porthole and "wild-cat" broke, and the chain to starboard anchor commenced running out. The port anchor was then let go and the sails taken in. The tugboat Blanche, standing near, took the schooner in tow about 10:30 a. m., and at 1 p. m. the schooner was grounded in Southport harbor. The Blanche and Alexander Stewart worked to siphon water out of her hold, and by 7:45 a. m., February 12th, had lowered the water from 72 inches to 54 inches, when she started to Wilmington, with master, crew, and pilot aboard, in tow of the tug Alexander Stewart, and docked at noon of same day at the Wilmington Iron Works for repairs. The two tugs remained by her, pumping water, until noon, February 13, 1921.

On reaching Southport the master, without delay, communicated to the owners of the schooner "her apparent condition and asking instructions." He was advised by the owners "to use his judgment"; that a representative of the company, owners, would come to Wilming-

ton. The master instructed the seamen to remain with the vessel, which they did. On February 13, W. G. Renaut, port captain of the Smith Navigation Company, owners of the schooner, arrived at Wilmington, and immediately, in the interest of the owners, took charge of all repair work to be done on the schooner. On February 14th Renaut called for a survey, in order to determine her condition, which was made by H. E. Queenstedt, surveyor of the American Bureau of Shipping. The survey showed that the—

"three-inch pipe of sea suction, in board of sea valve, was split for about 3 feet and opened up 2 inches. Riding chock for starboard anchor chain carried away and broken. Jib boom cracked for about 4 feet from bowsprit cap. Both anchors, and 180 fathoms of chain, lost off Southport bar, and 180 fathoms of 5-inch mooring lines and 90 fathoms of 6-inch mooring lines damaged by water and badly chafed from having been washed about; the same having been stowed in hold."

The survey recommended that certain repairs be made to the schooner, in consequence of which the master contracted for making such repairs with the Wilmington Iron Works. It was the intent and purpose of the master, upon the completion of the repairs, to proceed on his voyage to Baltimore. The officers and crew were kept on board and assigned to their duties. From February 11, 1921, to the day on which the schooner was towed to Wilmington, February 14, 1921, she was treated by her master and owners as a vessel, temporarily unseaworthy, needing and awaiting the completion of repairs to complete a voyage, with a crew held intact until such repairs were made. The Wilmington Iron Works began repairing the schooner on the 12th day of February, 1921, and while so engaged libelant Phillip Shore, on February 21st, filed the libel herein, and the marshal, on the same day, served the libel and monition by taking said schooner into his custody. No caretaker was put on her.

On March 3d, libelant R. R. Stone, owner of the tugs Blanche and Alexander Stewart, filed the libel herein, claiming $5,000 for salvage. The monition and attachment was levied the same day. Other libels were filed as of the dates appearing in the record. The master had no instructions from the owners until March 14, 1921, when he received, and immediately read to the officers and crew, the following letter:

"Wilmington, N. C., March 14, 1921.

"To the Master, Officers and Crew, American Schooner Nisseqogue, Wilmington, N. C.—Gentlemen: You are hereby notified to file your claim against the schooner Nisseqogue, for the reason that, on account of libels involved, the Smith Navigation Corporation, owners of the vessel, have decided to leave the vessel here and let matters take their course.

"Yours truly, W. G. Renaut, Port Captain,
"Smith Navigation Corporation, 17 Battery Place, New York, N. Y."

The owners, after this letter, have taken no further action in respect to the vessel or her cargo. At this time, and at no time thereafter, did the master have any funds with which to pay the crew the wages due them. He received no further instructions from the owners. The marshal retained the custody of the schooner until May 21, 1921, when appraisers appointed by the court appraised the schooner at $62,239; anchor and chains at $2,494; cargo at $6,000. On May 10, 1921,

a decree was entered, ordering the marshal to sell the schooner, her tackle, apparel, furniture, freight, cargo, and anchor and chains; that the cargo, anchor and chains be sold separately. Pursuant to said decree the marshal, after advertising same as directed by the decree, sold the schooner for $19,550, anchor and chains for $600, and the cargo for $1,275. On June 11, 1921, after notice to all parties interested, no objection being made, an order was entered confirming the sale.

The order was made on May 4th, appointing a special master to hear evidence and report his findings of fact upon the claim of the seamen and such other libels as counsel should desire. Upon filing the report, the libels were consolidated and heard upon the evidence taken by the special master, stipulations of counsel, and further oral evidence. By reason of the deficiency in the amount for which the schooner was sold, the several libelants litigate each claim, rendering it necessary to examine and pass upon the amounts, validity of the lien, and order of priority of each of the claims. The order, in respect to date of filing the libels, will be disregarded, and the libels disposed of in the order of their priority. The salvage claim will therefore be first considered.

R. E. Stone—Salvage.

[1] On February 9, 1920, it appears from the ship's log book that she was—

"beating around Frying Pan Shoals, one mile distant; a heavy fog set in at 6.30 p. m., which lasted until 10:40 a. m. She was leaking; had pump going; at noon had 44-inches water, gain of 6 inches since morning. February 11th, foggy, cloudy weather, fresh breeze, W. S. W. on course for Cape Fear river bar; at 3 p. m. came to anchor in 7 fathoms water, supposedly off bar. At 6:30 p. m. fog cleared, when found vessel was anchored 4 miles from bar; hove up anchor and run to bar, and anchored with entrance buoy. At 2 a. m. paid the 60-fathom shackle. At 7 a. m. received pilot; commenced getting under way when 30-fathom shackle outside hawsepipe, hoisted foresail, and, when short, hoisted staysail and jib, and, while breaking anchor, pawl wheel and wild-cat broke and chain commenced running out; let go the port anchor and took in the sails; water in vessel gathering fast, heaving s'ly sea. Strong westerly wind; were obliged to cut the starboard chain in order to slip both anchors to save vessel; slipped about 10:30 a. m., and took tug Blanche and proceeded in Cape Fear river. Hoisted staysail, jib, and foresail to help tow boat against strong ebb tide. At noon off the fort. Weather clear; wind west, blowing strong. At 1 p. m. vessel grounded off Southport, when tug and pilot left. At 1:30 p. m. vessel boarded by board of health. At 2 p. m. vessel apparently sunk, listing over to starboard, with the outside water reaching up to the hatch coamings on starboard side."

Capt. Newton, the pilot who went to the schooner, says:

That he was on her about two hours before the Blanche came. Master said, "She is sinking;" told him to "go forward and slip his chain." Said he could not get to the chains—too much water; called for hack saw and sawed them in two, tug there at that time; wind blowing strong southwest; shifted to west; "big sea washing across, coming in over side and going over other; told captain of the Blanche that she was sinking, not to leave, "we may have to leave in the boat." Requested prompt action. As soon as the chains were cut, captain of Blanche got the foresail and jib on her and got the hawser; would have been hard to get the hawser on her. She was rolling and jumping so, "it would be dangerous if you got under the vessel." The vessel could not have been sailed into the harbor at that time without the tug; do not know when it would have gone ashore; water about seven fathoms. She

would have gone on the breakers without the tug; there was no anchor; she would not steer. The bottom would have been knocked out, loaded with iron ore. It was between three and four hours before the Blanche ran her ashore with 5 or 6 feet water in her. "I went home;" took the Blanche about half an hour, a little over, to go from Southport to the vessel; laid by her before we got ready for her "to take hold." The Blanche is 94 tons net. Witness has been a pilot 30 years; had no mishap. "I did not solicit the Blanche to come to the vessel. She came unsolicited; always does so when "sees anything; looking for anything that comes along." Nisseqogue was not flying any distress signal. When the Blanche came along, the master of vessel "wanted her and wanted her bad." When the tug came up, I told her captain "to get the hawser as soon as he could;" was acting for the master of the vessel.

Capt. St. George and Capt. Sellers, on the Blanche, when she went to vessel, corroborated Capt. Newton:

Says that he thinks the tug in grave danger. There was no other tug available. After the Nisseqogue was beached, at about 1 o'clock, the Blanche returned to Southport, and her captain phoned Mr. Stone at Wilmington to send the Alexander Stewart to help pump her out. Went to the vessel and put the pumps to work; got the water low enough to make it safe to tow her to Wilmington. Seven men on the Blanche, four on the Stewart, and two on the Isabelle. They stayed by her and towed her to Wilmington. Worked all night, from Friday afternoon until Sunday noon, pumping, 39 hours. Used a four-inch pipe pumping a siphon. Stewart about 50 or 60 tons. The usual charge for towing from the bar to Wilmington, and back, is 50 cents a ton, "round tonnage." The Blanche built some 40 years ago. "The sea was not, at the time we went out, such as to deter us from going out to get a regular tow. If the vessel had not been in distress, we would have gone after her just the same."

This constitutes the substance of the evidence respecting the service rendered by the Blanche, the Alexander Stewart, and the Isabelle; the two last named only assisting in pumping and towing the vessel to Wilmington.

It is not necessary to cite authorities in support of the claim of libelant for a salvage service rendered by the Blanche from the time she went to the Nisseqogue on the morning of February 12th, until she was brought into the harbor and grounded at about 1 o'clock; the period during which she was in actual service being from 10:30 a. m. until 1 p. m. The schooner was leaking, her pipes split, and she was in peril. The service rendered by the tug was voluntary, prompt, and successful.

The sole question for determination is as to the amount which should be awarded the Blanche in rendering the service from the time of reaching the vessel until she was grounded. She was towed up the river for a distance of approximately 30 miles. The value of the vessel and cargo, as disclosed by the sale, was very much less than was, at the time the service was rendered, supposed to be by all parties. There is no suggestion that any injury was sustained by the Blanche or her crew. This, however, does not eliminate from consideration the danger to which they were subjected. This should be kept in view, taking into consideration such damage as might naturally and reasonably be deemed incident to the peculiar service, in view of the weather and other circumstances. The evidence shows that the officers and crew on the Blanche were skillful and experienced seamen, especially

on that coast and bar. Their work was well and successfully done. The fact that, as shown by long and often disastrous experience, the place at which the vessel was found is one of peril to navigation along our coast, must also be considered. It is to be noted that the Blanche was engaged in the business of towing vessels to and from Wilmington and across the bar. She was, as said by her captain, ready "to go to anything"; that is, any vessel requiring her service as a tow or salvage. He further says that he would have—

"gone out to her under existing conditions for a towage service. If the vessel had not been in distress, we would have gone after her 'just the same.'"

While this does not affect the merit of the service, it takes the tug out of the class of cases in which merchant or passenger ships either go, out of their regular course or risk their ship with freight or passengers in a voluntary service to a vessel in distress. While the general principles by which courts are guided in making awards for salvage service are well settled, the amount awarded in each case of necessity differs, because of the varying and variant conditions existing in instant cases.

To some extent the facts in The Penobscot (C. C. A. 4th Cir.) 106 Fed. 419, 45 C. C. A. 372, are analogous to those found in this evidence. The schooner was grounded on the shoals very nearly at the same place at which the Nisseqogue was found by the Blanche. The Wilmington, a freight and passenger boat, was at Ft. Caswell, within two miles of Southport. Observing the condition of the Penobscot, she went to her assistance at 8 o'clock a. m., passing through the breakers; the waves going over her sides and into her engine room. She pulled the Penobscot off the shoals and towed her into port, being engaged in the service about an hour. She was valued, with her cargo, at $8,000. The District Judge awarded for salvage service $2,000. Upon appeal, Judge Goff said:

"We are of opinion that the services rendered by the Wilmington were meritorious, and that a fair and just compensation should be allowed for the same. The Wilmington promptly responded to the signal of distress, and willingly rendered the necessary assistance to the disabled schooner, and her conduct, under the circumstances, was most commendable. The steamboat was quickly moved to the sand shoals near the mouth of the Cape Fear river, where the schooner was aground, and during the time she was engaged in the salving work she was properly and skillfully handled. But we do not find that there was any great risk to the property used by the salvors, nor to the lives of those engaged in the work. The schooner was, doubtless, in great danger at the time the Wilmington reached her, and the cargo would probably have been lost, or greatly damaged, but for the timely assistance rendered by the latter."

The Circuit Court reduced the award to $1,000.

In The Launberga (D. C.) 154 Fed. 959, Judge Purnell discussed conditions somewhat analogous to those found here. The vessel was grounded on Frying Pan Shoals, apparently flying a flag of distress. The steamer Wharton, of the value of $40,000, with a crew of 24 men, engaged in fishing, went to her relief. Reference to the facts, as stated by the District Judge, will disclose conditions upon which the award was made. The salvage service extended over a period of 12 hours.

The vessel was in peril. She was brought into the harbor and anchored near Southport. She was pumped out by the Wharton, from September 22d to October 3d. The Wharton furnished coal and water for the boiler and a man to run the engine. The judge, after a very careful statement of the conditions, said:

"The services rendered the Launberga by the Wharton and crew were salvage services, but of a low grade, involving some risk to the steamer of the libelant, but little more than she had taken before in the pursuit of her business of fishing, no particular peril of life or limb, no unusual expense, and no gallantry, courage, or heroism; and the lives of the officers and crew of the Launberga were in no immediate danger or peril. The time employed in said salvage service was about 12 hours."

The value of the Launberga and her cargo was $14,100. The judge awarded $2,000.

In view of the entire evidence, conditions under which the service was rendered, its character, result, value of the Nisseqogue and her cargo, and of the Blanche, I am of the opinion that an award of $2,000 for the salvage, pumping, and towage by all of the boats belonging to R. R. Stone, libelant, is fair and just, being the first lien on the proceeds of the Nisseqogue and her cargo, to be apportioned as hereinafter directed.

George F. Bowen and Others—Seamen.

[2] The only question presented in respect to the compensation due the seamen relates to the time at which, under terms of the shipping articles signed by them at Tampa and the law, their term of service, for which they have a maritime lien, came to an end. In addition to the facts found by the special master, hereinbefore stated, he finds that, prior to March 14, 1922, the master had no instructions from the owners in respect to the future movement of the schooner on her voyage to Baltimore, and he had no funds with which to pay them, and that after the libels of Phillip Shore and R. R. Stone, and the seizure of the schooner by the marshal, he was apprehensive that, if he gave the crew a discharge, they might in the absence of funds with which to pay them, be entitled to double pay. R. S. § 4529 (9 Fed. Stat. Anno. [2d Ed.] p. 156 [Comp. St. § 8320]).

The master further finds, and in this I concur, at the time the master received and gave notice to the crew of the instruction from the owners, March 14, 1921, he was without funds to pay his officers and crew, either the amounts then due for wages or a sum equal to one-third of the balance then due them, and that it does not appear that he could, either then or since, have raised sufficient funds for such purpose; that his failure to pay them was neither willful nor without sufficient cause or excuse; that the officers and crew had notice on March 14th that the master claimed to have no funds with which to pay them at the time; that, with such notice and information before them, the officers and crew of the schooner, on March 16, 1921, elected to consider their engagement at an end by libeling for their wages, but thereafter remained on board.

The record discloses that on March 16, 1921, G. F. Bowen and others, seamen, made an affidavit before A. S. Williams, United States

commissioner, at Wilmington, N. C., to obtain summons for seamen's wages, as provided by R. S. § 4546 (Comp. St. § 8335). Pursuant to the provisions of section 4547 (Comp. St. § 8336) the commissioner issued summons to S. G. Berglund, master of the schooner, returnable before himself on the same day, and said summons was served on the said master by the marshal. The amounts claimed by each of the seamen exceeded the sum of $100. In said affidavit the seamen described themselves as:

"Late mariners on board the Nisseqogue, setting out the amounts due them as wages, * * * which the master refused to pay."

On March 26, 1921, the seamen filed a libel before the United States commissioner against the schooner, containing a schedule of wages due each of them, aggregating $2,962.80. In the libel, after setting forth their employment and rate of wages, they allege:

"That during the whole time that they were in the service of the said S. G. Berglund, to wit, from the time when they went on board thereof to the time of leaving the same, they well and truly performed their duty as mariners on board said vessel, according to the best of their ability, and were obedient to the lawful commands of the said master and the other officers of said vessel. Your libelants further show that, at the time they were discharged from the said vessel, the wages earned by them as aforesaid were not paid to them, or any part thereof, except what was duly credited in the schedule annexed."

The libel was duly certified by the commissioner to the clerk of the District Court at Wilmington on March 26, 1921, and on same day monition issued and served by the marshal, by leaving a copy with the master "and retaining said vessel in custody."

On April 2, 1921, the same seamen filed in the office of the clerk an additional libel against the schooner, in which they set forth the foregoing proceedings and further allege:

"Third—That these libelants allege that the said vessel is liable to them for wages from March 6, 1921, to the actual discharge of these libelants, at the same rate of wages set forth in said libels; that in the said libels there was an allegation that these libelants were discharged, and these libelants aver that they thought they were discharged, but that some days after the libel had been filed the master of the said vessel insisted that they were not discharged, and stated that if they left the vessel they would be arrested for desertion, and in terror of such an arrest they remained aboard the said vessel, and the said vessel is now liable to them for their transportation to Baltimore, the port of discharge, set forth in their shipping articles."

No action was taken, other than filing this additional libel. Subsequent to the filing of the original libel by the seamen, March 16. 1921, several other libels were filed, based upon claims for repairs, advancements to the schooner, salvage of anchor and chain, supplies, and pilotage. The special master finds that:

"Subsequent to March 16th said officers and crew have been fed aboard, while the vessel was at her dock in Wilmington, N. C., performed duties aboard, pumping the vessel out, looking after lines, and other similar duties, remaining so aboard continuously till the day of the sale of the vessel on May 23, 1921, and are now claiming and have filed a second libel covering the period from March 16th."

The special master concludes that:

"The libeling seamen are entitled to wages (so far as to participation in funds from sale of vessel) to either March 14, 1921, the day notice was received that the owners would leave the vessel in Wilmington and let matters take their course, or March 16, 1921, the day the seamen libeled, and in view of all the circumstances"

—he recommends that they be allowed wages to and including March 16, 1921. To this conclusion the seamen libelants excepted. The question for discussion therefore is: To what date are the seamen entitled to a maritime lien on the schooner for wages. It will be well to dispose of several contentions made by the seamen and other libelants in regard to which there is no substantial difficulty.

It is suggested that the rights of the seamen, in respect to the date of their discharge, are governed by the provisions of section 4526, R. S. (Fed. Stat. Anno. p. 152 [Comp. St. § 8317]); that if the term of service terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seamen shall be entitled to wages for the time of service prior to such termination, but not for any further period. Provision is made for them as destitute seamen. It is manifest that the Nisseqogue was neither "a loss nor wreck" at the time she was brought into the port of Wilmington.

It is, on the contrary, contended by counsel for the seamen that by the terms of the shipping articles the term of employment was for six months from their date. The language of the articles excludes this construction. The term of service beginning November 18, 1920, was primarily for a voyage from Tampa to Cienfugos, and such other ports and places in any part of the world as the master may direct. This was met by taking the cargo of pyrites for Baltimore, Md., which entitled the seamen to wages to that port, "and back to a port of final discharge in the United States, the entire term for which they were within the foregoing limitation to service and the master to employ for a term of time not exceeding six calendar months." It would seem clear that the term of service, after entering upon the voyage from Cienfugos, could be terminated by either party upon reaching Baltimore, with the right on the part of the seamen to be carried to a port of final discharge in the United States. It is not necessary to discuss the question as to the right of the seamen under this clause.

Assuming, therefore, that the master was not entitled, under the terms of the contract, to discharge the seamen at Wilmington, the question arises: Were they discharged, and, if so, on what day? The owners elected on March 14, 1921, for the reasons stated in the letter to the master, to abandon the completion of the voyage and "to leave the vessel at Wilmington, where she was then 'docked,' undergoing repairs, and let the matters take their course."

The question presented by this condition of the vessel and action of the owners is not, for the purpose of this discussion, whether the seamen were "discharged," in the sense of having their contractual relation to the owners severed, and their right to sue them in personam for wages or damages for breach of contract, but whether their right to a maritime lien on the schooner, as against other libelants, terminated

when acting upon the notice given them by the owners. They filed their affidavits March 16th before the United States commissioner, followed by the libel March 26, 1921, pursuant to sections 4546 and 4547, R. S. In these affidavits, and schedules filed therewith, they describe themselves as "late mariners on the Nisseqogue" and allege the amount of wages due them "at the time they were discharged."

The libel and monition, based upon said affidavits, were served on the master and the marshal "returned" that he "had retained the custody of the vessel"; it being then in his custody, upon other libels filed and served prior to said date. It was open to the seamen to elect to accept the statement of the owners that the voyage, for the reasons stated and well known to them, had been abandoned. The master had no funds with which to pay the wages due the seamen.

The vessel had, at that time, been libeled for claims amounting to $15,000. The owners were unable to file a bond for her release, and, as shown by subsequent events, wisely declined to do so. It would seem that the course open to the seamen was that provided by R. S. § 4529 (Federal Statutes Anno. [2d Ed.] p. 156). If the right to terminate the employment and discharge the seamen was fixed by the terms of the shipping articles, by the conclusion of the voyage at Baltimore, they may, provided the master refuses or neglects to make payment in the manner provided without sufficient cause, demand a sum equal to two days' pay each and every day during which payment is delayed beyond the period of such wrongful discharge. This, however, they did not do, but elected to treat the action taken by the owners as a discharge, and libeled for the wages due.

It is insisted by other libelants that the seizure by the marshal upon the first libel terminated the voyage and the seamen's rights to a lien for wages. This view was taken by Judge Dodge in The Philomena (D. C.) 200 Fed. 873 and The Bethulia (D. C.) 200 Fed. 876. In The Esteban de Antunano (C. C.) 31 Fed. 920, 924, Pardee, Judge, said:

> "When * * * the steamship * * * went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners and of their agents, the master and ship's husband, to thereafter affect the ship by any conduct or contract to result in a lien on the ship, was ended. By the seizure all persons were notified of the change of control and possession. 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."

The marshal is responsible for the care of the ship, and any person entitled to be allowed any expense incurred in discharging such expense is taxable as a part of the cost, and not by the assertion of a maritime lien enforced by a libel. The Augustine Kobbe (D. C.) 37 Fed. 702. Whatever the rule usually applied may be, it seems clear that, if the seamen elect to recognize and accept the action of the owner as the abandonment of the voyage, and notice to the seamen that the vessel had been libeled and would not be replevied—that matters should take their course, all of which was true and well known to the

seamen—they are bound by such election, and could not continue to remain on board and claim a lien for wages until they saw fit to abandon the vessel.

If this be the correct view, no act of the master, the vessel being in the custody of the marshal, could as against other libelants re-establish or continue the relations of seamen, with the right to fix a lien upon the vessel. After the marshal had taken the schooner into his custody on the 21st day of February, 1921, he was alone responsible for taking care of her. The master could not, by any contract or otherwise, confer upon the seamen a right to remain on the vessel and impose upon her a maritime lien for wages not earned at the date upon which she passed into the custody of the marshal. It would seem but just to the seamen, who, in good faith and without objection on the part of the marshal, until the owners determined to abandon the voyage and the schooner, remained on the vessel discharging their duty, until notified by the owners they should receive their wages for a reasonable time. This time they fixed on March 16, 1921.

I concur with the special master that they are entitled to a lien for wages up to, and including, that day.

Collins Libel.

[3] When the schooner was placed at the dock or wharf of the Wilmington Iron Works on February 12th, and the survey made on February 14th, the representative of the owners contracted with the Iron Works to make the repairs as recommended. The crew remained on board, discharging such duties as directed by the master. The marshal, on February 21st, served the Phillips Shore libel for approximately $10,000. It does not appear that he took the schooner into his actual custody, by placing a caretaker on her, or posting notice of attachment upon her masts or other places, nor was any publication of the process made. The appraisal of the schooner, later on, placed her value at $62,239 and her cargo at $6,500. The schooner was in good order and condition, except for the injury to her pipes, involving, as developed, an expenditure of about $2,800 for repairs. It is quite evident that the libelants did not desire or direct, nor did the marshal do more than execute the libel, leaving the vessel at the wharf in the city undergoing repairs, as doubtless all concerned expected that her owners would arrange a bond and proceed on her voyage to Baltimore. On March 3d, the owners of the tug filed a libel for salvage, claiming $5,000. No change was made in the condition until March 14th, when the notice was given that the owners would abandon the voyage. During the period intervening between February 12th and March 16th, no other libels were filed. The report of cost and expense returned by the marshal shows no claim for a caretaker. During this time, at the request of the master, Collins furnished provisions to the crew amounting to $401.07, an itemized statement of which is filed with his libel, approved by the master. Of this amount $97.88 was furnished prior to, and including, February 21, 1921. His libel was filed May 16, 1921, and served the same day.

In their briefs filed, none of the libelants make objection to this claim, other than the Furness Shipping Company, whose libel was filed March 30th. While it is true, as contended and the authorities cited show, after the schooner is taken into custody by the marshal, no new contract can be made or liability incurred, fixing a lien upon her, the facts discussed here bring the case, so far as Collins' claim is concerned, within the rule laid down by Judge Brown in The Young America (D. C. S. D. N. Y.) 30 Fed. 789. There a libel was filed and process issued to the marshal, who made a formal arrest. The libelant's proctor, however, looking for a settlement of the case, and the owner not being able to give bail for the tug's release, the marshal was directed by the libelant not to tie her up, nor to put a keeper on board, and she was permitted to run about the harbor in her usual business as before. While this condition existed, coal was furnished her, for which libels were filed. Upon a sale, there was a deficiency. The question was whether the libelants furnishing coal, after the vessel was arrested, were entitled to a lien. The learned judge, after stating the general rule, says:

"So far as respects the parties to the cause, the benefits of the rule may be waived, and the rule cannot properly be applied at all where, by direction of the parties, the arrest of the vessel is formal only, and is not designed to be followed by any actual possession of the marshal."

While stating strongly the objections to the course pursued, he says:

"The rule excluding subsequent liens cannot be extended to vessels that are not actually, as well as constructively, in the marshal's possession. Where a plaintiff, as in this case, obtains only a nominal arrest of a vessel, and virtually directs that she be left to pursue her ordinary business, with its attendant liabilities to other persons, in contract or in tort, he must be held to have waived the benefit of the custody of the court as a protection against other liens, and to be estopped from claiming, as against third persons, the exemptions that belong only to a vessel in actual custody. Otherwise, not only would third persons be misled and deceived, but ready means would be offered of running vessels without * * * any further liens at all. * * * For these reasons I must hold the claims of the materialmen to be liens on the tug."

While the facts are not identical in the two cases, I think that those disclosed in this case bring the claim of Collins within the reason of the exception to the rule and the equity clearly stated by Judge Brown. The evidence in this case, as disclosed by the general course pursued, clearly shows that, until March 14th, the libelants who had filed libels expected the owners to bail the vessel and continue the voyage. As matters then stood, or appeared, it was a reasonable expectation. The vessel was of amply sufficient value to pay the claims then known and filed. She was undergoing repairs under the direction of the representative of her owners. The terminal of her voyage was Baltimore, and no suggestion had been made of her abandonment. The crew had not been discharged, and, so far as appears, no suggestion had been made that they would be. The proper care of the schooner required their presence on board. There is no suggestion that the libelant who furnished food to the crew had any notice or information that the libels had been filed or that the marshal served them. If the crew

had not remained on board, and given proper care and protection to her, the marshal would have been compelled to provide other means for doing so. These conditions ceased on March 16th, when the seamen filed libels for their wages, and every one had notice of the libels and the abandonment of the vessel by her owners.

To reject the claim of the libelant who furnished food for the crew to that date would be inequitable and unjust. The claim to the amount of $401.07 is allowed, as of the same priority as the seamen.

Diamond Wrecking Steamboat Company—Salvage Anchor and Chain.

The Nisseqogue, as testified by her master and the pilot, at the time she was taken by the Blanche, slipped her anchors and chains, to save the vessel. After the schooner was brought to Wilmington, Heide & Co., as her agents, and W. G. Renaut, port captain, for the owners, entered into a contract with James S. Williams, manager of the Diamond Wrecking Steamboat Company, by the terms of which the said Wrecking Company undertook to salve the anchors and chains, in consideration whereof it was to be paid $750 for each anchor and its chain delivered to the owners, and, if not recovered, it was to receive no compensation for its efforts. The Wrecking Company "rigged out" the steam barge Beaver, of 250 tons, and its tugboat Resolute, for the purpose of recovering the anchors and chains, at great trouble and expense, and with a crew of firemen and eight men on the Beaver proceeded to the place at which the anchors and chains were slipped with the Resolute; and after much effort succeeded in raising one anchor and 75 fathoms of the chain. The other anchor was in the rocks at the bottom. It was impossible to recover it.

The representative of the Nisseqogue and the manager of the Wreckage Company agreed upon the sum of $1,050 for salving the anchor and chain. The representative of the schooner estimated the anchor and chain to be worth to her $3,500. The money was not paid to the Wrecking Company. The libel was filed and served April 11, 1921. The anchor and chain were sold by the marshal for $600 and sale duly confirmed. None of the libelants litigate the claim of the Wrecking Company.

Decree awarding to the Diamond Wrecking Company the sum of $1,050, and the payment to it of the proceeds of the sale, less its proportionate part of the cost and 1 per cent. marshal's commissions.

Intervention of the Davison Chemical Company.

The Davison Chemical Company, on August 17, 1921, filed a petition averring that it was the sole owner of the cargo, 1,000 tons of pyrites, on the schooner, and prayed that it be permitted to intervene in the proceeding and assert its title and claim to the proceeds, subject to such claims as the court should find to be a lien thereon. The petition was allowed, and the court finds that the cargo was the property of petitioner. It was sold for $1,275, which sum will be treated for this purpose as its true value.

The sole question presented by the Chemical Company is the liability of the cargo for other liens than the salvage and its proportionate

part of the cost. The decree will direct the payment to the Davison Chemical Company of the proceeds of the cargo, less the marshal's commissions of 1 per cent. and its proportionate part of the costs.

The Wilmington Iron Works—Repairs and Wharfage.

[4] The master finds, and I concur therein, as hereinbefore set forth, that the schooner was, upon reaching Wilmington, February 12th, carried to the wharf of the Iron Works for repairs; that, on the 13th, W. C. Renaut, the port captain of the owners, took charge of "all repair work to be done on her." On February 14th he requested a survey to be made in order to determine her condition, which was made by H. E. Queenstedt, surveyor of the American Bureau of Shipping. The survey showed certain injuries sustained by the schooner and recommended certain repairs to be made, all of which are fully described in his report. In consequence of such survey and the recommendation of surveyor, the work on repairs was begun. It was the purpose and intention of the master of the schooner to proceed on his voyage to Baltimore when the repairs were completed. While the repair work was in progress, February 21, 1921, Phillip Shore filed a libel upon the schooner, which was executed on the same day. On March 3d R. R. Stone filed a libel, and on March 18th the Wilmington Iron Works filed a libel for repairs.

The repairs made by the Iron Works began on February 12 and were finished March 7, 1921, when a statement was rendered to the master, and approved by him, amounting to $2,854.34, all of which work was done and material furnished under the direction and supervision of the master and with the consent of the owners. The repairs were necessary to put the schooner in safe condition and continue her voyage. The charges for work and material made by the Iron Works, approved by the master, are reasonable. They necessarily enhanced her value. It is impossible to ascertain or find what she would have brought at public auction, if left in the condition in which she was brought to Wilmington. There was but small demand, at that time, for vessels, and although the sale was advertised in the New York Herald and other newspapers, and on the part of the libelants considerable effort was made to interest purchasers, there were but few bidders. Efforts were made, after the biddings were closed, to secure advanced bids, without success. No evidence was offered tending to show to what amount the repairs enhanced her value or increased the price for which she was sold, other than the amount charged and the approval of her master. The special master finds, and in this I concur, that—

"Such errors, if any, the master may have made, were mere errors of judgment. His fidelity to and faith in his owners were refreshing."

It is insisted by other libelants that—

"the repairs to ship constitute a maritime lien on her only for such work done and material furnished, prior to the seizure of the schooner, and to the extent that said amount enhanced the value of the vessel, as measured by the price obtained at the sale, and that the burden is on the Iron Works to establish, definitely, the amount furnished up to the time of the seizure, and also the extent to which these repairs enhanced the value of the vessel for the purpose of sale."

It is true, as contended, that the voyage was not continued and no freight earned. It is further insisted that it is impossible for the court—

"to find the value of the repairs up to the seizure; that it is incumbent upon the Iron Works to show, by some definite testimony, to what extent the value of the vessel was enhanced, for the purpose of the sale; and that there is no evidence tending to show this."

If this contention be sustained, it necessarily follows that the libel should be dismissed as to the claim for repairs. At the time the contract was made by the master, with the approval of the representative of the owners, no libel had been filed, and the owners and master expected and intended to continue and complete the voyage. The master and crew were retained, under their shipping articles, on the schooner, discharging their duties in accordance with the intention of the owners and themselves to continue such voyage. The officers and employees of the Iron Works were informed, and relied upon the statement of the master and other representatives of the owners, that it was their intention and purpose to put such repairs on the schooner as would enable her to resume and complete her voyage. No objection was made by the marshal nor any of the libelants to the continuation of the work on the repairs.

It would seem too clear to require the citation of authority that, as against the vessel, the reasonable charges for the repairs made upon the schooner, in the light of the facts, in regard to which there is no controversy, constitutes a maritime lien. The Lula, 77 U. S. (10 Wall.) 192, 201, 19 L. Ed. 906; The Dredge A, 217 Fed. 617; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Ulrica (D. C.) 224 Fed. 140. As the repairs were necessary and the charges reasonable, in the absence of any evidence to the contrary, it is a reasonable, if not a necessary, inference that they enhanced the value of the vessel, to the extent of their reasonable cost. It would be to require a burden impossible to carry if the party, under the conditions existing in this case, should be required to show by definite proof the exact amount to which, at some specific period while the work was being done, it enhanced the selling value of the schooner.

The charge for $92.13, which was not approved by the master, and was not a part of, or in performance of, the terms of the original contract, is not allowed as a maritime lien on the schooner. The Wilmington Iron Works makes a charge for wharfage for 77 days at $20 a day. No contest is made as to the claim as a lien. The amount charged is contested. The evidence as to the usual charge for wharfage in Wilmington is contradictory. In the light of the evidence and the conditions under which the schooner was carried to, and remained at, the wharf, a charge of $7.50 a day is, I think, reasonable, amounting to $565.50.

Phillip Shore—For Money and Supplies Advanced to the Master.

[5] Libelant says, in his deposition, referring to the master:

"He asked me to advance this money and act for the vessel, while she was in port, and take care of all his port charges—advance money—to take care

of all his port charges, including all the items that I have heretofore mentioned in my testimony. He said he was without funds, and that the crew had to be paid and had to be fed, and that the port charges and customs and towage charges had to be provided for before the vessel cleared, and that repairs had to be made and that the supplies must be furnished in order that the vessel could continue her navigation and before she could proceed on her voyage. I told him that I would make the advances, naturally assuming that I would be paid, and believing that I had a lien and first claim against the vessel for the moneys advanced to him and the supplies and repairs furnished to the vessel and all the items I have furnished. * * * I never accepted the drafts in payment for the advances, or any part of them, made by me, or under any agreement that I would look alone to the owners for payment of the drafts, or for payment of the advances by me. I have made no agreement with the owners or master not disclosed in my testimony given to-day."

He further says:

"At the request of the master I drew a draft on November 3, 1920, on R. Lawrence Smith, 17 Battery Place, New York, for the amount, with exchange, $12.50, added."

To this draft he attached a bill for the amount marked paid. It was forwarded to the First National Bank of New York for collection, and after several ineffectual efforts to collect returned unpaid. It has never been paid. The master says that he "expected the owners to pay the amount advanced to him by Phillip Shore." He telegraphed the owners to know if they would honor his draft and they answered that they would. "He [Shore] agreed to look to the owners for his payment."

It is contended by counsel for the Furness Shipping & Agency Company that, upon this evidence the court should find that the money was advanced upon the credit of the owners and not of the schooner. I am unable to concur in this view. There is no evidence that Shore knew the owners, or their financial standing. The fact that at the request of the master, and upon the assurance of the owners to him that they would honor his draft, does not lead to the conclusion that he advanced $5,000 upon their personal credit, when, as he says, he knew he would have a maritime lien which he thought was "the first claim" on the schooner. The conditions represented to him by the master, which were true, brings the advancement clearly within the reason upon which a maritime lien is given. When a vessel is in a foreign port, and now by the Act of June 10, 1912, in her home port, and—

"repairs and supplies are reasonably fit and proper" and "the master, if he has not funds and cannot obtain such on the personal credit of the owners, may obtain the same on the credit of the ship, either with or without giving a bottomry bond, as necessity shall dictate. Reasonable diligence, in either event, must be exercised by the merchant or lender to ascertain that the repairs and supplies were necessary and proper, as the master is not authorized to hypothecate the vessel, unless such was the fact within the meaning of the maritime law." The Lulu, 77 U. S. (10 Wall.) 192, 200 (19 L. Ed. 906).

The case is, in this respect, distinguished from The Avalon (D. C.) 169 Fed. 700. If the person making the advancement, coming within the meaning of the law, acts in good faith and upon reasonable ground, furnish the money or supplies on the credit of the vessel to its master, I do not think that he is bound to see that it is applied to the discharge of claims which constitute maritime liens. Of course, any suggestion of bad faith, collusion with the master, or absence of care to ascertain

the condition of the vessel and her inability to proceed in her voyage, or other condition, essential to the basis of the lien would be fatal to his claim. I find no suggestion of default on the part of Shore in either respect. The Emily Souder, 84 U. S. (17 Wall.) 666, 21 L. Ed. 683; The John L. Lawrence (D. C.) 231 Fed. 507.

In addition to the advance of the $5,000, while the vessel was at Tampa, preparing for her voyage and taking on her cargo, Shore advanced for counsel fees, stevedore bills, pilotage, towage, machinist bills, ship chandler, coal bills, repairing sails and various other amounts described in an itemized statement approved by her master, aggregating $5,959.46. Original invoices and bills for each lien are approved and attached to the statement. The master, on November 23, 1920, gave to Shore a draft on R. Lawrence Smith, of New York, the representative of the owners, which was sent to the First National Bank of New York for collection and was protested for nonpayment. No payment of this amount has been made. The draft was for $5,974.37, which included the exchange. The master testified, and there is no evidence to the contrary, that items in payment of which Shore made the advancements, were necessary for the care of the vessel and to enable her to continue her voyage. The schooner, while at Tampa, engaged a crew and took charge of lumber for Cienfugos, Cuba, by which she earned $15,000 freight. She sailed from Tampa, November 23, 1920.

I do not find anything in the master's testimony contradictory of this statement. If the advancements were made upon the credit of the vessel, the acceptance of the draft, which was dishonored, does not, as a matter of law, or in the absence of an intention to accept them in satisfaction and discharge of the lien, pay the debt or discharge the lien. The Emily Souder, supra. The question of its status with respect to other liens will be postponed for further consideration.

The Furness Shipping and Agency Company—Advancement of Money and Supplies.

[6] No answer was filed by the owners of the schooner, the original or intervening libelants, to the libel of the Furness Shipping & Agency Company of Rotterdam. The master testifies that the amount of the claim, as set out in the itemized statement attached to the libel, is correct. These items are for advancements made to the master, on the credit of the vessel, coming clearly within the definition of supplies and money to meet necessary expenses incurred while she was at Rotterdam, amounting to 14,454.11 guilders, approximately $5,000 American money.

The contention made by other libelants relates to the question of priority of the lien. This is based upon the suggestion that the claim is within the rules in admiralty "stale." The schooner reached Rotterdam November 27, 1919, with a cargo bound for Oporto, where she delivered a portion of her cargo; the balance she delivered at Cadiz. From Cadiz she went to Norfolk, without cargo, reaching there the latter part of May, going thence to St. Johns, New Brunswick, light; thence to Queenstown; thence to Runcorn, with a cargo. The master says that he sailed from Liverpool to Tampa, reaching there October

28, 1920, light. It is strongly urged by Phillip Shore that the claim of the Furness Shipping & Agency Company should be postponed until his claim is paid; that if the Furness Company had, with due diligence and promptness, enforced its lien, the schooner would have come to Tampa free of liens; that by its laches the lien as against subsequent liens of equal merit was lost or postponed. It will be noted that the Furness Company made advancements extending over a period from November 27, 1919 to January 12, 1920. Its libel is filed March 30, 1921. While more than one year elapsed and the schooner went to several ports, she did not return to her home port. She was at but one American port.

The rule by which liens, of equal merit, are marshaled by the court is not uniform. Much depends upon the conditions and circumstances existing in each case. Brown, District Judge, in the City of Tawas (D. C. E. D. Mich.) 3 Fed. 170, says:

"The subject of marshalling liens in admiralty is * * * left in great obscurity by the authorities. Many of the rules deduced from the English cases seems inapplicable here. * * * The American authorities * * * are by no means harmonious, and it is scarcely too much to say that each court is a law unto itself."

In that case the court was dealing with liens acquired upon vessels navigating the great lakes. In The Arcturus (D. C.) 18 Fed. 743, Welker, District Judge, discusses the more or less conflicting decisions, reaching the conclusion that the correct view is expressed in Vandewater v. Mills, 19 How. 82, 15 L. Ed. 554, that the maritime lien imports a tacit hypothecation of the subject of it. It is a jus in re without the actual possession, or any right of possession and accompanies the property into the hands of a bona fide purchaser. The 40-day rule in regard to filing libels is confined to vessels "making short trips about the harbor of New York." In The Gratitude (D. C.) 42 Fed. 299, Judge Brown says:

"By the general rule, however, the priority of liens continues only till the next voyage. The liens connected with every new voyage start with a priority over all former ones after the ship has sailed, if there has previously been opportunity to enforce them."

The master says that his shipping articles provided for a voyage and return to Brunswick. In The Buckingham (D. C.) 129 Fed. 975, the vessel began her voyage at Seattle, touching at a number of ports, taking cargoes of different character at several places and returned to Seattle. Judge McPherson says:

"On these facts I agree with the position taken by the proctors for the Buckingham that the voyage began and ended at Seattle. The charterers' contention that the voyage did not begin until June 10th, when the ship left her last port * * * with a complete cargo, finds no support in the authorities."

If, as contended by Phillip Shore, a voyage ended and a new one began at each port, where the schooner discharged one and took another cargo, the voyage for the promotion of which he advanced the money and supplies at Tampa came to an end when she reached Cienfugos, discharged the cargo of lumber, and took the cargo of pyrites for Bal-

timore, his position is no better than that of the Furness Company. This definition of the voyage would result in requiring the Furness Company to libel the schooner at Cadiz.

I cannot think this the correct rule. While the term "voyage" is not of a very definite meaning, it would seem that to give practical value to the lien of a person who furnishes supplies to a vessel in a foreign port, the rule should be as stated by Judge McPherson, supra. I do not think that either the Furness Company or Phillip Shore have lost their lien by failing to enforce it before the schooner had completed her voyage, as defined by her shipping articles. Nor do I think that Phillip Shore's rights are affected by his attempt to libel the schooner while she was at Cienfugos. It would seem that the correct rule, under the circumstances, found in this case, is announced by Judge Brown in The J. W. Tucker (D. C.) 20 Fed. 129, that:

"If the liens are of the same rank and for supplies, or materials, or services in preparation for the same voyage, or if they arise upon different bottomry bonds to different holders for advances at the same time, * * * such claims are regarded as contemporaneous and concurrent with each other, and they will be discharged pro rata."

After discharging the liens which have priority, the balance remaining in the registry will be approximately $10,000, to be applied to the claims of Phillip Shore and the Furness Shipping & Agency Company. This amount will be applied to the discharge of these claims pro rata. This, I think, in view of the conceded facts, meets as near as may be, the equities of the case. The libels were, by order of the court, consolidated. The clerk will charge the cost accruing, prior to the order of consolidation, to each of the libelants. The cost accruing subsequently will be paid from the proceeds of the schooner, each libelant paying his own witnesses.

The clerk will make a statement showing amount due on each libel, ascertaining the value in American dollars of the claim of the Furness Shipping Company and the cost for which the Davison Chemical Company and the Diamond Wrecking Company are liable, to be deducted from the amount due them.

LOWELL et al. v. BROWN,
and five other cases.

In re PONZI.

(District Court, D. Massachusetts. March 17, 1922.)

Nos. 1166, 1182, 1263, 1578, 1580, 1642.

1. Bankruptcy ⇐298—Right to recover preference held not barred by laches.

In a suit to recover a preference brought by trustees in bankruptcy on the last day of the year normally allowed for filing claims, a plea of laches, grounded upon the theory that the defendant, if defeated, has lost his right to prove his claim, cannot be sustained; section 57n of the Bankruptcy Act (Comp. St. § 9641) having been construed to allow proof of such claims after liquidation by litigation, although subsequent to the year.

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

2. **Bankruptcy ⟸164—Infant cannot be required to repay preference.**
An infant receiving back from a bankrupt money paid to the bankrupt for investment cannot be required by the trustees in bankruptcy to repay it as a preference.

3. **Bankruptcy ⟸164—Defendant held not required to repay as preference money recovered by him for another.**
Where a part of the money recovered by defendant from a swindling scheme was invested in his name by another without his knowledge, and he had repaid to the other the amount of such investment after he recovered it, defendant cannot be required to repay that portion of his recovery to the trustees in bankruptcy as a preference.

4. **Bankruptcy ⟸279—Equitable suit for preference involves same issues as if brought at law.**
Suits in equity by trustees in bankruptcy to recover unlawful preferences, under Bankruptcy Act, § 60b (Comp. St. § 9644), are not suits to set aside payments in fraud of creditors, or for the settlement of conflicting equities, but are technical preference suits, and involve the same issues as if they had been brought at law in the state court, as they might have been.

5. **Bankruptcy ⟸164—Preference must be payment from bankrupt's property.**
A payment, to amount to a preference under Bankruptcy Act, § 60, must be a payment or transfer of the property of the bankrupt, and there can be no preferential transfer without a depletion of the bankrupt's estate.

6. **Bankruptcy ⟸164—Repayment of money obtained by bankrupt's fraud is not a preference.**
Where money was fraudulently obtained by the bankrupt from defendants, and they elected to rescind and to recover their payments, which the bankrupt permitted them to do, the payments were not from the bankrupt's property, and did not diminish the estate, and the defendants were not strictly creditors, although they had provable claims, if they elected to rely on their contract.

7. **Bankruptcy ⟸363—Rescission for fraud is inconsistent with claim in bankruptcy.**
Though proof of a claim in bankruptcy does not bar an action for deceit which affirms the fraudulent contract, it is inconsistent with a rescission of the contract for fraud, followed by an attempted recovery in specie of the property fraudulently obtained.

8. **Bankruptcy ⟸164—Repayment of money fraudulently obtained held not depletion of bankrupt's estate.**
Where defendants elected to rescind their contracts with the bankrupt for his fraud, and to recover money paid by them, the repayment to them did not deplete the bankrupt's estate, even if such payment was not made from a deposit containing the money paid in by the defendants, since by recovering the amount of their payments from the bankrupt's general fund they released an equal amount of the funds held by him as trustee ex maleficio.

9. **Bankruptcy ⟸303(1)—Burden is on trustee to prove bankrupt's estate was diminished by alleged preferences.**
In an action by the trustees in bankruptcy to recover preferences, the burden is on them to prove that the payment to defendants diminished the bankrupt's estate, which is essential to establish the preference.

10. **Bankruptcy ⟸363—Money fraudulently obtained from those who filed claims is property of bankrupt.**
Where the bankrupt had fraudulently obtained money from numerous investors, who, after the bankruptcy, elected to file claims therefor against the estate, thus treating themselves as creditors ab initio, the money so received must be regarded as the bankrupt's money; that is, as money loaned to him, and not as money held in trust by him.

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11. Trusts ⟸358(2)—Withdrawal from mixed funds is presumed to be of trustees' money.

Where a deposit in a bank was made up in part of bankrupt's own funds and in part of funds held in trust for him by defendant, his withdrawals from the deposits must be presumed to have been first made from his own money, leaving the money held in trust in the deposit.

12. Bankruptcy ⟸303(3)—Evidence held to show alleged preferences were paid from trust funds.

In suits to recover as preferences repayments of money fraudulently obtained from defendants and repaid to them on rescission of their contracts, evidence *held* to show that the repayments were made from the money of defendants deposited in the same account with that of the bankrupt, and not from the money of the bankrupt.

13. Bankruptcy ⟸166(4)—Facts held to show payees had reason to suspect insolvency.

Where defendants, when they elected to rescind their contracts for fraud, had read or heard of a newspaper report stating that their payee was insolvent and that he had been paying earlier investors from the contributions of the later investors, they had more than reasonable cause to suspect insolvency when they received their payments.

14. Bankruptcy ⟸166(4)—Payee must have reasonable cause to believe payments were made from bankrupt's estate.

To establish a preference, the payees must not only have had reasonable cause to believe that the bankrupt was insolvent, but also that the payment would effect a preference, which involved a belief that the payment was to be made from the funds of the bankrupt, and not from the contributions fraudulently obtained from them.

15. Bankruptcy ⟸159—Classification in preference section does not apply to conflicting claims of creditors and beneficiaries of trust.

The classification of creditors in Bankruptcy Act, § 60, relating to preferences, refers to creditors entitled to priority, as distinguished from general unsecured creditors, but has no application to the conflicting claims between the beneficiaries of a trust fund and creditors of the bankrupt.

In Equity. Six separate suits by James A. Lowell and others, as trustees in bankruptcy of Charles Ponzi, against Benjamin Brown, against H. W. Crockford, against Patrick W. Horan, against Frank W. Murphy, against Thomas Powers, and against H. P. Holbrook, to recover preferences paid to defendants. Bill dismissed in each case.

See, also, 272 Fed. 536.

James A. Lowell and William R. Sears, both of Boston, Mass., for trustees.

John H. Devine, Louis Goldberg, William H. Powers, Jr., John P. Leahy, Philip Dexter, and Edward A. Counihan, Jr., all of Boston, Mass., for defendants.

ANDERSON, Circuit Judge. I. These six preference cases, brought by the trustees in bankruptcy of Charles Ponzi, were, by agreement, heard together. They are described by counsel as intended to test, in the Court of Appeals, questions common to many hundred suits now pending and yet to be filed. While they are brought on the equity side of the court, the defendants have not objected that the plaintiffs have a full, adequate, and complete remedy at law. I assume that such objection, if valid, may be waived. Compare Warmath v. O'Daniel, 159 Fed. 87, 86 C. C. A. 277, and cases cited in note

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

found in 16 L. R. A. (N. S.) 414; First State Bank of Milliken v. Spencer, 219 Fed. 503, 135 C. C. A. 253, and cases cited; Black on Bankruptcy (3d Ed.) § 401.

By these typical suits the plaintiff trustees seek to recover from the defendants, who paid money to Ponzi, and thereafter demanded and received back the same sums, without interest or profit, the amounts thus paid and received, as unlawful preferences. The amounts involved and the dates of payment and receipt may be tabulated as follows:

Name of Defendant.	Amt. Involved.	Date paid in.	Date Received Back.
Benjamin Brown	$1,200	July 20 and 24, 1920	August 2, 1920
H. W. Crockford	1,000	July 24, 1920	August 2, 1920
Patrick W. Horan	1,600	July 24, 1920	August 4, 1920
Frank W. Murphy	600	July 22, 1920	August 4, 1920
Thomas Powers	500	July 24, 1920	August 3, 1920
H. P. Holbrook	1,000	July 22, 1920	August 4, 1920
	$5,900		

All the transactions fall within a period of about two weeks, between July 20 and August 4, 1920. All of the defendants received notes in the following typical form:

"The Securities Exchange Company, for and in consideration of the sum of exactly $1,000, receipt of which is hereby acknowledged, agree to pay to the order of ———, upon presentation of this voucher at ninety days from date, the sum of exactly $1,500 at the company's office, 27 School street, room 227, or at any bank. The Securities Exchange Company,
"Per Charles Ponzi."

The Securities Exchange Company was nothing but Ponzi.

These notes were all given back to Ponzi, when the defendants rescinded and received and cashed checks for like amounts, as hereinafter set forth. Defendants plead in some legally sufficient form that they were all victims of Ponzi's fraud; that they elected to rescind, and did rescind; also that they had no reasonable cause to believe that the receipt of these moneys would effect preferences.

II. In December, 1919, Ponzi began, in a small way, selling such 50 per cent. 90-day notes, representing, in substance, that he had discovered that, through the use of international reply postal coupons, or the manipulation of foreign exchange, or both, he was able to make, within a very short time, 100 per cent. on all money intrusted to him, and was generously sharing this astounding profit with investors who should furnish him the money to enable him to do the business on a large scale. If, at the outset, he had any capital at all of his own, it apparently did not exceed $150. For present purposes, it may be assumed that he started as a penniless swindler. His scheme was simply the old fraud of paying the earlier comers profits out of the contributions of the later comers. In some fashion he caused it to be generally understood that, although his notes were written on 90 days' time, he would redeem them in 45 days. By the spring of 1920 this scheme had, apparently through advertising by word of mouth of recipients of the 50 per cent. profit, spread like an infectious disease through the community. By July he was receiving contributions at the rate of about

$1,000,000 a week. The aggregate in the period from some time in December, 1919, until the bankruptcy petition against him was filed on August 9, 1920, was between $9,000,000 and $10,000,000, received from perhaps 15,000 to 20,000 people. The scheme was, of course, a pure swindle. At no time did he deal substantially, probably not at all, in international coupons, or in any other speculation in foreign exchange. On this record every note buyer or depositor was a victim of fraud. Counsel on both sides agree in the view that, as to all moneys so received, Ponzi was, when he received them, a trustee ex maleficio, unless, of course, his investors stood on their rights under the notes, which, for present purposes, I assume they might legally do.

[1] In the Horan case, No. 1580, is a plea of laches which may as well be disposed of before dealing with the vital points.

Ponzi was adjudicated a bankrupt on October 25, 1920. The suit against Horan was begun on October 24, 1921, although actual service was not made until some days later. The plea of laches goes upon the theory that if Horan should be defeated he would have lost his right to prove his claim, because of the expiration of the year on October 25, 1921—an inequitable result. The plea rests upon what appears to be a mistaken theory of the construction put upon Bankruptcy Act, § 57n (Comp. St. § 9641). That section reads:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment."

The latter part of this provision, pertinently referred to by Judge Learned Hand as "the singularly blind language of the second sentence of section 57n" (see In re John A. Baker Notion Co. [D. C.] 180 Fed. 922, 924), has been construed so as to leave the door open to parties, situated like these defendants, to prove their claims at the expiration of litigation adverse to them. See In re Bergdoll Motor Co., 233 Fed. 410, 147 C. C. A. 346; Page v. Rogers, 211 U. S. 581, 29 Sup. Ct. 159, 53 L. Ed. 332; Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; Hutchinson v. Otis, 115 Fed. 937, 942, 53 C. C. A. 419. Other decisions are collected in 1 Remington, Bankruptcy (2d Ed.) §§ 717, 727½; Collier, Bankruptcy (10th Ed.) § 746; Black, Bankruptcy, § 526. This plea of laches cannot be sustained.

III. While all the cases are, on the main issues, similar, the Brown case, No. 1263, is, in two material aspects, distinguishable. The defendant is an infant, and defends by his guardian ad litem. It also appears that of the sum of $1,200 paid in by him on two days, July 20 and 24, one-half, $600, was, without Brown's knowledge, put in his name by another infant, Gross, a friend of Brown. Gross made the investment in Brown's name, fearing that his family would have the good sense to object if they learned of it. Brown collected the whole $1,200 under circumstances common to all of the cases, and turned over Gross' half, $600, to him. The plaintiffs nevertheless contend that Brown is liable for the whole $1,200.

[2] No case is cited in which an infant has been held liable in a bankruptcy preference case. The plaintiffs cite and rely upon Christopher

v. Norvell, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740. In that case it was held that a married woman, residing in Florida, where common-law incapacities still obtained, could, under R. S. § 5151, be held to pay an assessment on shares in a national bank inherited by her. I think the case not in point. I rule that Brown is, on the ground of infancy alone, entitled to a decree. MacGreal v. Taylor, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345.

[3] It also seems clear to me that, even if Brown is liable, he cannot be held for money which was invested by and paid back to Gross, the other infant. I so rule.

[4] IV. Turning now to the main issues: It is important to keep clearly in mind that these are suits to recover unlawful preferences and nothing else. On no other ground has this court jurisdiction. See section 60b of the Bankruptcy Act (Comp. St. § 9644). They are not suits to set aside payments in fraud of creditors, or for settling conflicting equities among defrauded cestuis que trustent. They are technical preference suits. They might have been brought in a state court and tried before a jury. The issues here are precisely the same as they would have been in the state court on the law side. In order to recover, the plaintiffs must fully prove their cases under section 60 of the Bankruptcy Act. The issues here presented are quite other than those before the court in the Bolognesi Case, 254 Fed. 770, 166 C. C. A. 216, or in the Matthews Case, 238 Fed. 785, 151 C. C. A. 635. See, also, In re Stewart (D. C.) 178 Fed. 463.

[5, 6] As it is admitted that Ponzi was insolvent and that the payments were made by him within four months, those elements of a voidable preference are made out. But the statute requires a payment or transfer "of his property"; that is, the bankrupt's property, not the property that he might merely possess, but which was not distributable under the Bankruptcy Act to his creditors. 2 Collier, Bankruptcy (12th Ed.) p. 885, and cases cited. "There can be no preferential transfer without a depletion of the bankruptcy estate." 2 Collier, Bankruptcy, supra; 2 Black on Bankruptcy (3d Ed.) § 576; In re Schwab (D. C.) 258 Fed. 772. No one contends that the return of goods secured by fraud constitutes a preference. Precisely so, in my view, as to the repayment of the defendants' money procured by fraud. Ponzi's estate in bankruptcy was not diminished by his returning to them money that belonged to them, and not to him as a debtor and prospective bankrupt. They were not at that time, strictly speaking, creditors. They were victims of fraud, asserting, with Ponzi's assent, the right to rescind. 2 Black on Bankruptcy (3d Ed.) §§ 582, 583, 584. They did not stand on their notes; they gave them up, canceled.

Of course these defendants, and all other victims, were creditors of Ponzi in the sense that they had provable claims. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; Clarke v. Rogers, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953. So far as now appears, they could prove on the notes. And apparently, since the amendment of

1903 (32 Stat. 798 [Comp. St. § 9586 et seq.]), they might prove claims for the amounts they paid without waiving the torts and being barred by a discharge. Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718; same case, 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649. An action for deceit affirms, it does not disaffirm, a fraudulently induced sale or loan. Compare Cheney v. Dickinson, 172 Fed. 109, 96 C. C. A. 314, 28 L. R. A. (N. S.) 359; Frey v. Torrey, 70 App. Div. 166, 75 N. Y. Supp. 40.

[7] These cases hold that an action for deceit may be brought, even if the victim of the fraud has, by proof in bankruptcy, affirmed the transaction to the extent of allowing full title to the money or property to pass to the worker of the fraud. But clearly they could not prove a claim for money fraudulently obtained from them, and at the same time seek to recover from the bankrupt estate the same sum of money in specie. Rescission (followed by an attempted recovery in specie) and a right to share in the distribution in bankruptcy, are plainly inconsistent remedies. Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448.

[8] But our present concern is as to the title to the moneys paid Ponzi, not as to rights for subsequent actions for deceit. These defendants neither waived the tort nor made any claim on the general assets, if there were then or thereafter any general assets. They claimed the right to rescind, gave up their notes, and took back the exact sums they paid in, so that their dealings with Ponzi neither increased nor diminished the amount of assets, which remained for distribution exactly the same as if they had had no dealings at all with him. Compare Illinois Parlor Frame Co. v. Goldman, 257 Fed. 300, 168 C. C. A. 384.

In that case, the appellant had been fraudulently induced to raise the bankrupt's credit from $1,000 to about $6,000. On discovering the fraud, instead of rescinding the sale of the goods thus fraudulently procured, book accounts to the amount of about $4,000 were turned over to him. The decision below that this was a voidable preference was reversed by the Court of Appeals, opinion by Circuit Judge Mack. The court said:

"But on June 9th appellant concededly had a right to rescind the fraudulent sales and to recover back such of the goods as were then in the bankrupt's possession. Clearly a return of these goods would not be a preference; to the extent of their value, payment could no more effectuate a preference; neither transaction would diminish the estate to which bankrupt was then entitled. That appellant did not expressly assert a right of rescission is immaterial; it relinquished that right in confirming the sale; it then gave up the property interest equal to the value of the goods then on hand. To that extent the transfer was for a present consideration, and not preferential."

This case is in point. The defendants here, like the appellant in that case, "concededly had a right to rescind" the transaction and get back their money. The plaintiffs concede that if they did "get back *their* money"—that is, money that came out of a fund identified as one including their contributions—there was no preference. But, even if Ponzi paid them out of money derived from those who, by subsequently proving their claims, either on their notes or for the amounts paid in, waived the right to rescind, his estate was not diminished; for the de-

fendants' money, thus freed from the trust ex maleficio, remained in his possession as an exact offset. They relinquished their right to a sum, the exact equivalent of the sum they received. See the learned discussion of the law as to commingled and identified trust funds, by District Judge Ray, in Re Stewart (D. C.) 178 Fed. 463, 470, 477. Compare Smith v. Mottley, 150 Fed. 266, 80 C. C. A. 154; Board of Com'rs of Crawford County v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; Peters v. Bain, 133 U. S. 670, 693, 10 Sup. Ct. 354, 33 L. Ed. 696; Tiffany v. Boatman's Sav. Institution, 18 Wall. 375, 21 L. Ed. 868.

Moreover, if the money with which Ponzi paid these defendants came technically out of a fund made up in whole or in part of money belonging to other cestuis, who have not waived the torts, it is far from clear that such moneys ever became Ponzi's estate within the meaning of the Bankruptcy Act. Compare National Bank of Newport v. National Bank of Little Falls, 225 U. S. 178, 184, 185, 32 Sup. Ct. 633, 56 L. Ed. 1042; New York County Bank v. Massey, 192 U. S. 138, 147, 24 Sup. Ct. 199, 48 L. Ed. 380. It is plain, however the legal elements are stated, that Ponzi's "estate," if he had any, was neither increased nor diminished by the short-lived, fraudulently induced contributions, and withdrawals of these defendants.

[9] But plaintiffs contend "that the burden is upon the defendants to show that the checks which they received were drawn on and paid from a deposit which, as matter of law, the defendants might have charged with a trust for the amount of such checks." They cite for this proposition In re Matthews, 238 Fed. 785, 151 C. C. A. 635; In re Bolognesi, 254 Fed. 770, 166 C. C. A. 216; In re Kearney (D. C.) 167 Fed. 995.

Neither of these first two cases was a preference case. Both were petitions to revise orders of distribution of funds among special claimants, in which the courts proceed under general equity principles, and not in accordance with the specific requirements of the preference statute. As I construe them, they have little or no bearing on the questions here presented, which, as already stated, are questions of technical statutory preferences.

This contention as to burden of proof cannot, in my view, be sustained. 2 Black on Bankruptcy (3d Ed.) § 614. The burden is upon the plaintiffs to show that the defendants have received unlawful preferences. Even if, as the plaintiffs contend, the money paid by Ponzi to these defendants came out of deposits held by Ponzi as trustee ex maleficio for other dupes, I do not believe the plaintiffs can on that ground maintain these preference suits. They must show that Ponzi's estate—that is, an estate distributable to Ponzi's creditors (not belonging in equity to cestuis)—was diminished by the payments made to these defendants.

On all the evidence, I find and rule that the defendants were not, when paid, creditors within the meaning of section 60 of the Bankruptcy Act, and also that Ponzi's estate was not diminished by these payments.

But, even if the burden of proof is upon the defendants to show that their moneys came back out of a deposit charged with a trust in

their behalf, I think that that burden has been sustained. It is undisputed, and I find, that the defendants' moneys were deposited not later than one day after their payments to Ponzi, in the Hanover Trust Company, with other moneys extracted from other victims by similar frauds. I also find that all the moneys were repaid on the dates above set forth by checks drawn on Ponzi's account in the Hanover Trust Company. Three checks were certified; three were not.

These six checks were promptly cashed at the Hanover Trust Company. But in this connection, at the plaintiffs' request, I find, if material, that approximately 500 other checks were given by Ponzi for the sums originally contributed by the recipients thereof, for amounts not shown in the evidence, either seriatim or in the aggregate, and that such checks had not, at the beginning of the bankruptcy proceedings, been cashed; that claims in bankruptcy grounded on such checks were filed and allowed. It does not appear whether any of said unpaid checks were or were not ever presented to the Trust Company for payment. Counsel agree that the accounts in the Hanover Trust Company, although carried in several names, were all Ponzi's accounts. The relation of the defendants' payments and receipts to this fund in the Hanover Trust Company will be more clearly shown by setting forth a consolidated statement, prepared by the plaintiffs' expert accountant, of these accounts from July 19 to August 11, 1920, inclusive.

Hanover Trust Company.

Consolidation of All the Charles Ponzi Accounts.

	Deposits.				
	Less Transfers.	Transfers.	Total.	Withdrawals.	Balance.
1920.	334,726.69		334,726.69		334,726.69
July 19.	193,296.79		193,296.79	101,500	426,523.48
20.	273,713.18		273,713.18	18,513.22	681,723.44
21.	273,802.98		273,802.98	1,869.24	953,657.18
22.	285,847.66		285,847.66	503,350.	736,154.84
23.	270,992.92		270,992.92	73,117.34	954,030.42
24.	100,000	100,000		62,284.94	871,745.48
26.	528,458.76	55,850.70	584,309.46	572,098.77	883,956.17
27.	563,541.79		563,541.79	288,172.95	1,159,325.01
28.	254,195.75	300,000	554,195.75	905,719.10	1,107,801.66
29.	760,058.63		760,058.63	508,235.16	1,059,625.13
30.				405,127.25	654,497.88
31.	23,072.50		23,072.50	168,514.35	509,056.03
Aug. 2.				387,619.52	121,436.51
3.	40,600	400,000.	440,600	541,870.84	20,165.67
4.	359,080	299,600	658,680	295,172.47	313,737.08
5.	256,360.58	25,000	281,360.58	524,585.04	140,448.74
6.	259,999.38	283,709.62	543,709	249,999.32	434,158.42
7.	68,768.34	204,950.58	136,182.24	556,949.34	13,391.32
9.	31,471.11		31,471.11	376,740.50	331,878.07
10.	471,393.08	9,300	480,693.08	151,349.99	2,534.98
11.	9,300		9,300		6,765.02
	$5,021,143.46	$1,678,410.90	$6,699,554.36	$6,692,789.34	$ 6,765.02

The items in the column headed "Transfers" refer to sums gathered by Ponzi into the Hanover Trust Company from other banks. The items in the first column are payments of victims like the defendants. All the moneys of these defendants were deposited in this Trust Com-

pany not earlier than July 20, or later than July 26, 1920. (July 25 was Sunday).

Brown's, the earliest case, may be taken as typical. The plaintiffs contend that, because the amount on deposit on July 20, $681,723.44, was, if all the intervening withdrawals were applied to that balance alone, fully withdrawn by July 26 at the latest, the payment on August 2 to the defendant Brown did not come out of a fund which included his original contributions of July 20 and 24 of $1,200.

[10] Undoubtedly, as already set forth, all the deposits made in the Hanover Trust Company were funds originally belonging in equity to Ponzi's dupes; they all had a right to give up their notes and demand their moneys back, because obtained from them by fraud. But it is admitted that of the large sums (about $3,500,000) deposited between July 20 and August 5 a great part came from victims who subsequently filed claims in bankruptcy of about $4,000,000, thus electing to treat themselves as creditors ab initio, rather than as cestuis que trustent. Even if Ponzi stopped issuing new notes on July 26, as is claimed, approximately $2,500,000 of depositors' money was, in the period from July 26 to August 4, put into the Hanover Trust Company.

It follows that all moneys received and paid by such creditor victims must be regarded, for present purposes, as Ponzi's money; i. e., money loaned to him. Compare Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Hewitt v. Hayes, 205 Mass. 356, 363, and cases cited on page 364, 91 N. E. 332, where it is explicitly ruled that such depositors, by proving in bankruptcy, elect as their remedy to be creditors. So proving, they lost their right to rescind; their money was loaned to Ponzi.

[11] The result is that the entire deposit in the Hanover Trust Company was of a mixed fund, made up in part of the trustees' (Ponzi's) own funds, and in other part of money belonging to the defendants and to other similar cestuis. It is well settled that, when a wrongdoing trustee makes withdrawals from such a mixed fund, the presumption is that he first withdraws his own money, and not the trust money. Hewitt v. Hayes, 205 Mass. 356, 361, 91 N. E. 332, 137 Am. St. Rep. 448, and cases cited; National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981; In re Hallett's Estate, 13 Ch. Div. 696; National City Bank v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115; Southern, etc., Oil Co. v. Elliotte, 218 Fed. 567, 571, 134 C. C. A. 295; In re Stewart (D. C.) 178 Fed. 463. Ponzi's drafts on this fund during this period were therefore of money loaned to him, at least in large part.

It follows that on August 4, after the defendants had cashed all their checks, there still remained at least $20,165.67 of the fund on deposit on July 20, when Brown's money went into the trust fund; for this was the smallest balance on any day now material. If we take the next earlier transactions, Horan's and Holbrook's, on July 22, these sums were part of a balance of $736,154.84, and after their withdrawal on August 4, there was a balance of $313,737.08. It is obvious that we need not resort to the theory of the restoration to an exhausted trust

fund from moneys of the defaulting trustee, in order to meet the claim that the moneys of these defendants were not repaid from general assets of a bankruptcy estate.

[12] On all the evidence I find that the defendants' money went, on or almost immediately after the dates of the payments, into an identified deposit in the Hanover Trust Company, and there remained until it was repaid to them by checks drawn as above set forth. In other words, so far as the defendants' rights are concerned, the trust fund in the Hanover Trust Company remained unaffected by the large deposits and withdrawals between July 20 and August 5.

Mention may be made of the fact that, in addition to the moneys appearing in this consolidated account in the Hanover Trust Company, Ponzi had actually there on deposit $1,500,000 more, represented by time certificates of deposit taken out for the purpose of preventing embarrassment to the bank through which the Hanover Trust Company checks were cleared. While these certificates were negotiable, they were not in fact negotiated. They were grounded on moneys received prior to the earliest date here significant, July 20.

Plaintiffs contend, and on this point I think they are right, that the existence of this additional fund of $1,500,000 has nothing to do with the issue here involved. There is no evidence that any part of that $1,500,000 was derived from these defendants, or that any of their payments came out of it. But, if material, it is a fact that Ponzi had in this Trust Company during the period in question a deposit ranging from $2,500,000 down to little over $1,500,000.

[13] V. But, if wrong in the conclusions so far stated, did the defendants have reasonable cause to believe that the payments to them would effect a preference? If and in so far as such "reasonable cause to believe" means simply that they had reasonable cause to believe that Ponzi was insolvent, I find that they did have such reasonable cause to believe. On the morning of August 2, 1920, there was published in the Boston Post a report, headlined in great letters, to the effect that Ponzi was insolvent. I am satisfied that all of the defendants either saw this report or heard enough of its contents, so that they knew that one McMasters, who was or had been in Ponzi's employ, reported in substance that Ponzi was insolvent, and to the effect that he had been paying earlier comers out of the proceeds of later comers' contributions. Apart from this published statement, it is difficult for one accustomed to dealing with realities to believe that any ordinarily intelligent person could regard the scheme as other than one that made its worker insolvent almost from the start. I think they had more than "reasonable cause to suspect insolvency." Compare Putnam v. United States Trust Co., 223 Mass. 199, 204, 111 N. E. 969; Rogers v. Am. Halibut Co., 216 Mass. 227, 229, 103 N. E. 689.

[14] But the statute requires more than reasonable cause to believe that Ponzi was insolvent. It requires reasonable cause to believe that such payments "would effect a preference"; that is, that "the effect of the" payments "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." But they were not demanding and receiving money as

creditors. They asked to have their money back, and, so far as they knew or "had reasonable cause to believe," they got back their own money.

On all the evidence I find that the defendants had no reasonable cause to believe that the money received by them by payment of the checks drawn on the Hanover Trust Company did not come from the specific fund into which their moneys had gone. I find this, even if, in fact, it did not come from such fund.

[15] Again, I am unable to find that these defendants had reasonable cause to believe that they were getting a greater percentage of their claims (assuming for the moment that such claimants are creditors) than other claimants "of the same class." I do not believe the classification of creditors in section 60 of the Bankruptcy Act has any application to the conflicting claims of claimants to share in a trust fund grounded wholly upon a scheme of fraud, or to the conflicting claims between the cestuis of such trust fund and creditors of the bankrupt, who have stood on their rights under the notes, or by other conduct have waived their right to rescind, so that their contributions have been, ab initio, transmuted into loans to the bankrupt. As a practical matter, the only claimants "in the same class" as these defendants would be other victims who have exercised or seek to exercise like rights to rescind. No such claimants are now before this court. Compare 2 Collier, Bankruptcy (12th Ed.) pp. 894, 895.

So far as I am aware, the classes of creditors referred to in the preference section are such creditors as those to whom taxes are owing, employees, and any others who by the laws of the states or of the United States are entitled to priority as distinguished from general unsecured creditors. 2 Collier, Bankruptcy, supra, p. 895. Such classification obviously does not fit this case.

In a word, I am unable to believe that the preference section of the Bankruptcy Act is applicable to this case. I find nothing supporting the plaintiffs' main contentions in Clarke v. Rogers, 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953; and Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806. Compare Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718.

In my view, no case cited, properly analyzed, supports the plaintiffs' contention. Both the issues and the record in this case are radically different from those before Judge Morton in Lowell v. Ashton (D. C.) 272 Fed. 536. There is nothing in that record indicating what Judge Morton's views would be on the questions with which I must deal. In effect, the plaintiffs seek a ruling that an insolvent swindler cannot assent to the rescission of any of his swindling transactions without thus making his temporary victims unlawfully preferred creditors, assuming bankruptcy within four months and reasonable cause to believe him insolvent. I am constrained to reject that proposition.

The bills must each be dismissed, with costs.

In re DUNCAN CONST. CO.

(District Court, S. D. West Virginia. March 3, 1922.)

No. 1057.

1. Bankruptcy ⟸188(1)—Language construed, and held effective as pledge of fund.

Bankrupt was building a road under a contract with a county containing a provision for reservation by the county of 10 per cent. of all sums due on monthly estimates until completion of the work. Needing money to meet a monthly pay roll, claimant bank, after consultation with a member of the county court and the road engineer, and ascertaining that there was then in the reserved fund about $4,700, lent bankrupt $2,200, which was used in paying employees, taking a note containing a pledge as collateral "out of account due from estimates from the county court" of the county, notice of which was given to the county court. No monthly estimate was then due. *Held*, that such language was intended to, and did, effect a valid pledge of the fund reserved, and that claimant was entitled to payment therefrom when received by bankrupt's trustee on completion of the contract.

2. Words and phrases—"Due" defined.

The word "due," in its larger sense, covers liabilities matured and unmatured, and its meaning as used depends on the context and evident purpose intended.

In Bankruptcy. In the matter of the Duncan Construction Company, bankrupt. On referee's certificate for review of order disallowing claim of the First National Bank of Marlinton as a secured claim. Reversed.

J. E. Campbell and J. H. McClintic, both of Charleston, W. Va., and L. M. McClintic, of Marlinton, W. Va., for petitioners.

R. E. Hughes and C. W. Good, both of Charleston, W. Va., for trustee.

McCLINTIC, District Judge. [1] By contract dated on the 21st day of October, 1919, the county court of Pocahontas county entered into a written contract with the Duncan Construction Company for certain road work, as set out in the contract, between the county seat, Marlinton, and the village of Huntersville, in that county. The contract provides for certain prices, and also provided the usual agreement as to a reservation of 10 per cent. from each monthly estimate, to be retained by the county court until after the completion of the entire contract and the acceptance of the work to be done by the county court. The work commenced, and progressed until, on the 5th of August, 1920, this 10 per cent. amounted to $4,713.54.

On the 5th of August, 1920, the manager in charge of the work had no money to meet his pay roll, and the men were waiting for their money in the town of Marlinton, the county seat of said county, and the manager applied to the First National Bank in Marlinton for a loan of $2,200 for the purpose of paying the labor then due and unpaid. The bank refused the loan until Mr. W. H. Barlow, a member of the county court, could be consulted. He came to the bank, and also brought the road engineer, and it was shown to the bank officers that

this sum above named was retained by the county court, and would be payable to the contractor when the job was finished. No other sums of money were due from the county to the contractor at that time, and it was necessary that the labor should be paid, if the work was to be continued.

The Duncan Construction Company gave a note to the First National Bank of Marlinton for the sum of $2,200, the proceeds of which note were immediately turned over to the contractor, and immediately paid by the contractor to the persons who had performed labor on said work during the preceding month. Notice was immediately given to the county court of that fact, and the work progressed. For this sum of money the Duncan Construction Company gave to the bank a note bearing date August 5, 1920, for the sum of $2,200, and payable to the bank 30 days after date. This note was given on the collateral form used by the bank, and pledged that amount due from the county court, as understood by all the parties at that time, as follows:

"Having pledged and deposited with the said First National Bank of Marlinton, West Virginia, as collateral security for the payment of this note and any renewals thereof, the following, viz.: Out of account due from estimates from the county court of Pocahontas county, West Virginia."

It appears from the record in this case that at that moment there was actually nothing, in the sense of being immediately payable, "due" from the county court to the contractor, which fact was well known to the contractor, to the county court and the members thereof, and the road engineer. Later, in the month of September, a receiver was appointed by the state court for the contractor, and the work progressed a while under the direction of the court and this receiver. There was an estimate of something over $1,600 for the month of August, and about two-thirds thereof was paid to this receiver, and about one-third for tools and material used on the work.

The receivership in the state court was followed by the bankruptcy proceeding in this court, and a trustee was appointed, and the work progressed and was finally finished, and, including the sum of $4,713.54, there was paid to the trustee in this cause by the county court as a final estimate the sum of $7,526.02. The question decided by the referee, now before this court for decision, was whether the First National Bank had a secured claim upon the sum of $4,713.54, to secure the payment of its note, with interest from maturity. The referee held that it was not a secured claim, and that the bank was only a general creditor, along with all the other creditors of the contractor, and the whole amount received by the trustee from the county court of Pocahontas county would then be sufficient to pay 24 per cent. upon the debts proven.

Upon the argument here it was claimed in behalf of the trustee that there were two accounts out of which it could be equally claimed that this note, if it had any security at all, was due; that is, the estimate earned in the month of August, as well as the amount in the hands of the county court, under the reservation in the contract at the date of the note. I see no merit in the proposition that it was the duty of the bank to insist upon payment out of the estimates for the month of Au-

gust, for such estimate had not yet been earned, and when it was earned it was used for the purpose of continuing the work, and thereby saving said sum of $4,713.54.

[2] The construction put upon the language typewritten on the note, to wit, "Out of account due from estimate from the county court of Pocahontas county, West Virginia," by the referee, is in my opinion, under all the circumstances surrounding the transaction, too narrow and technical. In the language of Justice Story, in the case of United States v. State Bank of North Carolina, 31 U. S. (6 Pet.) 29, 8 L. Ed. 308, the word "due," in its larger sense, covers liabilities matured and unmatured, and he further says that "much depends upon the context and evident purpose intended." This idea runs through all the decisions upon this word. All the surrounding circumstances must be taken into consideration, to arrive at the meaning intended by the parties at the time the note was made and the security given. At that time there was no money immediately due, in the sense of being immediately payable, from the county court of Pocahontas county to the contractor.

If the meaning asked to be given to the word "due" by the trustee in this case is correct, then this whole transaction, this whole attempt on the part of the bank to get security for the money which it was then paying out to the laborers of the contractor, and the attempt on the part of the contractor to give security for such present consideration, and the attempt on the part of the county court to accept notice thereof, were all futile and of no effect. It was plainly the purpose of the parties, at this meeting on the 5th of August, 1920, to give the bank security for this note, and in my opinion it is the duty of this court to put a construction upon the language used and the acts done that would carry out this evident purpose, if it is possible to do so. The laborers, to whom this money was paid, had liens under the laws of West Virginia upon all the property of the contractor, at that time, to secure their unpaid wages, and they likewise would have had liens upon such property in the bankrupt court. The county court was anxious to have the work finished; the contractor was naturally anxious to finish it; it was for the benefit of the community, and it was for the benefit of all the creditors of the contractor, that the work should be finished, and the reserve 10 per cent. paid to the contractor or those claiming under it.

There is no doubt but that the contractor, subject to the rights of the county court under the contract between the court and the contractor, had the right to assign, either as collateral security, or fully and completely, the reserved 10 per cent. then in the hands of the county court. Of course, if the contract had not been finally completed, and the amount of the reserved money had not become due upon a final estimate, then such an assignment would have had no effect, and would have been of no value; but where, as in this case, the contract was fully completed, and the final estimate, including the reserved 10 per cent., was paid to the trustee, then the assignment by the contractor thereof was valid and binding. This reserved 10 per cent. then stood as an unmatured liability of the county court to the contractor, and as such was assignable, and was the only asset of the kind which was assignable,

at the time the note was given and the notice of such assignment accepted by the county court.

This meaning of the word "due" I find has been considered by Judge Brannon, in the case of Marstiller v. Ward, 52 W. Va. 74, 43 S. E. 178, where he holds that the word "due" was often held to have the meaning of merely "owing," whether unmatured or not. It is plain to me, as stated before, that it was the evident purpose of the parties in this case, as shown by the testimony of the discussion of the reserved 10 per cent., the amount thereof, and the condition of the work, that all the rights of the contractor in and to that reserved 10 per cent. were to be, and actually were, assigned to the bank to secure the note on the 5th of August, 1920.

Therefore an order should be drawn, reversing the holding of the referee, and ordering this note, with its interest from the date of its maturity, to be paid out of the money in the hands of the trustee as a secured debt.

UNITED STATES ex rel. SEYMOUR v. FISCHER, Sheriff, et al. UNITED STATES ex rel. WATSON v. SAME.

(District Court, D. Nebraska, Lincoln Division. February 27, 1922.)

Nos. 373, 374.

1. **Constitutional law ⟸255—May be lawful for military commander to imprison citizen.**

   Due process of law depends on circumstances, and varies with the subject-matter and the necessities of the situation, and imprisonment of citizens by a military commander may be lawful in some cases.

2. **Militia ⟸15—Governor of state may use militia to suppress insurrection, and declaration of state of insurrection conclusive.**

   Under Const. Neb. art. 5, § 14, and Rev. St. Neb. 1913, §§ 3904, 3913, 3916, the Governor of such state may use the militia to suppress insurrection, and his declaration of the existence of a state of insurrection is conclusive.

3. **Militia ⟸15—Proclamation held declaration of state of "insurrection."**

   Proclamation of Governor of Nebraska, describing condition as being lawless and disorderly beyond the control of the civil authorities, and declaring martial law, was equivalent to a declaration of the existence of that organized resistance to authority known as "insurrection," within Const. Neb. art. 5, § 14, and Rev. St. Neb. 1913, §§ 3904, 3913, 3916, authorizing him to call out the militia, though the word "insurrection" was not used.

   [Ed. Note.—For other definitions, see Words and Phrases, Insurrection.]

4. **Militia ⟸15—Military commander becomes controlling authority in occupied territory.**

   When a state of insurrection exists, and the Governor of Nebraska has legally called into action the military forces of the state, under Const. Neb. art. 5, § 14, and Rev. St. Neb. 1913, §§ 3904, 3913, 3916, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war.

5. **Militia ⟸15—Military power in occupied territory extends to trial and punishment of offenders against regulations made by commander.**

   The military power in occupied territory declared under martial law, under Const. Neb. art. 5, § 14, and Rev. St. Neb. 1913, §§ 3904, 3913, 3916,

extends to the trial and punishment of offenders against regulations made by the military commander, such as those prohibiting the passing of the military lines by persons without permission, the possession of arms and ammunition, and the sale of intoxicating liquors; and the power of the military forces is not limited to the arrest and detention of offenders against the laws of the state, until they can be delivered to the civil authorities for trial on the restoration of peace and order, though the military commander may avail himself of the courts as a means of trial, instead of instituting tribunals during the emergency.

6. Militia ⟸21—Sentence of imprisonment by military tribunal continued after peace.

A sentence of imprisonment by a military tribunal instituted by Governor of Nebraska as to a portion of the state in state of insurrection can be continued after peace is declared and order restored, under Const. Neb. art. 5, § 14, and Rev. St. Neb. 1913, §§ 3904, 3913, 3916.

At Law. Applications by the United States, on the relation of Hugh Seymour and of Ernest Watson, respectively, for writs of habeas corpus to obtain their release from the custody of Edward H. Fischer, Sheriff, and others. Rule to show cause why the writ should not issue discharged.

Jamieson, O'Sullivan & Southard, of Omaha, Neb., for plaintiffs.

Wm. H. Pitzer, Earl M. Cline, and Paul Jessen, all of Nebraska City, Neb., Clarence A. Davis, Atty. Gen., of Nebraska, and R. F. Stout, of Lincoln, Neb., for defendants.

MUNGER, District Judge. These are applications for writs of habeas corpus by two persons who have been committed to a term of imprisonment in a county jail of this state. The facts leading up to the imprisonment are as follows:

The Governor of the state had issued a proclamation declaring the existence at Nebraska City of a state of lawlessness and disorder beyond the control of the civil authorities, and that the local officers had applied for military assistance to be placed in control of that territory for the restoration and maintenance of law and order. The proclamation therefore declared the territory to be subject to martial law, and ordered the National Guard of the state to occupy the territory for the purpose of restoring law and order. After the troops were in possession of the territory, the Governor authorized the appointment of military commissions to try offenses against the public peace and violations of any military rules and regulations.

Each of the petitioners was charged with violation of some of these regulations, one in retaining in his possession arms, equipment, and munitions of war, and the other in keeping open a prohibited place of business, and each was found guilty and sentenced, and the commitments are in pursuance of these sentences. The petitioners were not employed in the military service and were citizens of Nebraska City. The state courts at Nebraska City were open during all the time of military occupation. After the petitioners had served a portion of their sentences, the Governor issued a proclamation reciting that violence and disorder had ceased at Nebraska City, and he therefore terminated martial law and withdrew the troops.

The chief claim of the petitioners is that their continued imprisonment violates the due process of law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States: (1) Because martial law did not exist at the time of their alleged offenses; (2) because the military commission had no power to try them; and (3) because sentence by the commission could not outlast the period of military occupancy.

[1] Due process of law depends upon circumstances, and varies with the subject-matter and the necessities of the situation, and imprisonment of citizens by the military commander may be lawful in some cases. Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410. Article 5, § 14, of the Nebraska Constitution makes the Governor commander of the military forces of the state, and authorizes him to call out the militia to execute the laws and suppress insurrection. Section 3904 of the Revised Statutes of Nebraska (1913) authorizes the Governor, as commander-in-chief of the militia, to employ it in the defense or relief of the state, or any part of its inhabitants or territories, and gives him all the powers necessary to carry into effect the provisions of that chapter of the Statutes.

Section 3913 of the same chapter provides that the militia may be called into service in time of war, invasion, riot, rebellion, insurrection, or reasonable apprehension thereof, and section 3916 authorizes the Governor to proclaim any portion of the state in a state of insurrection when in his judgment the maintenance of law and order will be promoted thereby, and the militia are employed to aid the civil authority.

[2] Under such powers the Governor may make the ordinary use of soldiers to suppress insurrection and his declaration of the existence of a state of insurrection is conclusive. Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410; Luther v. Borden et al., 7 How. 1, 12 L. Ed. 581; United States v. Wolters (D. C.) 268 Fed. 69; In re Moyer, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189; State v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996, Ann. Cas. 1914C, 1; Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988, Ann. Cas. 1916A, 1166.

[3] Was the proclamation of the Governor the declaration of a state of insurrection, or were the military forces called into service merely as aids to the civil officers for the purpose of assisting them in enforcing the laws? The proclamations do not use the word "insurrection," but the condition described of lawlessness and disorder beyond the control of the civil authorities, and the declaration of martial law, are equivalent to a declaration of the existence of that organized resistance to authority known as insurrection. In re Charge to Grand Jury (D. C.) 62 Fed. 828; Alleghany County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670.

[4] When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war. New Orleans v. Steamship Co., 20 Wall. 387, 22 L. Ed. 354; United States v. Diekelman, 92 U. S. 520, 23 L. Ed. 742; Luther v. Borden et al., 7 How. 1, 12 L. Ed. 581; United States v. McDonald

(D. C.) 265 Fed. 754; In re Egan, 5 Blatchf. 319, Fed. Cas. No. 4,303; Commonwealth v. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759; 40 Cyc. 383, 390. As said by the Supreme Court of the United States in the case of Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410, of the powers vested in the Governor to suppress insurrection:

"That means that he shall make the ordinary use of the soldiers to that end, that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power."

[5] Does the military power in the occupied territory which is declared under martial law extend to the trial and punishment of offenders against regulations made by the military commander? Some cases are cited in support of the proposition that the military forces can do no more than to arrest and detain offenders against the laws of the state until they can be delivered to the civil authorities for trial, upon the restoration of peace and order. Franks v. Smith, 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A, 1141, Ann. Cas. 1912D, 319; Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988, Ann. Cas. 1916A, 1166. No doubt the commander may avail himself of the courts as a means of trial, but he may also institute tribunals during the emergency to deal with offenders in the district. The Grapeshot, 9 Wall. 129, 19 L. Ed. 651; New Orleans v. Steamship Co., 20 Wall. 387, 22 L. Ed. 354; United States v. Wolters (D. C.) 268 Fed. 69; Winthrop on Mil. Law (2d Ed.) 1295, 1301; Davis on Mil. Law, 308; State v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996, Ann. Cas. 1914C, 1; Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N. S.) 1030, Ann. Cas. 1914C, 31. This is especially true of offenses against the military regulations, such as these petitioners committed, acts which are not offenses against the laws of the state.

In cases of military occupancy during war or insurrection, the passing of the military lines by persons without permission, the possession of arms and ammunition, the sale of intoxicating liquors, may cause the commander the loss of a battle, and yet these acts may not offend against the local laws. The usage in time of war has been to make regulations covering offenses in violation of the laws of war or of military discipline. Winthrop on Mil. Law (2d Ed.) 1310, 1311.

[6] Can the sentence of imprisonment by such a military tribunal be continued after peace is declared? This question has not been the subject of many reported decisions. The power to punish serious offenses by imposition of the death penalty is well understood, and the lesser punishment of imprisonment for life has been sustained. Ex parte Ortiz (C. C.) 100 Fed. 955. It is stated that during the Civil War such military commissions acting under the authority of the United States held trials and entered judgment in more than two thousand cases (Winthrop, Mil. Law [2d Ed.] 1302), and that sentences of imprisonment for terms of years and for life were imposed (Id. 1313). See, also, Davis on Mil. Law, 313. In case of serious offenses, it is not doubted that the sentence of imprisonment may continue during

the war or insurrection. If the punishment is inflicted but a few days before the establishment of peace, it would seem absurd that sentences, otherwise just, should at once expire. While the necessity for crushing of further resistance may have passed, the reason for continuance of sentences theretofore given has not ceased. The power of the military commander to make a lease of enemy city property extending beyond the termination of the war was sustained in New Orleans v. Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

The conclusion is that, assuming the acts of the military court to have been done in accordance with the laws of the state, there is nothing in the exertion of this power which contravenes the right of due process of law guaranteed by the Constitution of the United States. The rule on the defendants to show cause why the writ of habeas corpus should not be issued will be discharged.

KISSAM et al. v. McELLIGOTT.

(District Court, S. D. New York. December 29, 1920.)

1. **Joint tenancy ⟸3—Assignments of mortgages and corporate bonds held to create "joint tenancy."**

Assignments of bonds and mortgages and corporate bonds to two persons and their survivor, and such survivor's executors, administrators, and assigns, with habendum, in one case, to the party of the second part and the executors, personal representatives, and assigns of such party, and in the other case to their survivor and such survivor's executors, administrators, and assigns, and with a provision that the survivor should become the absolute owner, and that neither of the assignees should have power to affect the right of the survivor, created a "joint tenancy" with right of survivorship, under Real Property Law N. Y. § 66.

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

2. **Joint tenancy ⟸1—Joint ownership of personal property recognized in New York.**

A joint ownership of personal property, analogous to a joint estate in lands, is recognized in New York.

3. **Perpetuities ⟸7(1)—Provision that joint tenant should not have power to affect right of survivor held not restraint on transfer.**

A provision, in an assignment of mortgages and corporate bonds to two persons as joint tenants, with right of survivorship, that they should have no power to affect the right of the survivor thereto, must be construed either as an idle promise, or as an agreement by them not to exercise the power to sever the jointure, and not as a restraint of alienation or transfer, as, so construed, it would be void.

4. **Joint tenancy ⟸6—Joint owner held to own one-half of property, and to gain nothing with regard thereto by other's death, except elimination of interest.**

Where personal property was assigned to two persons jointly, with right of survivorship, one of them owned one-half the property, with right to dispose of it, and she gained nothing in regard to such one-half by the death of the other joint owner, except as his interest was thereby eliminated.

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5. **Internal revenue ⇐8—Tax on estates held a "succession tax."**
Under Act Sept. 8, 1916, § 202, imposing a tax on the value of the gross estate of decedents, the tax imposed is a succession tax.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Succession Tax.]

6. **Internal revenue ⇐8—Estate tax relates to estates thereafter created.**
Act Sept. 8, 1916, § 201, providing that the tax thereby imposed is imposed on the transfer of the net estate of every decedent dying after the passage of the act, relates to estates thereafter created, and not to then existing vested property.

7. **Internal revenue ⇐8—Share of property owned by joint owner prior to other's death not taxable as part of estate.**
Under Act Sept. 8, 1916, §§ 201 and 202, imposing a tax on the estate of decedents, including property to the extent of the interest therein, held jointly by decedent and any other person, where personal property was owned by decedent and another jointly under assignments executed prior to the passage of the statute, the part of the property from which the survivor received the income prior to decedent's death was not taxable as a part of the estate, whether her ownership was the result of a gift or of a contribution by her of that part of the property embraced within the joint tenancy.

At Law. Action by Cornelia B. Kissam and another, as executrix and executor of Jonas B. Kissam, deceased, and Cornelia B. Kissam, individually and as sole beneficiary, against Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York. On motion by plaintiffs for judgment on the pleadings on the first cause of action. Granted.

Stark B. Ferriss, of New York City (Joseph T. Stearns, of New York City, of counsel), for the motion.

Francis G. Caffey, U. S. Atty., of New York City (Richard S. Holmes, Sp. Asst. U. S. Atty., of New York City, and Wheaton Augur, Sp. Asst. U. S. Atty., of counsel), opposed.

MAYER, District Judge. The action is brought to recover an additional tax assessed by the Commissioner of Internal Revenue against the estate of Jonas B. Kissam, deceased, and paid by the plaintiffs as executrix and executor of the last will and testament of said Jonas B. Kissam, deceased, to defendant upon compulsion and under protest.

Plaintiffs, as executors of the will of Jonas B. Kissam, deceased, on May 16, 1918, filed their return under the Federal Estates Tax Law (Act of Congress entitled "An act to increase the revenue and for other purposes," approved by the President September 8, 1916 [39 Stat. 756]) as the same was amended by title III of the act of Congress entitled "An act to provide increased revenue to defray the expenses of the increased appropriations for the army and navy and the extensions of fortifications and for other purposes," approved by the President March 3, 1917 [39 Stat. 1000]), and paid a tax of $5,354.14, less a discount of $11.89, for advance payment. Said return included one-half the value of certain property which was jointly owned by the decedent and the plaintiff Cornelia B. Kissam, to wit, the one-half from which the said decedent received the income in his lifetime.

On May 9, 1919, the Commissioner of Internal Revenue assumed to impose an additional assessment against said estate, by increasing the valuations of said jointly owned property, by including also the value of the one-half thereof from which the plaintiff Cornelia B. Kissam derived income, such increases amounting to $202,812.37, and assumed to impose an additional assessment of tax on said estate, amounting to $13,668.60. A claim for abatement was duly filed, and the executors on June 13, 1919, paid the whole additional tax assessed as aforesaid; $13,668.60, under protest, and thereafter duly demanded a refund of $12,840.69 of the amount so paid, which claim for refund was denied.

The bonds and mortgages and corporate bonds mentioned in the first cause of action constitute a portion of said jointly owned property. On July 15, 1912, the decedent was the owner of said bonds and mortgages and corporate bonds, and on that day assigned and transferred all of said bonds and mortgages and corporation bonds to John C. Knox. On July 19, 1912, Knox assigned and transferred said bonds and mortgages to Jonas B. Kissam (the decedent) and Cornelia B. Kissam (one of the plaintiffs) as joint tenants, and on August 13, 1912, Knox assigned and transferred said corporate bonds to them as joint tenants in like manner.

The Commissioner of Internal Revenue, in making such additional assessment, assumed to act under section 202 of said Estate Tax Law, which, so far as material, reads as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The question raised by the demurrer to the first cause of action is whether, under section 202 of the Estate Tax Law quoted, the entire value of the bonds and mortgages should be returned, or only the value of the one-half interest therein from which the decedent received the income; the defendant and the Commissioner of Internal Revenue claiming that the entire value of the property should be returned, and the plaintiffs contending that the Federal Estate Tax Law should be construed as not affecting the one-half interest in said property from which said Cornelia B. Kissam always (since 1912) received the income, on the ground that her said one-half interest in said jointly owned property was vested in said Cornelia B. Kissam in individual ownership in July and August, 1912, four years before the passage of the Estate Tax Law, and remained her individual property to the time of decedent's death, and was not, in fact or law, a part of the estate of the decedent.

[1] The first cause of action is to recover that portion of such additional tax which is based on the assessment of the Cornelia B. Kissam one-half interest in the bonds and mortgages and corporate bonds, and demands judgment for $11,819.74. There are four causes of action,

and defendant has demurred to the first and fourth. The demurrer to the first cause of action will be considered.

The bonds and mortgages mentioned in the first cause of action were assigned in July and August, 1912, to Jonas B. Kissam and Cornelia B. Kissam by several assignments of mortgage, the granting clauses of which ran to them (who were therein designated as "party of the second part") and to "their survivor, such survivor's executors, administrators, and assigns," and the habendum clauses of which assignments, ran to them, viz. "to the party of the second part and to the successors, personal representatives, and assigns of said party of the second part forever," and each of said assignments contained a clause after the habendum stating:

"It is the intention of this assignment that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner to affect the right of the survivor thereto."

The corporate bonds mentioned in the first cause of action were assigned to them in August, 1912, by one assignment, the granting clause of which ran, "unto the said Jonas B. Kissam and Cornelia B. Kissam, their survivor, such survivor's executors, administrators, and assigns," and the habendum clause in which ran to them, "their survivor, such survivor's executors, administrators, and assigns forever," and said assignment contains a clause after the habendum reading as follows:

"It is the intent of this instrument that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said bonds, and that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

In New York:

"Every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be a joint tenancy." Real Property Law of New York (Consol. Laws, c. 50) Laws 1909, c. 52, § 66.

In Mills v. Husson, 140 N. Y. 99, 104, 35 N. E. 422, 424, it was held:

"The statute declaring that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy, applies to personal estate."

In Overheiser v. Lackey, 207 N. Y. 229, 233, 100 N. E. 738, 739 (Ann. Cas. 1914C, 229), the court said:

"It was held at an early date, however, in this state that the provision of the Revised Statutes which has been quoted did not necessarily require that the words 'joint tenancy' should be used in a grant or devise to create an estate of that character provided any other expression clearly importing such an intent was employed. * * *"

[1] It is clear from the language used in the instruments, supra, that the ownership of the securities was one of joint tenancy, with right of survivorship. The nature and character of a joint tenancy has naturally been often defined, from Coke on Littleton, § 288 (186a) and section 281 (182a), to the modern writers. Blackstone's Commentaries, Book II, c. XII, par. II (Chase's Blackstone [3d Ed.] p. 363); Reeves

on Real Property, § 680; Tiedeman on Real Property, § 117; Schouler's Personal Property (1884) §§ 160 and 163.

[2] That "there is joint ownership of personal property analogous to a joint estate in lands" is well recognized by the New York courts. Matter of McKelway, 221 N. Y. 15, 18, 116 N. E. 348, 349 (L. R. A. 1917E, 1143). The legal status of such an ownership is succinctly stated by Judge Pound in the McKelway Case, supra:

"Joint tenants, by reason of the combination of entirety of interest with the power of transferring in equal shares, are said to be seized per my et per tout, or by the half and the whole; but tenants by the entirety are seized per tout et non per my, and the conveyance by either husband or wife will have no effect against the other, if survivor. Hiles v. Fisher, 144 N. Y. 306. Upon the vesting of an estate by the entirety, both tenants become seized of the whole estate, and upon the death of one the survivor acquires no new or additional interest by survivorship. Matter of Klatzl, supra. But joint ownership in personal property may be severed by the act of one in disposing of his interest. If the interest of one joint owner passes to a third party he and the other joint tenant become tenants in common. The doctrine of survivorship applies only if the jointure is not severed. Williams on Personal Property, pp. 302–306. The undivided half of this joint property which Mr. McKelway might have effectually disposed of at any time during his life never passed into the absolute ownership of his wife until her husband's death."

[3] The clause in the assignment, supra, "it is the intent of this instrument * * * that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto," cannot be considered as in restraint of alienation or transfer. If so, it would be void. It must be construed either as an idle promise, so far as concerned survivorship, or as a recognition of the power of each to sever the jointure by assigning his or her interest and an agreement not to exercise this power. Whether such agreement would be valid or effective is here immaterial.

[4] The situation, therefore, is that Cornelia B. Kissam owned one-half the property. This she had the right to dispose of, and from this she received the income.

"She gained nothing in regard thereto by the death of her husband, except as the jus accrescendi eliminated his interest." Matter of McKelway, supra; Matter of Teller, 178 App. Div. 450, 453, 165 N. Y. Supp. 517; Matter of Moebus, 178 App. Div. 709, 165 N. Y. Supp. 887; Blackstone's Commentaries, Book II, c. XII, par. II; Chase's Blackstone (3d Ed.) p. 362.

[5] The tax imposed by section 202, supra, is clearly a succession tax. Randolph v. Craig, 267 Fed. 993. If construed retroactively, from one standpoint it would impose a tax on property owned by Cornelia Kissam prior to the passage of the act, and might be open to serious constitutional objections on the ground that it imposed a direct tax without apportionment among the states. If construed prospectively, it might be upheld on the theory of Matter of Dolbeer, 226 N. Y. 623, 123 N. E. 381:

"In Matter of McKelway, 221 N. Y. 15, it was held that, even when the joint account was created prior to the adoption of the statute, the transfer by survivorship was taxable to the extent of one-half the joint property. When the joint account is created subsequent to the adoption of the statute, the privilege of acquiring the entire property by the right of succession may be subjected to the tax on the method of acquisition. Matter of Vanderbilt, 172

N. Y. 69, 73; Matter of Keeney, 194 N. Y. 281; 222 U. S. 525. The right to take property by survivorship is the creation of law upon which the state may impose conditions (Matter of Dows, 167 N. Y. 227; Matter of White, 208 N. Y. 64, 67), if no vested or contract rights are thereby violated." Matter of Dolbeer, supra.

[6, 7] It is true that section 201 provides that the tax is imposed upon the transfer of the net estate of "every decedent dying after the passage of this act" ; but the assumption must be that this related to estates thereafter created, and not to then existing vested property. If it be argued that in taxing the succession or transfer involved in the passing of the interest of Jonas to Cornelia, the measure of the tax was the extent of the interest of both, the result is the same.

At the time the statute was passed Cornelia Kissam's interest belonged to her. In other words, the time of the transfer of the interest which Cornelia Kissam got from Jonas Kissam, in his lifetime, had passed. From the structure of the act, to say that the measure of the tax is the extent of the interest of both joint tenants, is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer neither title nor control.

When viewed prospectively, Congress would have the power to tax the privilege of a survivor of acquiring the entire property by the instrumentality of a joint tenancy. When viewed retroactively, it must be assumed that Congress would regard as the original owner of the "part" the surviving joint tenant who prior to the passage of the act was vested with or possessed of legal title, whether such ownership was the result of a gift or of a contribution of the "part" of the property embraced within the joint tenancy.

The view here expressed is, perhaps, more favorable to the government than that entertained in Randolph v. Craig, supra. If correct, the statute will be workable from a practical standpoint and what may prove to be serious objections will be avoided.

Motion granted.

ALBERS BROS. MILLING CO. v. DRUMHELLER, Collector of Customs, et al.

(District Court, W. D. Washington, N. D. March, 1922.)

No. 214.

Carriers ⇐58—Indorsee of bill of lading holds title as against purchaser from one in wrongful possession.

The payee of a draft drawn against a shipment of merchandise consigned to order of the consignor, on which is indorsed "Documents against payment," and to which was attached the bill of lading indorsed to such payee, *held* to hold title to the merchandise as security until payment of the draft and surrender of the bill of lading, which title was not divested by a sale and delivery of the merchandise to a bona fide purchaser for value, after acceptance of the draft by the drawee, who obtained possession without authority or knowledge of the payee.

In Equity. Suit by the Albers Bros. Milling Company against Roscoe Drumheller, Collector of Customs, and the Exporters' & Importers' Warehouse Company of Seattle. Decree of intervener.

Farrell, Kane & Stratton, of Seattle, Wash., for plaintiff.
Charles H. Hartge, of Seattle, Wash., for defendants.
Bronson, Robinson & Jones, of Seattle, Wash., for intervener.

NETERER, District Judge. This action against Drumheller has on stipulation been dismissed, and the issue to be determined is between the plaintiff and intervener, who, it is stipulated, are corporate entities doing business in this district, and that, on December 4, 1919, Rogers, Brown & Co. imported from Japan to Seattle 1,200 bags of peas from Kaisi & Co., consignor and shipper over the line of Mikami & Co., operator of the steamship Eastern Moon; that the peas were shipped and consigned to the order of Kaisi & Co., Limited, with instruction to "notify Rogers, Brown & Co." At the time of shipment Kaisi & Co. drew its draft on Rogers, Brown & Co. in favor of the intervener for the sum of $9,072, as a part of the purchase price of the peas, and Kaisi & Co., for the purpose of transferring all of its interest in the bill of lading and peas, indorsed and transferred to the intervener the bill of lading covering the shipment, and thereupon forwarded the bill of lading, with draft attached, on the face of which is indorsed "Documents against payment," to the intervener, and were delivered to such intervener on the 26th of December, 1919, who since said time has been the owner and in possession thereof; that the draft was presented to Rogers, Brown & Co., and accepted December 26, 1919, payable on March 25, 1920. On January 4, 1920, the peas arrived at the port of Seattle, and on that date were unloaded by the carrier on the dock of the East Waterway Dock & Warehouse Company, a public terminal warehouse, where the importers in the usual course of business received their importations. On the 8th of January the customs house broker, an agent of Rogers, Brown & Co., without objection of the carrier, made a warehouse entry for the warehousing of the peas in bonded storage, and obtained customs permit authorizing the transfer of the peas from the dock to the public bonded warehouse, and to there deposit them for warehouse and bonded storage. At the time of the entry no bill of lading was produced, a bond being accepted by the collector from Rogers, Brown & Co., conditioned for the production of the bill of lading within 90 days from the date of such bond.

The respondent testifies that he did not know that the peas were entered for warehousing by Rogers, Brown & Co., and did not know that a bond had been posted to produce the bill of lading. On January 21, Rogers, Brown & Co. obtained a switching permit, authorizing the use of cars for transfer of the peas from the dock of said East Waterway Warehouse Company, to Exporters' & Importers' Warehouse Company, and directed a joint letter to the East Waterway Warehouse Company and Exporters' & Importers' Warehouse Company, advising what had been done and directed the Exporters' & Importers' Warehouse Company to issue to it a negotiable warehouse receipt on arrival of goods. On the 23d of January, pursuant to the permit and directions, the peas were without objection transferred in sealed cars, and under the supervision of the inspector of customs, to the public

bonded warehouse, and in conformity with provisions of the United States customs laws deposited in bonded storage under the supervision of customs inspectors, and the Warehouse Company without objection issued its negotiable warehouse receipt for the peas. On the 22d of March following the plaintiff purchased the peas and paid to Rogers, Brown & Co. $7,639.65, in good faith, and without notice of fraud or mistake or irregularity in delivering the peas without the bill of lading, and without notice that they were consigned to the order of the consignor, Rogers, Brown & Co., indorsed and delivered the negotiable warehouse receipt to the plaintiff. Upon the maturity of the draft, March 25, the time was extended to May 25.

Prior to the issuance of the negotiable warehouse receipt Rogers, Brown & Co., paid all previous storage charges. The plaintiff at no time had any notice or knowledge of condition, or the relation of the peas, bill of lading, or the draft. June 7, 1920, a receiver was appointed and took charge of Rogers, Brown & Co.'s assets. The intervener took no steps in the matter until it intervened in this case, except on the 3d of July, 1920, it notified the collector of customs that it claimed right and title to the possession of the peas. On September 7, 1920, plaintiff demanded delivery of the peas from the collector of customs, basing its right upon its warehouse receipt, and at the time offered to pay all United States customs duties and charges against the peas, due and payable, but delivery was refused. By stipulation of the parties the peas have been sold and the money deposited in the registry of the court, less the custom charges and expense of sale.

It is contended by the intervener that by the bill of lading, accompanied by a time draft, upon acceptance of the draft, the title passed to Rogers, Brown & Co., and seeks to support such from National Bank v. Merchants Bank, 91 U. S. 92, 23 L. Ed. 208; Moore et al. v. National Bank, 44 La. Ann. 99, 10 South. 407, 32 Am. St. Rep. 332. In the cases cited a bill of lading of merchandise deliverable to order was attached to time draft without special instructions, and upon acceptance of the draft the bill of lading was surrendered, and the court said:

"If the absence of specific instructions left it uncertain what was to be done, further than to procure acceptances of the drafts, and to receive payment when they fell due, it was the fault of the principal. If the consequence was a loss, it would be most unjust to cast the loss on the agent."

In the same decision, on page 104 of 91 U. S. (23 L. Ed. 208), the court says:

"We feel justified in saying that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft."

The issue determined by the court in Moore et al. v. National Bank, supra, was that in absence of instructions the collecting agent was authorized to infer that the warehouse receipts were annexed to the draft to secure its acceptance, and were to be surrendered on acceptance. N. S. R. v. Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611, has no re-

lation to the issue here, since the issue in that case was negligence on the part of the carrier to deliver to the consignee goods upon which freight charges were not paid, and the company having thus delivered the goods could not enforce its lien for freight charges against the goods in the hands of a bona fide purchaser. The intervener is not the carrier, but stands in the place of the consignor. Upon the face of the draft is indorsed, "Documents against payment," to which are attached documents per steamship Eastern Moon, which were not surrendered at the time of acceptance, or at all. The Supreme Court in Dows v. National Bank, 91 U. S. 618, 23 L. Ed. 214, held that a bank discounting a draft and receiving therewith, deliverable to its order a bill of lading of the goods against which the draft was drawn, acquires a special property therein, and has a right to hold the goods as security for the acceptance and payment of the draft. At page 637 of 91 U. S. (23 L. Ed. 214) the court says:

"The defendants could acquire no title, or even lien, from a tortious possessor; however innocent they may have been (and they were undoubtedly innocent of any attempt to do wrong), they could not attain ownership of the wheat from any other than the owner. The owner of personal property cannot be divested of his ownership without his consent, except by process of law."

It is shown in this case that interest of the vendor in the goods covered by the bill of lading was transferred to intervener for the purpose of securing the payment of the draft when due, and that it is now the owner and holder of such bill of lading, and from the draft and attached documents, and the established fact, the parties, no doubt, intended that the title and ownership of the property should remain in the vendor until the purchase price was paid. Canadian Northern Railway Co. v. Northern Mississippi Railway Co., 209 Fed. 758, 126 C. C. A. 482. Title to the property in issue never passed to Rogers, Brown & Co., but vested in the intervener, and as owner it has the right to follow and reclaim them as it so elects. Nothing was done by the intervener which could mislead the plaintiff, or which did in any sense authorize a limited or special bailment, as in Dows v. National Bank, supra. Silence when it was not required to speak could not work an estoppel. Blanck v. Pioneer Mining Co., 93 Wash. 34, 159 Pac. 1080.

"To effect an estoppel must have operated as a fraud, must have been intended to mislead, and itself must have actually misled. The party keeping silent must have known, or had reasonable grounds for believing, that the other party would rely and act upon his silence. The burden of showing these things rests upon the party invoking the estoppel."

As between the plaintiff and intervener, the right of the intervener is clear. What enforceable right the plaintiff may have against other parties is not in issue before the court.

MOORE v. SHISLER.

(District Court, D. New Jersey. April 6, 1922.)

1. **Pleading ⇐360(1)—Motion to strike admits only facts well pleaded.**
A motion to strike out a complaint, under Practice Act N. J. 1912 (P. L. p. 377), for failure to disclose a cause of action is the equivalent of a demurrer, and does not admit conclusions of law, but only such facts as are well pleaded.

2. **Mechanics' liens ⇐113(2)—Prerequisites to stop notice under New Jersey statute.**
Under Mechanics' Lien Law N. J. (P. L. 1917, p. 821) § 3, which provides, inter alia, that whenever any contractor shall on demand refuse to pay a subcontractor "the money * * * due to him," the subcontractor may serve a stop notice on the owner, which shall be the basis for a lien and impose liability on the owner, as construed by the courts of the state, in order that the stop notice shall be effective the contractor must first be put in fault by a refusal to pay an amount then presently due and payable, and a demand for a sum which is not yet due under the terms of the subcontract is not effective to authorize a stop notice.

At Law. Action by David H. Moore against George W. Shisler. On motion to strike the complaint. Motion granted.

C. L. Cole and Lee F. Washington, both of Atlantic City, N. J., for the motion.

Bolte, Sooy & Gill, of Atlantic City, N. J., opposed.

BODINE, District Judge. The plaintiff entered into a contract to furnish the plumbing and heating work for a number of brick and frame houses one Wesley B. Porch was building at Atlantic City, under a contract for the defendant. The contract between Porch and the defendant was recorded in accordance with the provisions of the Mechanics' Lien Law.

This suit is predicated upon the performance of the plaintiff's contract, nonpayment for the work done, and the service upon the owner of the land of a stop notice in alleged pursuance of section 3 of the New Jersey Mechanics' Lien Law (P. L. 1917, p. 821). The question at issue is the effect of the notice.

The contract between plaintiff and Porch provided, with respect to payment, as follows (the italics are mine):

"On or about the first day of every month during the progress of the work, the plumbing and heating contractor shall submit to the general contractor, a copy of the pay roll and other expenditures put forth by him, the plumbing and heating contractor, during the previous month, also a statement of the cost of materials incorporated in the structures; upon the general contractor's receipt of such statement from the plumbing and heating contractor, he shall, within three (3) days of the receipt of same, pay or cause to be paid to the plumbing and heating contractor a sum equal to 50 per cent. of such statement presented by the plumbing and heating contractor.

"At the entire and full completion of the work, the plumbing and heating contractor shall submit to the general contractor *a full statement showing the contract price for the work plus any additions or deductions, with the full credits and payment for the balance shall be made within thirty (30) days after the receipt by the general contractor of such statement.*".

The complaint shows that the work required under plaintiff's contract was not completed until July 16, 1920, and it was on this day that demand of payment was made upon Porch and the stop notice served, and it is said that, such demand and stop notice being premature, in that the contract provides that the payment shall be made within 30 days after the furnishing of the "full statement," that no rights arose by reason of the stop notice, and the plaintiff is without remedy against the owner of the land. Further the complaint nowhere states that the "full statement" called for by the contract was given by plaintiff to Porch, and it is urged that this "full statement" was a condition precedent to complainant's right to file a stop notice with the owner of the land, and that the sum for which the stop notice was served was not "due" within the meaning of the statute.

[1] A motion to strike out a complaint under the New Jersey Practice Act of 1912 (P. L. p. 377), for failure to disclose a cause of action, is the equivalent of a demurrer. Such facts only as are well pleaded are admitted and not conclusions of law. Tinsman v. Bel. Del. R. R. Co., 26 N. J. Law, 148, 69 Am. Dec. 565; Coxe v. Gulick, 10 N. J. Law, 328; Davis v. Minch, 80 N. J. Law, 214, 76 Atl. 328; Koewing v. West Orange, 89 N. J. Law, 539, 99 Atl. 203.

[2] Section 3 of the New Jersey Mechanics' Lien Law, on which the action is predicated, is to be found in Pamphlet Laws 1917, p. 821. How closely the act resembles the first enactment, as embodied in the Pamphlet Laws of 1853, p. 437 (Revision, p. 668), is shown below. The act of 1853 is set out in parentheses and italics; the act of 1917 in italics and ordinary type.

"(That) *Whenever any master workman or contractor,* or whenever any contractor under any master workman or contractor *shall, upon demand, refuse to pay any person who may have furnished* him *material*(s) *used in the erection of any such house or other building, or any* subcontractor, *journeyman or laborer employed by him in* (the) *erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman,* (or) *laborer,* (or) *materialman* or subcontractor *to give notice in writing to the owner or* (the) *owners of such building,* and such master workman or contractor of *such refusal, and of the amount due to him or them and so demanded,* specifying said amount as nearly as possible, *and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by* (any) *such journeyman, laborer* (or) *materialman* or subcontractor *out of the amount owing by him or them* (to such master workman or contractor) on the contract or that thereafter may become due from him or them on such contract for labor or material used in the erection of such building, *giving* (him) the master workman or contractor and any contractor under any master workman or contractor *written notice of such notice and demand, and if the same be not paid or settled by said master workman or contractor,* or such contractor under any master workman or contractor, *such owner or owners, on being satisfied of the correctness* of said (such) *demand, shall pay the same, and the receipt of such journeyman, laborer,* (or) *materialman* or subcontractor *for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such master workman or contractor,* or his representatives or assigns, *as so much paid on account.*"

The original enactment was construed by Mr. Chief Justice Beasley in Reeve v. Elmendorf, 38 N. J. Law, 125, 132, where he says:

"Before the workman or subcontractor can notify the owner of his claim, he must put his employer in fault. The statute says that, when the contractor

shall, upon demand, refuse to pay the wages due, the owner may be notified. Now, therefore, until the contractor has refused to pay what is justly due and in arrear, the statutory remedy is not applicable."

The plaintiff's contention is that Reeve v. Elmendorf is no longer law, and that the 1917 amendment has modified the statute, so that the reasoning of Chief Justice Beasley no longer applies. The 1917 amendment, as above shown, merely enlarges the class who may have the benefit of section 3. It does not give a right to those whose claims are not due. There is no language in the amendment justifying a contrary suggestion. Mr. Vice Chancellor Van Fleet in Kirtland v. Moore, 40 N. J. Eq. 106, 2 Atl. 269, stated, so far as pertinent, the requisites to the maintenance of such an action:

"A person, to be in a position to be entitled to the remedy given by the third section of the mechanics lien law, must, in the first place, be a creditor of the contractor; not a general creditor, but a creditor whose debt was contracted for work done to the building erected by the contractor for the owner, or for material furnished for the building. Such is the plain direction of the statute. Second. He must be a creditor whose debt is due. Before a workman or materialman can notify the owner of his claim, he must put the contractor in fault. The statute says that when the contractor shall, upon demand, refuse to pay the money or wages due, the owner may be notified. *Until, therefore, the contractor has refused to pay what is justly due and in arrear, the statutory remedy is not applicable.* Reeve v. Elmendorf, 9 Vroom, 125. Third. There must be a demand and refusal, and the demand must be for such an amount as the creditor *is entitled to be paid at once.* There can be no recovery against the owner of a lesser sum than that demanded of the contractor, because the finding that such lesser sum was the debt really due, would, per se, show that the contractor was not in fault in refusing to pay. His obligation is to pay the money or wages due, and if more is demanded, he has a right to refuse to pay. Reeve v. Elmendorf, supra. Fourth. The creditor must give notice, in writing, to the owner, of the contractor's refusal to pay and of the amount by him demanded. In a case where all these requisites exist, the workman or materialman has a right to have the owner to retain the amount so due to him and demanded 'out of the amount owing by him to the contractor,' and the owner, on being satisfied of the correctness of the sum demanded, must pay the same to the workman or materialman, and the receipt of the workman or materialman will entitle the owner to an allowance therefor against the contractor. In a case where the statutory requisites exist, notice, given according to the statute, works an assignment, pro tanto, to the workman or materialman of the rights of the contractor against the owner. Wightman v. Brenner, 11 C. E. Green, 489. Upon notice given, the workman or materialman, to the extent of his demand, takes the place of the contractor. Reeve v. Elmendorf, supra. But if, when the notice is served on the owner, there is nothing owing to the contractor, and he is without right against the owner, the notice is without legal effect. Craig v. Smith, 8 Vroom, 549. The test is whether a suit for the money demanded will lie by the contractor against the owner; if it will not, the owner is not liable to a suit by the workman or materialman. Reeve v. Elmendorf, supra. The construction of the statute to this extent is settled, and the rights of the claimants to the fund in court must be determined by the rules above stated."

It is finally urged by the plaintiff that the word "due" in section 3 of the act should have the construction given the word "due" as set forth in the case of United States v. State Bank of Carolina, 6 Pet. 29, 8 L. Ed. 308. Whatever force there might have been in that argument prior to the decision in Reeve v. Elmendorf now requires no speculation. It may here be said in passing that the Legislature, as is

shown by the context of the act, used the word "due" as referring to that which was immediately "due," because the right to file a stop notice is given to him "whose money or wages are due." The notice, then, if it complies with the statute, is effective to stop in the hands of the owner such sum of money as is owing on the contract or thereafter *may become due on such contract.*

Clearly the Legislature recognized the distinction between that which is due and that which shall become due, and confined the rights arising from the stop notice to those whose claims were "due" and payable.

The motion will be granted.

THE MUNALBRO.

(District Court, D. Massachusetts. April 13, 1922.)

No. 2016.

1. **Collision ⟸48—Steamer must justify failure to discover schooner.**
A steamer colliding with a schooner must justify herself for failing seasonably to discover the schooner and to keep out of her way.

2. **Collision ⟸82(2)—Duty of ship to discover fog bank and moderate speed.**
It was the duty of a steamship to discover a fog bank ahead of it, and to moderate her speed before entering it.

3. **Collision ⟸86—Steamer colliding with schooner held solely at fault.**
A steamship colliding with a schooner at night at the entrance to a sound *held* wholly at fault for not sooner discovering the schooner.

In Admiralty. Libel by Charles Pike against the steamship Munalbro. Decree adjudging steamship at fault for collision.

Goodwin, Proctor, Field & Hoar, of Boston, Mass., for libelant.

Burlington, Veeder, Masten & Fearey, of New York City, for claimant.

MORTON, District Judge. This is a case of collision between the steamship Munalbro and the schooner Whiteways. It occurred about 12:06 a. m., July 5, 1921, in the western entrance to Vineyard Sound. The Munalbro is about 375 feet long and 4,000 tons gross register. She was bound to the eastward. Her speed was about eight knots. The Whiteways was a three-masted schooner; she was loaded, as was the steamer, and she was leaving the Sound, bound west. The vessels came together on the northerly side of the entrance, about a mile and a half to the east and south of the lightship, and about two miles to the west and south of Cuttyhunk light.

The account of the accident given by the schooner is that she was proceeding under full sail, with a moderate northeasterly breeze, her booms being well off and guyed on the port side. Her objective was the lightship. Another schooner, the Ononette, with which the Whiteways was in company, had passed her, and at the time of collision was between a quarter and half a mile ahead. The schooner's lookout saw

and reported the lights of the steamer. As the vessels drew together, the officers of the schooner observed that the steamer's course was taking her very close to them. The schooner nevertheless held her course and speed, with the result that the steamer cut across her bow, carrying away her bowsprit and jibboom and all the head sails, and causing severe damage. After the collision the schooner anchored until daylight and subsequently made her way to a repair point.

The steamer's account is that as she approached the entrance she saw the Ononette on her port bow and a steamer somewhat broader off on her starboard bow; that she was not aware of the presence of the Whiteways until the latter's sails were discovered close aboard on the *starboard* bow, and shortly afterward her *red* light; that the steamer's helm was put hard astarboard and the engines reversed in an effort to swing away from the schooner; and that the collision occurred before the steamer had swung perceptibly to her helm.

[1] Obviously it devolves upon the steamer to justify herself for failing seasonably to discover the schooner and to keep out of her way. Her explanation is that the schooner was sailing along in a bunch of rolling fog, which obscured her lights. The steamer also claims that the schooner changed course towards the steamer just before the collision, and that this change of course caused the accident. The schooner's crew deny that they were sailing in a fog, or that there was any fog before the collision, which interfered with her being seen from the steamer, or that she changed course as claimed. It thus becomes necessary to examine with some care the evidence upon these points.

The collision occurred at six minutes after midnight, steamer's time. The clocks of the schooner were an hour faster than those of the steamer. Making due allowance for this difference, there is not much discrepancy in the statements as to the time of the collision. Until midnight the steamer's deck had been in charge of her third mate. About five minutes before midnight the captain came to the bridge, and remained there until after the collision. As the steamer passed Vineyard Sound lightship, it was clearly seen, as was Cuttyhunk light, then some 2½ miles or 3 miles ahead, and Gay Head light about 5 miles to the southeast. The steamer's watch also saw the red light of the Ononette, and observed her as the vessels passed. Just before midnight the Gay Head light was shut out by weather conditions, but Cuttyhunk light continued visible, according to the steamer's witnesses. At some time after the collision both vessels were unquestionably enveloped in fog—the Vineyard Sound lightship began fog signals at 12:15 a. m. according to the testimony. Before daybreak, however, the fog had cleared up.

[2] Whether the fog settled down on that part of the Sound before or after the collision is greatly in dispute; the schooner contending that it was afterward, the steamer that it was before. One of the steamer's officers, who came on deck immediately after the collision, testifies that he did not notice any fog until seven or eight minutes later. The schooner's witnesses are inclined to deny that there was fog at any time during the night. In this they are plainly wrong, and their denial impairs the weight of their testimony. Ward, the mate of the Ononette,

testifies that he heard the crash of collision and, looking back, saw the lights of both vessels. The steamer contends that the schooner was traveling just at the outer edge of the rolling fog bank, so placed that she could see the steamer's lights, while her own were obscured from the steamer—an improbable state of affairs, not consistent with Ward's testimony, nor with the testimony of the schooner's crew, nor of the steamer's own third officer, and her helmsman. I am not satisfied that the facts in this respect are as the steamer claims. I think it more probable that the schooner was visible from the steamer and that her lights were overlooked. There are some things in the evidence which suggest that the steamer's lookout may have been inattentive to his duty. Moreover, if there was a fog bank ahead of her, the Munalbro had no right to plunge into it at full speed. It was her duty to discover it, and to moderate her speed before entering it, as was expressly held in The St. Paul, 11 Asp. Mar. Cas. N. S. 169 (C. A.), and The Strong, 7 Asp. Mar. Cas. N. S. 194.

The remaining question is whether the schooner was also at fault. The steamer contends that the schooner changed course across her bow, and that but for this the vessels would have gone clear. It is a claim which the steamer is obviously in no strong position to make, because nobody on her saw the schooner until just before the collision, and her principal contention is that the schooner was obscured by fog which made it impossible to see her. In collision cases, a claim by the burdened vessel that the privileged vessel changed course and thereby brought about the accident is not infrequently made (see Haney v. Balt. Steam Packet Co., 23 How. 287, 291, 16 L. Ed. 562), but seldom with as little in the way of direct evidence to support it as in the present case. All the witnesses on the schooner have testified that she made no change of course, and no witness on the steamer testifies to having observed such a change. McDormand, the schooner's helmsman, gave a second deposition, as a witness for the claimant, in which he testified that the schooner did change course across the steamer's bow, and that his first testimony was untrue. This and the angle of collision constitute practically all the evidence in favor of the steamer's contention on this point. There are certain grounds for suspicion about the schooner's testimony. If there were any reliable and positive testimony that she changed course, the denials of her crew would hardly suffice to convince me to the contrary. But the testimony of McDormand, who, at one time or the other, has sworn falsely is not reliable. Of a witness in a similar situation, except that his statements in contradiction of his testimony had not been made under oath, Judge Dodge said:

> "If he were now to make these statements under oath, * * * I should be unable, under the circumstances shown, to accept or rely upon them for any purpose." The Teaser (D. C.) 217 Fed. 925.

While the angle of collision as described by most of the witnesses was much greater than the divergence of the courses on which the colliding vessels were proceeding, it is to be borne in mind that the impact of the steamer swung the bow of the schooner as soon as the vessels came into contact, and the angle given by the witnesses may be that of a few seconds after the collision, instead of at the moment

ot contract. There may also have been a slight swing of the steamer to port under her starboard helm and the push of the collision. For the schooner to turn across the bow of the on-coming steamer, which she had under observation, would have been, not only a violation of her duty, but an unnatural and improbable thing to do. On all the evidence, I am not satisfied that it took place. Several other charges of fault have been made against the schooner; but they are not substantiated by the evidence, and it is unnecessary to discuss them.

[3] While the case is not free from doubt, it seems to me that it is probably the not unusual one of a sailing vessel nearly ahead of an approaching steamer being overlooked by the steamer. The surrounding circumstances support this view. The Ononette was just ahead of the Whiteways. She had just passed the steamer close aboard, showing her red light. One witness estimates the distance between them at not over 50 yards. It is likely that she distracted the attention of the steamer's lookout for a moment or two. The Whiteways was just behind the Ononette, proceeding on substantially the same course, and also showing a red light. The Whiteways was just enough to the southward of the Ononette to bring her almost dead ahead of the Munalbro, and was following the Ononette so closely that she was not noticed.

It follows that there must be a decree adjudging the Munalbro solely at fault for the collision, and referring the case to an assessor to state the damages.

In re MADDOX.

Petition of VIVETT.

(District Court, W. D. Kentucky. November, 1921.)

1. **Bankruptcy ⟸288(2)—Process in execution of judgment obtained more than four months before bankruptcy cannot be attacked in summary proceeding.**
   Under Bankruptcy Act, § 67c (Comp. St. § 9651[c]), providing that a lien obtained in or pursuant to any suit or proceeding begun within four months shall be dissolved by the adjudication, where an action was begun and judgment entered more than four months before the filing of the petition, the final process for the enforcement of the judgment by a sale of property seized under execution cannot be interfered with or annulled by a summary proceeding, but only by a plenary action.

2. **Bankruptcy ⟸288(2)—Right to attack process on judgment governed by law in force four months before filing of petition.**
   The right of the trustee in a summary proceeding to attack an execution sale under a judgment in an action commenced more than four months before the filing of the petition in bankruptcy depends on the law as it existed previous to a date four months prior to the filing of the petition.

In Bankruptcy. In the matter of F. M. Maddox, bankrupt. On petition by Cage Vivett for review of an order of the referee requiring him to account for the proceeds of property sold on execution. Order reversed, with directions to dismiss petition.

Crossland & Crossland, of Paducah, Ky., for bankrupt.
Arthur Y. Martin, of Paducah, Ky., for trustee.
E. T. Bullock, of Clinton, Ky., for Cage Vivett.

WALTER EVANS, District Judge. This case comes before us upon a petition filed by Cage Vivett on October 3, 1921, for a review by the court of an order of the referee entered September 26, 1921, directing and requiring said Vivett "to account to and forthwith pay over to" the trustee of the bankrupt "the sum of $818.25 as the property of the said bankrupt."

The facts are not complicated and are found to be that on the 13th day of October, 1920, a judgment was entered by the Mississippi county circuit court in the state of Missouri in an action then pending in said court, wherein said Vivett was plaintiff and F. M. Maddox was defendant, the latter being now the bankrupt and the suit being to recover from him the sum of $1,078 besides interest and costs. On March 8, 1921, an execution was issued on the judgment, and on March 16, 1921, was levied on certain personal property belonging to and in the possession of said Maddox. Under execution and levy, and after due advertisement thereof, a sale of the property was made by the sheriff of that county on April 1, 1921, and Vivett became the purchaser thereof for the net sum of $818.25. Meantime on March 30, 1921, F. M. Maddox filed the petition in this proceeding to be, and accordingly on that day he was adjudicated a bankrupt by this court. Of that fact, however, neither the sheriff nor Vivett had any knowledge until a few days after the sale.

On June 16, 1921, the trustee of the bankrupt filed before the referee a petition for an order directing Vivett, the purchaser of the property sold under the execution issued on his judgment, to deliver to said trustee the property so purchased at that sale. On August 18, 1921, the referee entered an order requiring Vivett to show cause why the petition should not be granted. On August 30, 1921, he entered a qualified appearance and filed objections to the relief sought by the trustee upon the ground that the referee had not jurisdiction of the subject, and moved to dismiss the trustee's petition, urging that the referee was without jurisdiction or power to act in such a situation by a summary proceeding, and that the trustee's claim to relief should be asserted in a plenary action brought in a court of adequate jurisdiction, and not before the referee. This motion was not sustained, and Vivett filed his response to the trustee's petition as the latter had been amended on September 16, 1921.

Upon final hearing the referee made the order now sought to be reviewed, and which directed and required the return to the trustee, not of the property itself, but of the money for which it had been sold. To this phase of the referee's action neither party appears to have made any objection. Upon the facts as thus presented the inquiry is not, primarily, what the rights of the trustee in the property may be, but whether the summary proceeding brought by him is sustainable.

[1, 2] The exact question to be determined, therefore, is whether, upon those facts, a summary proceeding was admissible or whether a

plenary action was necessary. Section 67c of the Bankruptcy Act (Comp. St. § 9651) provides that—

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt."

This statute appears to be relied upon in support of the summary proceeding, but it is obvious from a reading of it that its provisions were meant to apply only where the "suit" was "begun within four months before the filing of the petition in bankruptcy." Here the suit of Vivett against Maddox was begun previous to October 1, 1920, which of course was much more than four months before the petition in bankruptcy was filed on March 30, 1921. In this situation the provisions of section 67 of the act are not available in support of the trustee's contention. Any support it may have must be based upon the law as it existed previous to November 30, 1920, that date being the beginning of the four months' period preceding the filing of the petition in bankruptcy. Meantime, as we have seen, the final process of the Missouri state court for enforcing its judgment of October 13, 1920, had been issued on March 8, 1921, had been placed in the hands of the sheriff for execution, and had been levied on property for that purpose. Hence the question, can a summary proceeding be resorted to, to prevent Vivett from enforcing the lawfully rendered judgment of the state court by and through the lawful process of an execution duly issued and levied before the filing of the petition in bankruptcy?

We have reached the conclusion that as Vivett's action was begun in the state court more than four months before the filing of the petition in bankruptcy, and as judgment was promptly entered in that action for the amount of the plaintiff's debt also more than four months before the proceeding in bankruptcy was commenced, the final process of that court for the enforcement of that judgment by a sale of the property seized under the execution should not be interfered with nor annulled by a summary proceeding in this case. We think any other ruling would be obviously opposed to the whole current of decisions which determine the grounds upon which a summary proceeding as distinguished from a plenary action must be based. To sustain a summary proceeding in this instance might nullify and make ineffective the judgment of the state court and the process by which it might lawfully enforce that judgment, and in view of the facts stated we hold that nothing short of a plenary proceeding can properly be held sufficient when making an attack upon the validity of proceedings under the state court's final process in this instance. Courtney v. Shea (C. C. A. 6th Cir.) 225 Fed. 361, 140 C. C. A. 382, 34 Am. Bankr. Rep. 753; Shea v. Lewis (C. C. A. 8th Cir.) 206 Fed. 877, 124 C. C. A. 537, 30 Am. Bankr. Rep. 436; Board of Education v. Leary (C. C. A. 8th Cir.) 236 Fed. 521, 149 C. C. A. 573, 38 Am. Bankr. Rep. 289; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. Rep. 633; In re Shea (D. C. Ky.) 211 Fed. 365, 366, 369, 31 Am. Bankr. Rep. 697; In re Howe Manufacturing Co. (D. C. Ky.)

193 Fed. 524, 527, 528, 27 Am. Bankr. Rep. 477, 478; In re Mimms & Parham (D. C. Ky.) 193 Fed. 276, 27 Am. Bankr. Rep. 469; In re Bacon (C. C. A. 2d Cir.) 210 Fed. 129, 126 C. C. A. 643, 31 Am. Bankr. Rep. 777; and Collier on Bankruptcy (12th Ed.), in comments on sections 23b, 60, 67, and 70 of the Bankruptcy Act (Comp. St. §§ 9607, 9644, 9651, 9654).

Accordingly the order of the referee entered September 26, 1921, and sought to be reviewed by the court upon said Vivett's petition therefor, should be and it is reversed, and the referee is directed to dismiss the petition of H. H. Martin, trustee, filed June 16, 1921, as amended, but without prejudice to the right of the trustee to institute in any court having jurisdiction any proper action based upon the facts developed in this proceeding or otherwise pertinent thereto.

DOUGLASS v. RHODES.

(District Court, E. D. Arkansas, Jonesboro Division. May 8, 1922.)

1. **Public lands ⟸29—Unsurveyed lands are not "public lands," open to entry and sale.**

   Unsurveyed lands are not "public lands," within the meaning of the law, so as to be subject to sale, entry, or disposal.

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

2. **Public lands ⟸34—Pre-emptor of unsurveyed lands has no vested right therein.**

   A pre-emptor of lands which are unsurveyed, and therefore not yet open to entry, has no vested right to such lands, but only a preferential right to enter in the event that the United States makes no other disposal of the lands before they are open to public entry.

3. **Public lands ⟸34—Congress can grant unsurveyed lands to another, regardless of pre-emption by third person.**

   Congress had the power to grant unsurveyed public lands of the United States, as it did by Act Jan. 17, 1920, regardless of the right of a pre-emptor to a portion of such lands.

In Equity. Suit by Annie Viola Douglass against J. W. Rhodes. On motion to dismiss the complaint. Motion sustained.

T. E. Allyn, of Marked Tree, Ark., for plaintiff.
Davis, Costen & Harrison, of Blytheville, Ark., for defendant.

TRIEBER, District Judge. This is an action to cancel a patent of the United States to the defendant for the land in controversy, or to declare defendant to hold it in trust for the plaintiff. The facts are:

The land is a part of what is known as the "sunk lands," containing several thousand acres. The government claimed them, while numerous persons claimed them, by virtue of conveyances from the state of Arkansas, as having been granted to the state under the Swamp Land Act of 1820 (Comp. St. §§ 4958–4960), and also as riparian owners of the adjacent lands. A number of actions were instituted by the government in this court to establish its title. It was finally held that

these lands belonged to the government. United States v. Lee Wilson (D. C.) 214 Fed. 630, affirmed 245 U. S. 24, 38 Sup. Ct. 21, 62 L. Ed. 128. The lands were all unsurveyed until 1919, and the official survey was filed in the Little Rock land office in May, 1920.

In the year 1901 the plaintiff's husband pre-empted the land in controversy, moving on it with his family with the intention of homesteading it under the homestead laws when opened to entry. The husband died, and the plaintiff, his widow, continued to reside on it with her children. She and her husband made valuable improvements on the land, of the value of $1,500. On January 17, 1920, Congress passed an act (chapter 49, 41 Stat. p. 1458) granting to the defendant, and certain others named in the act, a preferential right to purchase certain lands, including this land, at $1.25 an acre, at any time within 90 days after the passage of the act and the filing of the plats of the corrected survey in the United States land office in Little Rock, Ark., in accordance with the divisions and allotments of a decree of the chancery court of Mississippi county, Ark.

The lands in controversy were the lands decreed to the defendant by the said chancery decree. On May 27, 1920, within a few days after the filing of the plats of the corrected survey, the defendant made entry of the lands at the Little Rock land office, paid the purchase money, and received a certificate of purchase. On March 1, 1921, the patent therefor was issued to him by the government.

[1] Upon these facts, should the motion to dismiss the complaint be sustained? Unsurveyed lands are not "public lands," within the meaning of the law, so as to be subject to sale, entry, or disposal under the laws of the United States. Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Buxton v. Traver, 130 U. S. 232, 235, 9 Sup. Ct. 509, 32 L. Ed. 920; Bardon v. Northern Pacific R., 145 U. S. 535, 538, 12 Sup. Ct. 856, 36 L. Ed. 806; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Minnesota v. Hitchcock, 185 U. S. 373, 391, 22 Sup. Ct. 650, 46 L. Ed. 954.

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. * * * He has been permitted by the government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it, in which case he is to have the preference over others in purchasing; that is, the right to pre-empt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him: If you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them." Buxton v. Traver, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920.

[2] That a pre-emptor has no vested right has been decided so many times that it has ceased to be an open question. A leading case is Frisbie v. Whitney, 9 Wall. (76 U. S.) 187, 193, 19 L. Ed. 668. In that case the court, after assuming that unsurveyed lands were open to pre-emption, as contended by plaintiff, said:

"But, resolving this difficulty in favor of complainant for the present, we are still of opinion that he had not acquired a vested right in the land when Congress acted upon the subject. What had he done? He had gone upon the land, built a house and barn, and perhaps inclosed some * * * ground. He had also applied to the register of the land office, and offered to make a declaration that he had done these things with the intention of making a permanent settlement, and claiming the land under the right of pre-emption. This is all. He had paid no money, nor had he then tendered any. The land officers refused to receive his declaration, and denied his right to pre-empt the land. He never has paid any money, has never received any certificate of pre-emption, and the register and receiver have never, in any manner, acknowledged or admitted his right to make pre-emption of that land. So far as anything done by him is to be considered, his claim rests solely upon his going upon the land and building and residing on it. There is nothing in the essential nature of these acts to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right.

"The act of Congress on this subject, to which all the subsequent acts refer, and which prescribes the terms, and the manner of securing title in such cases, is the act of September 4, 1841 (5 Stat. at Large, 453). That was an act full of generosity, for it gave the proceeds * * * of the public lands to the States. The tenth section of the act provides that any person of the class therein described, who shall make a settlement upon public lands of a defined character, and who shall inhabit and improve the same, and who shall erect a dwelling thereon, shall be authorized to enter with the register of the proper land office, by legal subdivisions, one quarter section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Section 11 provides that conflicting claims for pre-emption shall be settled by the register and receiver; section 12, that prior to such entry proof of the settlement and improvement required shall be made to the satisfaction of the register and receiver; and section 13 requires an oath to be made by the claimant before entry; section 15 requires a person settling on land with a view to pre-emption to file within a limited time a statement of his intention and a description of the land. When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver, and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal title to the land."

This was reaffirmed in the Yosemite Valley Case, 15 Wall. (82 U. S.) 77, 87, 21 L. Ed. 82; Buxton v. Traver, supra, and in the late case of Banning Co. v. California, 240 U. S. 142, 151, 36 Sup. Ct. 338, 60 L. Ed. 569, where it was again held that such pre-emption conferred no vested right as against the government. The rule would be different, if this were a contest between parties for a preferential right of entry. In such a case the first pre-emptor would have a preferential right over the later applicant. Shipley v. Cowan, 91 U. S. 330, 338, 23 L. Ed. 424; Weyerhaeuser v. Hoyt, 219 U. S. 380, 388, 390, 31 Sup. Ct. 300, 55 L. Ed. 258; Wadkins v. Producers' Oil Co., 227 U. S. 368, 370, 33 Sup. Ct. 380, 57 L. Ed. 551.

[3] As the plaintiff had no vested right against the United States at the time Congress enacted the Act of January 17, 1920, Congress had the power to grant it to the defendant, and, having done so, the courts are powerless to grant the relief asked, although working a great hardship on the plaintiff.

The motion to dismiss is sustained.

CLAFFY v. FORBES, Director of Bureau of War Risk Insurance.

(District Court, W. D. Washington, N. D. April, 1922.)

No. 260E.

1. **Army and navy ⊂⊃51½, New, vol. 12A Key-No. Series—War risk insurance regulations have the force of law.**

The regulations promulgated by the Bureau of War Risk Insurance, which, with the provisions of the War Risk Insurance Act (Comp. St. § 514a et seq.), limit the contract for such insurance, have the force of law.

2. **Evidence ⊂⊃47—Court judicially knows regulations of department of government.**

The court judicially knows of the regulation by a department of the United States government.

3. **Army and navy ⊂⊃51½, New, vol. 12A Key-No. Series—Letter to soldier's mother held sufficient "designation of beneficiary" of war insurance after the death of the mother.**

Under War Risk Insurance Act Oct. 6, 1917, §§ 400, 402, and Act June 25, 1918, §§ 2, 21, and the regulation of the Bureau of War Risk Insurance authorizing change of beneficiary by notice in writing to the bureau signed by the insured a letter written by an insured soldier to his mother, plainly expressing his wish that in the event of the mother's death the insurance should be made payable to the soldier's niece, was a sufficient designation of the niece as a beneficiary, the fact that the letter was not addressed to the bureau, or was not presented to it by the mother in her lifetime, not requiring the disregard of the soldier's wishes.

4. **Army and navy ⊂⊃51½, New, vol. 12A Key-No. Series—Notice of designation of beneficiary of war risk insurance need not be received prior to death of soldier.**

Under the regulations of the Bureau of War Risk Insurance, providing that before notice of designation has been received payments will be made under the laws of intestacy, the fact that a letter designating the beneficiary was not received by the bureau prior to the death of the soldier does not invalidate the designation, nor defeat the rights of the beneficiary so designated to installments of the insurance thereafter falling due.

In Equity. Suit by Irene Claffy, as guardian of the estate of Agnes Claffy, a minor, against Charles R. Forbes, Director of War Risk Insurance. Disposition rendered for plaintiff.

The plaintiff is guardian of Agnes Claffy, a minor niece of Clarence Swank, who was killed in battle in the line of duty September 26, 1918, and who at the time of his death carried war risk insurance in the sum of $10,000, in which policy Malinda Swank, mother, was named as beneficiary. On the 15th day of July, 1918, the deceased soldier, in a letter addressed to his mother and father, among other things, said: "* * * I have also made out a $10,000 life insurance to you. If I should be killed, it will be paid to you, $57.50 a month for 20 years, and I wish that if you should not live to get it all that you make it so that Agnes would get it. * * *"

On March 10, 1919, the mother published and declared a codicil to her last will and testament, in which she bequeathed to the named niece the said insurance. Thereafter the mother died, and the last will and testament was probated, and demand was made by the executor upon the war risk insurance for the unpaid installments due under said policy. The said letter was likewise presented to the Bureau of War Risk Insurance, and payment demanded on behalf of the niece, as a beneficiary designated within the regulations.

A motion to dismiss is made on the part of the United States and the Bureau of War Risk Insurance. The other defendants have not appeared. It is

conceded that the unpaid installments of war risk insurance are not subject to the testamentary disposition by the beneficiary (Cassarello v. U. S. [D. C.] 271 Fed. 486), and that the right of the niece to recover must be predicated on the letter referred to. The contention of the plaintiff is that the letter is an equitable designation of beneficiary.

Walter B. Beals, of Seattle, Wash., for plaintiff.

John A. Frater, Asst. U. S. Atty., of Seattle, Wash., for defendant Forbes.

NETERER, District Judge (after stating the facts as above). [1, 2] The insurance policy is a contract between the insured and the Bureau of War Risk Insurance within the limitations of the War Risk Insurance Act (Comp. St. § 514a et seq.) and the regulations promulgated by the Bureau of War Risk Insurance, such regulations having the force of law (U. S. v. Birdsall, 233 U. S. 231, 34 Sup. Ct. 512, 58 L. Ed. 930; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563), and the court judicially knows of the regulations by a department of the United States government (Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415). The purpose of insurance, as expressed in the act (section 400), is to give greater protection to the soldiers and sailors and their dependents; for this protection the insured pays a stipulated compensation, based upon the American Experience Table of Mortality, and interest at 3½ per cent. per annum (section 402), and the beneficiaries are limited to spouse, child, grandchild, parent, brother, or sister (section 402), uncles, aunts, nephews, *nieces* (Bulletin No. 1). The insurance shall be payable only to the beneficiary (section 21, Act June 25, 1918, 40 Stat. 609, 615), and is exempted from taxation and debts, and is nonassignable (section 2, supra, as section 28 added to article 1, October 6, 1917, 40 Stat. 402).

[3] The insured may change the beneficiary in writing, signed by the insured, and witnessed by one person (Regulation 14, dated March 20, 1918). By amendment of this regulation dated February 24, 1919, the change may be made "by notice in writing to the Bureau of War Risk Insurance, signed by the insured, or by his duly authorized agent," the change to be effective when received and recorded in the War Risk Insurance Bureau. Under the regulations of February 24, 1919, if the insured had written to the bureau, supra, that upon the death of his mother, the beneficiary, to pay the unpaid installments to the niece, such designation would undoubtedly have been sufficient, and if the mother during her lifetime had notified the bureau, supra, in writing, pursuant to the provisions of the letter, that upon her death the unpaid installments should be paid to the niece, the designation would have sufficed. The intent to designate the niece as residuary beneficiary is explicitly established. Does the fact that the designation was by misapprehension of the laws sent to the mother, instead of the bureau, defeat the soldier's intent and right granted him under the insurance contract and law?

This inquiry must be answered in the negative. Is the designation made in harmony with the regulations at the time it was received by the bureau sufficient? Yes. The only purpose of the regulations, hav-

ing relation to change of beneficiary, is to enlarge the right of the insured, and to protect the insurer. To hold the designation in the letter sufficient does not change the liability of the insurer, and is within the privilege granted the insured. The brothers and sisters of the deceased soldier have no right, except that of blood relationship, and all right is determined against them by the expressed designation by the deceased in harmony with the regulations at the time it was presented. The execution and receipt of designation must be taken together. It takes both to conclude the issue, and form, formality, and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; and when the purpose of the law has been complied with, there should be no hesitancy in carrying out the express wish of such deceased. The letter is a designation signed by the insured and the fact that it was sent to the mother to make the final designation, in the event of her death, instead of being sent to the bureau for record, should not defeat it.

[4] All that is necessary is that the real wish and purpose of the soldier, who exposed his life in the army for the safety of the government, should sufficiently appear (notes, Cooper's Justinian, p. 496, R. E.; Gifts Inter Vivos, Jaen-Marie Ricard, printed in Paris in 1754, p. 332); nor is it vital that notice of designation should be received by the bureau prior to the death of the insured. The regulations of February 24, 1919 (paragraph 3), provide for such a contingency:

"Before notice of such designation has been received and recorded by the bureau, payment shall be made to those entitled according to the laws of intestacy, as provided in section 402 of the War Risk Insurance Act."

Throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield (The Customs of Duchy of Burgundy, printed at Dijon, 1694, p. 410; Coutumes de Paris, column 51, Paris, 1714); and remedial justice requires, under the facts in this case, that the designation of the niece in the letter to the mother be established from the date of presentation to and record thereof by the Bureau of War Risk Insurance.

THE OREGON.
THE FRANK COE.

(District Court, S. D. New York. October 22, 1918.)

Collision ⇐96—Vessel colliding with ferryboat held at fault.

In a collision between a vessel and a ferryboat in a river, while angling in to their respective berths, *held*, that the vessel was at fault and that the ferryboat was not.

In Admiralty. Collision between the ferryboat Oregon and the steam lighter Frank Coe. The Frank Coe held at fault.

Decree affirmed 280 Fed. 238.

Pierre Brown, of New York City, for the Frank Coe.
Geo. E. Hargrave, of New York City, for the Oregon.

LEARNED HAND, District Judge. This case presents the usual conflict of testimony, without very much by which it may be corrected. Upon the whole the witnesses for the Coe impressed me more favorably than those for the Oregon, yet the difference is not enough to justify a finding based upon their relative credibility. As is common, I can come to a conclusion more certainly by a consideration of the probabilities than by an attempt to apportion the weight to be given to the several oaths of those who appeared.

It is agreed that the Coe remained near the east side of the river until not far below the Brooklyn Bridge. In passing under it she had got over no further than the center of the channel. Now Pier 26 is only a very short distance above the western abutment, so that it seems strange to me that she should have exposed her starboard side to the full force of the ebb by going nearly across stream, rather than by making up to say Pier 28 or 29 preparatory to berthing at Pier 30. However, the testimony on both sides appears to put her no further off shore than 200 feet when opposite Pier 26, and I must conclude that she preferred to navigate nearly across the stream rather than to oppose the full force of the ebb further out in the channel. Whether her course thereafter was directly upstream, or whether she was angling in towards the pier ends, appears to me incapable of determination. I incline to suppose that she angled in slightly all the time, basing this conclusion upon the angle of collision, which I shall discuss, and upon the probability that such would be her course. The collision occurred somewhere between Piers 26 and 28, and between 100 and 200 feet off shore, but it is quite impossible to assign it more definitely.

As to the course of the Oregon, I accept the statement of her witnesses that she came down upon a substantially straight course from well out in the stream when under the Manhattan Bridge to the outer corner of her rack. I cannot believe, in spite of the advantage of the tide, that she would have held her course in mid-channel till nearly opposite the slip. To do so would have embarrassed her entrance into the slip, unless she was prepared to go well below the racks and then to enter against the tide. This, it is true, is what many vessels would do, so situated, rather than to enter with the tide, but none of the witnesses suggest that she did it, and it would not, I think, be a maneuver common to ferries which approach more directly. It seems pretty clear that, if she meant to enter without going below, her natural course was to keep angling into the slacker water she would find close to the New York shore. This would enable her to make her berth without having her course continually changed as she crossed the river with the ebb on her quarter.

I therefore place the vessels upon crossing courses, a conclusion corroborated by the angle of collision. The Coe insists that there was no angle, but that it was a case of head and head meeting, and this is borne out also by the report of Day, the Oregon's master. The story of Hines, the Oregon's passenger, though certainly not accurate in

degree, I give credence to, and it is to the contrary, as well as those of the other witnesses for the Oregon, and I am disposed to accept their version. I cannot think that in broad daylight two vessels could come into collision upon exactly opposite courses without either yielding a point to the other. Such folly seems to me scarcely credible. Furthermore, at least two of the Coe's witnesses agree with the rest, that the force of the blow threw the Oregon's head heavily to starboard, which presupposses an angle of collision. The help rendered the Oregon after the collision also fortifies this testimony. Even if the Coe were further inshore than the Oregon, yet still, if the Oregon were angling in, the collision would not have been head on. The angle was probably very small in any case, but I think that it was an appreciable one.

If the vessels were in this position, I see no reason for changing the usual incidence of the respective duties of vessels upon crossing courses. The Oregon's course was patent to all; she was a ferry upon a known course to a notorious destination. I know of no rule which forbade her entering her slip on a course direct, but gradually angling in. It is true that she was probably shaving the pier ends rather close, but that, though a fault, did not contribute to the collision between herself and a vessel which, like the Coe, was not emerging, but was herself doing the same thing. It was not a proximate cause of this accident, since it was obvious to the Coe.

The Coe did not keep out of the Oregon's way, and the Oregon did keep her course and speed, and concededly did give at least one whistle. It is urged that the case is one where the ferry attempted to push other craft out of her way and should be held for the consequences. My answer is that, if the courses were crossing, she had the right of way, and that she was obliged to "push out of the way" all burdened vessels. At least I cannot suppose the Coe's story correct, which says that the vessels were on opposite courses, but safely starboard to starboard. This would not have resulted in any collision at all. If, on the other hand, they were on meeting courses, we are again faced with the necessity of supposing that neither yielded till they met head on, which, as I have said, is incredible.

Even if I am to suppose that the Coe was inside of the Oregon and headed straight upstream, yet if the Oregon were on a steady course angling in, the case still seems to me only of crossing courses, because the Oregon's course would in that event lead her across the Coe's bows. In any aspect the Coe's proper navigation was to port her wheel and ease out into the stream. My conclusion is either that the Coe was inattentive until too late, or that she tried, being near to her slip, to force the Oregon's rights.

On the whole case, therefore, I find the Coe at fault and the Oregon not at fault. Settle decrees in accordance with these findings.

THE OREGON.

THE FRANK COE.

(Circuit Court of Appeals, Second Circuit. January 26, 1922.)

Nos. 160, 161.

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

Libels by the International Nickle Company against the ferryboat Oregon, the Brooklyn & Manhattan, Ferry Company, claimant, and by the Brooklyn & Manhattan Ferry Company against the steam lighter Frank Coe, the International Nickle Company, claimant. From a decree (280 Fed. 235) the last-named claimant appeals. Affirmed.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Vine H. Smith, of New York City, of counsel), for appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs.

P. LORILLARD CO. v. WEINGARDEN.

(District Court, W. D. New York. March 15, 1922.)

No. 369-B.

1. **Injunction ⟸147—Granted pendente lite, when plaintiff made prima facie case of right thereto and irreparable damage, notwithstanding counter affidavits.**
   Where plaintiff showed prima facie that it sold cigarettes to a third party, and the third party sold them to defendant with the understanding that they were not to be resold in the United States, and that because of their inferior grade irreparable damage would result to plaintiff's business from their resale in the United States, an injunction pendente lite, maintaining the status quo until final hearing, will be granted, though defendant's affidavits show that it purchased without notice of such restriction, as any damages resulting to defendant from the injunction may be ascertained and measured.

2. **Injunction ⟸61(1)—Restrictions on resale enforced, if reasonable and within proper limitations.**
   A court of equity will enforce a restrictive covenant by a buyer of goods concerning their resale, if it is reasonable and made within proper limitations.

In Equity. Suit by the P. Lorillard Company against Max Weingarden. On motion for a preliminary injunction. Preliminary injunction granted on conditions.

Simon Fleischmann, of Buffalo, N. Y. (Stroock & Stroock, of New York City, of counsel), for complainant.

Penney, Killeen & Nye, of Buffalo, N. Y. (John A. Kelly, of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. A brief statement of the claims of the parties arising from conflicting versions will suffice for the purpose of the decision that it is thought proper to make herein. The plaintiff

corporation seeks to enjoin the defendant from selling a large quantity of "Helmar" cigarettes, or portions thereof, for use in the United States, in violation of a sales agreement between it and the Volga Engineering & Trading Company, Inc. (hereinafter called Volga Company), which later on sold the identical cigarettes to the defendant, subject to the agreement, as the bill alleges, that they were not to be sold for consumption in the United States, but were to be promptly exported to a foreign country and sold there. The ex parte affidavits of plaintiff establish that the Volga Company unquestionably purchased the cigarettes on about March 23, 1921, with the direct understanding that they were sold for export only, and were not to be resold for use in the United States, and, moreover, that they were resold by the Volga Company on or about June 18, 1921, to defendant under restriction as to sales is testified by one Kwasha, president of the Volga Company, who is claimed to be corroborated inferentially by various of plaintiff's affidavits.

The defendant denies that he bought the cigarettes under any restrictive covenant as to resale by him, and disclaims being aware of any understanding with relation thereto between plaintiff and the Volga Company, and indeed, on the contrary, asserts that he bought the cigarettes without anything being said as to any restriction on resale, except that he was told that they were shipped to Copenhagen for the express purpose of enabling plaintiff, or the Volga Company, to avail itself of the right to have remitted the internal revenue taxes that had been paid for the government stamps upon the individual packages, and that shipment to a foreign port was required to procure remission or draw back. He is claimed to be corroborated by the witnesses Bondy, who acted as his counsel in the negotiations for the purchase of the cigarettes, and Solomon, who was his broker, both of whom testify that the cigarettes were sold without any restrictions as to resale, or as to the right to bring them back to the United States for consumption; both testifying to their understanding that the goods were exported merely to obtain a landing certificate and to procure a drawback of revenue taxes. There are other affidavits for defendant which appear to inferentially support the claim that the purchase was made, unaccompanied by any restrictive agreement as to reimportation and resales in the United States. Letters, too, are in evidence passing between defendant and the Volga Company, and other letters and replies thereto, from which conflicting inferences may be drawn.

Plaintiff's claim is that its only purpose in selling the cigarettes was that they had become dry, stale, and inferior, and were not up to the standard of the Helmar brand sold by it in the markets of the United States; that because of their deteriorated condition it sold them under restriction as to place of sale at the price of only 7 cents per thousand, excluding the drawback of $3 per thousand, which would be paid on receiving a landing certificate of the arrival of the cigarettes in a foreign country. The export price for cigarettes in good condition was $7.65 per thousand, and for domestic trade $10.14 per thousand. The defendant paid the Volga Company $1.75 per thousand, or a total of $20,791.45. One million of the cigarettes have been imported into

this country by defendant, and he had advertised them and other Helmar cigarettes (about 10,000,000 in number) which are still in Copenhagen, and which he threatens to bring back for sale in the United States at a lower price than the price at which such brand of cigarettes is sold by the plaintiff. The defendant also has introduced ex parte testimony tending to show that cigarettes contained in packages brought back from overseas are not deteriorated, but only a little dry, and that many smokers prefer cigarettes of that character.

[1] Considering all the testimony of the defendant, there are nevertheless certain inferences to be drawn from plaintiff's affidavits which to my mind create a probability that it may succeed on the final hearing. Even though the denials of defendant may be thought to outweigh affirmative assertions with respect to his knowledge as to restriction on sales, I think that plaintiff's prima facie case and the undoubted injury to its business in the United States that may result from the sale of the cigarettes, assuming them to be of inferior grade, warrants the issuance of an injunction pendente lite. The argument of counsel, together with the complete briefs filed, indicate not only the necessity of determining conflicting evidence as to essential matters, but important questions of law are also involved which require careful consideration, it seems to me, and accordingly a maintenance of the status quo until final hearing can be had. It is peculiarly a case that should not be determined on its merits until the ex parte affiants are examined and cross-examined.

[2] Defendant insists that the injunction should not issue, even though he knew of the restrictive agreement between it and the Volga Company; that the agreement was in restraint of trade; that a case of unfair competition is not made out; that the complainant comes into court with unclean hands. But all these questions in the main may be reserved to the trial, except that it may be stated that I am fairly satisfied that a court of equity will enforce a restrictive covenant, if it is reasonable and made within proper limitations. There does not seem to me to be anything unreasonable in the reservations under consideration.

To enjoin the defendant from reimporting the cigarettes and selling them in the United States may, it is true, also be of great damage to him. If he purchased them without any covenant of restrictive sale or reasonable notice thereof, then his disposal of them should not be hindered or delayed to his detriment. But any damages that may result to him by reason of the preliminary injunction may, I think, be ascertained and measured while on the other hand the damages and injury to plaintiff from violation of the covenant may be irreparable. Hence, without deeming it necessary to further or more fully pass upon the various questions of law submitted in the briefs, I determine and decide that a preliminary injunction issue only upon plaintiff filing an undertaking or bond conditional to fully indemnify the defendant for the costs and damages that he may sustain by reason of the restraining order entered herein.

So ordered.

CATHERWOOD v. UNITED STATES.

(District Court, E. D. Pennsylvania. April 7, 1922.)

No. 8766.

Internal revenue ⟸7—Estate tax paid not deductible from taxable income of decedent prior to death.

Under Tax Act Sept. 8, 1916 (Comp. St. § 6336a et seq.), an individual taxpayer and his estate after death are separate entities, and section 5, permitting deduction from income of taxes paid to the United States, does not authorize an executor to deduct the amount of estate tax paid from the taxable income of decedent for the part year prior to his death.

At Law. Action by Wilson Catherwood, Executor, against the United States. On affidavit of defense raising question of law. Decision and judgment for defendant.

M. Hampton Todd, of Philadelphia, Pa., for plaintiff.

Truman D. Wade, Asst. U. S. Atty., and George W. Coles, U. S. Atty., both of Philadelphia, Pa.

DICKINSON, District Judge. Other questions than the one herein discussed have been suggested and one formally raised. We pass them all, except the one discussed, as we understand this to be the request of the parties. We treat the question as one raised in accordance with the Pennsylvania Practice Act of 1915 (Pa. St. 1920, §§ 17181–17204). The issue is in effect one raised by demurrer.

The Question Stated.

Broadly the question is a challenge of the cause of action. Disregarding formalities, the plaintiff claims the right to deduct from the income tax owing by the decedent for the part of the year between December 31, 1919, the end of the last tax year, and August 22, 1920, the date of the death of plaintiff's testatrix, the estate tax levied upon the estate, payable August 22, 1921, or one year from decedent's death.

The Facts.

Emma R. Catherwood, the plaintiff's testatrix, died August 22, 1920. Letters testamentary were granted to the plaintiff on August 25th following. On February 25, 1921, the plaintiff, in obedience to the directions of the Revenue Act of 1918, filed a return of the income of the testatrix for that part of the current tax year of her death covering the period between January 1, 1920, and August 22, 1920 (both inclusive). No deduction was made for any estate tax, because under the regulations enforced at that time the taxing authorities would not have allowed it. The income tax upon the income of the decedent (returned as above) was paid at the time of filing the return. The plaintiff also filed a return of the income of the estate for the period between August 22, 1920, and January 1, 1921 (both inclusive). There was no taxable net income for this period. The plaintiff also filed an estate tax return and paid a tax of $10,142.99, in accordance with this return.

The sum so paid is in excess of the income tax paid on the basis of the net income of the decedent to the time of her death. Asserting the estate tax paid to be properly deductible from the income tax paid, demand is made for the return of the latter.

The Argument.

Counsel for plaintiff reasons to a conclusion favorable to the plaintiff from the following propositions:

(1) The Tax Act permits the taxpayer to deduct from his income otherwise subject to income tax any sum paid to the United States for taxes, if the sum so paid was paid, or the tax so paid accrued, within the year. Woodward's Estate, infra.

(2) The estate tax paid was such a tax.

Discussion.

The conclusion follows if the premises are sound. The second, as stated, is supported by Woodward's Estate, 256 U. S. 632, 41 Sup. Ct. 615, 65 L. Ed. 1131. The first, as stated, must likewise be accepted, if there is embraced in it the fact that the taxpayer who has paid the estate tax to be deducted is the same person whose net taxable income is being thus found.

Just here is the point of the difference between the opposing arguments which are addressed to us. There is much practical force in the view of counsel for plaintiff that there are not "two separate entities" in the person of the decedent and her estate. The plaintiff is the representative of the estate of the decedent. The income returned for the period ending with the death and the income returned for the remainder of the tax year are both returned and the tax paid by the executor in his representative capacity, and together are paid as the tax on the income for the whole taxable year. Substantially the decedent and his estate are for taxing purposes one, and it does seem that the separation of them into two taxables is an artificial distinction. None the less the power and the possible motive of the taxing authority to differentiate them is undenied. The sole question is: Are they in the eyes of the taxgatherer one or two?

Upon a full survey of the statute, our conclusion is that there are two taxpayers—not one—the decedent, who pays on his income to the time of his death, and his estate, which pays on the income of the estate and an estate tax. It is true the three taxes are paid out of the estate, but the first is paid as the tax upon the income of the decedent, and is paid as all his other debts are paid. The other taxes are paid as taxes assessed against the estate. If the two income taxes were one, they would be returned and paid as one, based upon the income for the whole taxable year. Instead of this, they are returned and paid separately as upon the incomes of different taxpayers. There is an artificiality about this which makes one reluctant to take this view, except upon compulsion. The tax acts, however, seem to compel us to take this view. Under the doctrine of Woodward's Estate, the estate tax is to be deducted in finding the net taxable income of the estate.

The conclusion is reached, however, that it is not to be deducted in

finding the net taxable income of the decedent who is another taxpayer. The question of law raised is decided in favor of the defendant, and as, "in the opinion of the court, the decision of this question disposes of the whole claim," judgment is directed to be entered for the defendant, with costs, in accordance with the Pennsylvania Practice Act. This we understand to be in accord with the course counsel desire the case to take. To give definiteness of date to the judgment, none is now entered, but may be entered upon præcipe.

An exception is allowed to plaintiff.

W. C. GROVES LIQUOR CORPORATION v. COLLECTOR OF INTERNAL REVENUE.

(District Court, S. D. Florida. April 10, 1922.)

No. 1351.

1. **Internal revenue ⟸46—Prosecuting officers may take bill of sale without forfeiture proceedings.**
   Prosecuting officers may accept a bill of sale to the United States for liquors forfeited under Rev. St. § 3449 (Comp. St. § 6351), by reason of their transportation under some other designation, without instituting proceedings to forfeit the liquors.
2. **Internal revenue ⟸46—Liquor shipped as something else by one acting for the owner is forfeited.**
   Under Rev. St. § 3449 (Comp. St. § 6351), liquor shipped under a bill of lading falsely describing it as hay is forfeited, no matter whose property it may be, if the shipper was rightfully acting for the owner.
3. **Internal revenue ⟸42—Collector of internal revenue, not having possession of liquor delivered to his predecessor, will not be ordered to return it.**
   An order will not be made requiring the collector of internal revenue to return liquor seized and turned over to his predecessor, where it appears that such liquor is not in his possession, and that it is not in his power to comply with such order.

Proceeding by the W. C. Groves Liquor Corporation against the Collector of Internal Revenue. Petition denied, and proceeding dismissed.

C. D. Abbott, of West Palm Beach, Fla., for petitioner.

Wm. M. Gober, U. S. Dist. Atty., of Jacksonville, Fla., opposed.

CALL, District Judge. On May 16, 1921, W. C. Groves Liquor Corporation filed its petition, in which it alleges: That during the month of May, 1918, W. C. Groves purchased and had shipped from Jacksonville, Fla., to West Palm Beach, Fla., 340 cases of whisky. That upon its arrival at its destination the same was seized by the sheriff of Palm Beach county, and turned over to the collector of internal revenue. At the December term of the United States District Court in and for the Southern District of Florida, said Groves was indicted by the grand jury in two counts—the first count for violation of section 3449 of the Revised Statutes (Comp. St. § 6351); and the second, for violation of the tenth section of the Act of Congress approved June 18, 1910,

chapter 309 (Comp. St. § 8574). That W. C. Groves, upon arraignment, pleaded guilty and was sentenced to pay a fine of $500 and costs, and by a bill of sale executed by him conveyed said whisky to the United States. It then alleges that the whisky belonged to the corporation, and Groves had no right to convey the same. That the District Attorney's office had no right to purchase same from Groves, and the internal revenue officer had no right to seize same.

A rule to show cause was issued and served upon the then collector of internal revenue, who answered that he had seized and was then holding one cask and 212 cases of whisky as evidence against Groves, and setting up the further facts of indictment, plea, and fine of Groves, and the conveyance of the whisky to the United States, and upon information and belief that said whisky was the property of Groves, and not of the corporation. This answer was filed June 1, 1921. Subsequently on January 30, 1922, the petitioner obtained order to make D. T. Gerow, the then collector of internal revenue, who had succeeded the collector making the seizure, a party, and the rule therefore issued was answered by the new party, in which answer, after alleging his ignorance of the allegations of the petition, he contends that under the acts of Congress the liquor was forfeited to the United States. He also sets out an inventory of all liquor coming to his possession as such collector received from his predecessor in office, with the marks thereon; none of it being identified as that described in the petition, and the whole amount aggregating much less than that described in the petition.

Passing over the question of whether the liquor belonged to W. C. Groves or to the corporation, there is no question that W. C. Groves did ship the liquor in a car billed as hay, and not properly marked, as required by section 3449 of the Revised Statutes (Comp. St. § 6351). This fact is admitted by the petition, answers to the rule, and by plea of guilty by Groves. The section provides:

"Whenever any person ships * * * any spirituous * * * liquors * * * under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors. * * *"

If Groves was not acting for himself in the purchase and shipping of said liquors under a false bill of lading, then he was acting for the corporation, of which he was president and largest stockholder.

[1, 2] The petitioner claims that, even though the liquor was forfeited under the terms of the section, yet no judgment of forfeiture was rendered, and the prosecuting officers had no right to accept a bill of sale to the United States, and therefore it had a right to have this court order its return. This argument does not impress me. It seems to me it would be an idle and useless proceeding for this court, granting that the liquor was purchased with corporation funds, to make such order, and then force the government to institute proceedings to forfeit the liquors, which under the admitted facts is clearly forfeited. It does not seem to me to be material whether the corporation or Groves owned the liquor. Groves was the agent of the corpora-

tion, acting for it and in its behalf. The corporation could not well take the position that it could disavow the act of its president in its behalf and receive the benefits of such act. I am inclined to think that liquor shipped by one in violation of that section is forfeited, no matter whose property it may be, if the shipper was rightfully acting for the owner.

What reason could exist why the prosecuting officer of the government should not receive a bill of sale to the government for liquors forfeited under the statute? Why should it be necessary to proceed by forfeiture proceedings, when the same object is obtained by the guilty party voluntarily accomplishing the object of the forfeiture proceedings.

The second count in the indictment charges a felony, for which Groves might have been sent to prison for two years and fined $5,000.

[3] On the showing made by the answer of the present collector of internal revenue, it appears that he has not in his possession the liquor mentioned in the petition. Under such circumstances, it does not seem to me that the court would be justified in making the order prayed for, when it is not in the power of the officer to comply with it.

The petition will be denied, and the proceeding dismissed.

COLONIAL TRUST CO. v. STONE HARBOR ELECTRIC LIGHT & POWER CO.

(District Court, D. New Jersey. April 19, 1922.)

Corporations ⇐478—Pledge of rents, issues, and profits of corporation entitles mortgagee to subsequently acquired accounts receivable.

Where a mortgage securing corporate bonds pledged, not only all the property of the corporation, but also the rents, issues, and profits thereof, it covered personal property acquired by the corporation subsequent to the mortgage, so that execution could not be levied on accounts receivable by the corporation after a receiver had been appointed in proceedings to foreclose the mortgage, though, if the mortgage had not pledged after-acquired property, the mortgagee would have no better right to them than an unsecured creditor, and the creditor first levying thereon would possess.

In Equity. Suit by the Colonial Trust Company, trustee, against the Stone Harbor Electric Light & Power Company. On petition of the receiver to restrain the sheriff of Cape May county from levying on property of the defendant corporation an execution issued in favor of Annie Kerr against the corporation. Injunction issued.

Walter Carson, of Camden, N. J., for receiver.
Ott & Carr, of Camden, N. J., for judgment creditor.

BODINE, District Judge. The receiver of the defendant company appointed in a foreclosure suit applies for an injunction to restrain the defendant, Annie Kerr, a judgment creditor, and the sheriff of Cape May county from interfering with his possession. The mortgage is

the ordinary trust mortgage, giving the trustee a right to foreclose upon default. Default occurred in 1917, but the foreclosure proceeding was not instituted until the 2d of December last, when the receiver was appointed. He shortly thereafter qualified. On the same day that he was appointed Annie Kerr recovered a judgment in the Cape May county circuit court, and on the 23d day of December an execution was issued and a levy made by the sheriff upon the property of the defendant, particularly upon certain accounts receivable which had accrued since the default in the mortgage, but prior to the appointment of the receiver. The accounts were for electric power furnished to certain municipalities.

The sole question for the determination of the court is whether the sheriff had a right, under the circumstances, to levy upon accounts receivable for electric power furnished by the defendant company subsequent to default and prior to the appointment of the receiver. The mortgage, so far as pertinent, provides as follows:

"Together with any and all lands, tenements, real estate, building, rights of way, poles, wires, cables, conduits, machinery, appliances, equipment, corporate rights, franchises, including a right to be a corporation, rentals, income, and real and personal property of every sort and description, and all revenues, issues, profits, effects, rights, credits, and income from the operation of its franchises or conduct of its business, now owned or possessed, or hereafter acquired, by or from any means or source whatever. Also together with all and singular the improvements, ways, rights, liberties, privileges, hereditaments, and appurtenances to the above-mentioned property belonging, or in any wise appertaining, and the reversion and remainders, rents, issues, and profits thereof, and all the estate, right, title, property, claim, and demand whatsoever of the said electric company, and its successors and assigns, of, in, and to the same and every part thereof.

"That until the maturity of said bonds, or until default shall be made in respect to some covenant herein required to be preserved, performed, or kept by it, the said electric company shall be suffered and permitted to possess, manage, operate and enjoy the lands, premises, rights of way, poles, wires, cables, conduits, machinery, equipment, appliances, and real and personal property hereinbefore referred to, and every part thereof, with the appurtenances, and to take and use the income, receipts, revenues, rents, issues, and profits thereof, in the same manner and with the same effect, as if this mortgage had not been made, except as herein otherwise provided. That until default shall be made in the payment of the interest on the bonds secured by this indenture, as may be due and payable under the terms and conditions hereof, the said electric company shall be suffered and permitted to possess, manage, operate, and enjoy the lands, premises, rights of way, poles, wires, cables, conduits, machinery, real and personal property hereinafter referred to and every part thereof, with the appurtenances, and to take and use the income, receipts, revenues, rents, issues, and profits thereof, in the same manner and with the same effect as if this mortgage had not been made, except as herein otherwise provided."

It was held by this court in Pierce v. Bound Brook Engine & Manufacturing Co. (D. C.) 274 Fed. 221, that the provisions of a mortgage somewhat similar to the above were sufficient to cover after-acquired personal property including things in action. That case rested upon Mr. Vice Chancellor Leaming's decision in Buvinger v. Evening Union Printing Co., 72 N. J. Eq. 321, 65 Atl. 482.

The judgment creditor contends that the mortgagee and the receiver appointed at the instigation of the mortgagee have no rights to the ac-

counts receivable arising prior to the taking possession of the property by the receiver. The New Jersey case of Stewart v. Fairchild Baldwin Co., 108 Atl. 301, is cited. Counsel has, however, overlooked the distinction which Mr. Justice Trenchard, in writing the opinion of the court in that case, made when the mortgage, as here, expressly pledges the rents, issues, and profits of the mortgaged premises as further security for the payment of the debt.

Certainly, if there is no pledge in the mortgage of after-acquired things in action, the mortgagee has no better right to them than an unsecured creditor, and a creditor first having levied would possess; but, where the mortgage expressly pledges after-acquired rights of action, the mortgagee would seem to be entitled thereto by virtue of the agreement, unless some statute or rule of law forbade. In re Jarmulowsky (D. C.) 224 Fed. 141. The case of American Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144, Freedman's Saving Co. v. Shepherd, 127 U. S. 494, 8 Sup. Ct. 1250, 32 L. Ed. 163, and Myers v. Brown (N. J. Ch.) 112 Atl. 844, are cases in which there was either no pledge of after-acquired rights in action or the mortgagee had not taken possession as here.

In Commercial Trust Co. of New Jersey v. Drayton, 90 N. J. Eq. 264, 105 Atl. 241, Mr. Justice Kalisch held that a mortgagee of chattels could recover from a trustee in bankruptcy accounts receivable collected. The same rule would seem to apply here, where the sheriff and a judgment creditor are interfering with a mortgagee in possession through a receiver, of accounts pledged under the precise language of the contract of mortgage.

Let an injunction issue in accordance with the prayer of the petition.

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

(District Court, W. D. New York. February 20, 1922.)

No. 1974.

Negligence ⇐121(2)—Allegation of specific negligence does not exclude rule of res ipsa loquitur.

Where the complaint in an action for wrongful death alleges that decedent was a passenger on a train of defendant railroad company and was killed in a collision between trains the rule of res ipsa loquitur is not excluded by the fact that the complaint also alleges specific acts of negligence.

At Law. Action by Benjamin Rosenzweig and Edmund J. Stafford, administrators of the estate of Frances Adelaide Doherty, deceased, against Walker D. Hines, Director General of Railroads. On motion by defendant for new trial. Denied on condition that plaintiffs stipulate for reduction from amount of verdict.

Charles P. O'Neil and Edmund J. Stafford, both of Detroit, Mich., for plaintiffs.

Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y. (R. C. Vaughan, of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District Judge. Error is assigned in the charge of the court that a presumption of negligence arose from the mere happening of the accident. The record shows that, after stating that the deceased was a passenger on the defendant's train, the court said to the jury that in view of the circumstances and relations existing between the deceased and the railroad company, a presumption of negligence arose from the occurrence of the injury that the presumption was not unwarranted that the accident occurred because of the negligent operation of the railroad in question that—

"It is the law, where injuries are sustained by a passenger in a railroad train owing to a wreck, derailment of a car, collision, or through faulty equipment of a roadbed, the happening in itself is prima facie evidence of negligence on the part of the railroad company, and unless the prima facie evidence is explained or repudiated, you may conclude that the accident happened because of the negligent operation of the train."

The presumption of negligence, the defendant contends, does not exist where the complaint, as in this case, first in general terms, and then specifically, alleged the negligence of the defendant company which induced the mishap. The complaint, however, also alleges (subdivision E) wherein the specific acts of negligence are charged, that the defendant negligently permitted one of its trains to collide with another train on the same track which was standing still in front of it and in which the plaintiff was a passenger. This inclusion, even though it is a part of the specific charge of negligence, I think justified submitting the case to the jury under the rule of res ipsa liquitur. It is true there are decisions in various states holding in effect that when a declaration sets forth specific acts of negligence, the rule relating to prima facie negligence arising from the circumstances does not apply; but in these decisions the declaration was not governed by any Code of Civil Procedure providing for methods of pleading. Section 522 of the Code of Civil Procedure substantially states that the allegations of the complaint are taken as true unless controverted by the answer, and in the answer herein the collision, as alleged in the complaint, is admitted. Accordingly, the plaintiff cannot be deemed to have waived his rights to rely on the ipsa loquitur rule. Indeed, there are numerous adjudications in disagreement with the rule of abandonment stated in the citations upon which the defendant relies, and the weight of authority favors the rule announced in Massachusetts, in Cassady v. Old Colony Street Ry., 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285, wherein it was said:

"The defendant also contends that even if originally the doctrine [of res ipsa loquitur] would have been applicable, the plaintiff has lost or waived her rights under that doctrine, because, instead of resting her case solely upon it, she undertook to go farther and show particularly the cause of the accident. This position is not tenable. * * * An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it."

And in Southern Ry. Co. v. Adams, 52 Ind. App. 322, 100 N. E. 773, the court said:

"The complaint clearly shows that the relation of carrier and passenger existed between appellants and appellee, and where this is shown, and it also

appears from the pleadings that the complaining passenger was injured by the derailment of the train, the rule of res ipsa loquitur applies, notwithstanding several causes are alleged to have produced the derailment."

Since the plaintiffs have complied with the state statute in alleging liability on the part of the defendant company, which finds support in the evidence, the case, in my view, was properly submitted to the jury under the res ipsa loquitur rule.

It is also contended that the verdict of $28,000, rendered by the jury in favor of plaintiffs, is excessive. The evidence with relation to the recovery has been carefully considered, and the conclusion reached that the award is excessive. It is true the beneficiaries would have received from her, had she not been killed, not only the nurture that only a mother can give to infant children, but also a high order of training, intellectual, moral, and physical. But in view of the fact that the father was also killed in the same accident, for which a recovery has been rendered since the verdict herein, which substantially included as one of the elements of pecuniary loss the same element of deprivation of intellectual, moral, and physical training that the jury considered in this action, I feel that in reason and justice there should be a reduction. Besides, it is quite probable that the circumstances of the occurrence and the premature death of the mother of the beneficiaries, and their infancy naturally appealed to the sympathy of the jury. In addition thereto, it is not improbable that they believed they had the right to include in their estimate the loss of society and companionship. Hence I think a reduction of the verdict to $22,000 would be reasonable and just.

If plaintiffs stipulate to reduce the verdict to that amount within 15 days, the motion for a new trial will be denied; but, if they decline, an affirmative order may be ordered.

S. O. STRAY & CO., Inc., v. TROTTIER, IDE & CO.

TROTTIER, IDE & CO. v. S. O. STRAY & CO., Inc.

(District Court D. Massachusetts. April 5, 1922.)

Nos. 1622, 1700.

Shipping ⊂=39—Mutual mistake in charter party held not prejudicial to charterer.

A charter party for carriage of a cargo of wool in bales from South Africa to Boston, for a lump sum as hire, in describing the vessel stated her tonnage and that she was "estimated about 10,000 bales capacity." Both charterer and the broker for the owner acted in the belief that the South African bales averaged 16 cubic feet, whereas they averaged 23 cubic feet and the vessel was able to take but 6,360 bales, though she could have stowed about 10,000 bales of 16 cubic feet. *Held*, that the estimate of capacity in bales was not a warranty, but was made under a mutual mistake, and that, since the actual capacity of the vessel was as understood, charterers were liable for the full charter hire.

In Admiralty. Suit by S. O. Stray & Co., Inc., against Trottier, Ide & Co., with cross-libel. Decree for libelant, and for respondent in cross-suit.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for S. O. Stray & Co., Inc.

Wheaton Kittridge and Wm. L. F. Gilman, both of Boston, Mass., for Trottier, Ide & Co.

MORTON, District Judge. This is a libel to recover balance of charter hire. There is a cross-libel to recover damages for the vessel's alleged failure to perform the charter. The case was heard in open court on a written agreement covering certain facts and on oral testimony. The facts are as follows:

Stray & Co., on behalf of the owners of the Norwegian ship Svalen, by a written charter party dated July 2, 1917, chartered her to Trottier, Ide & Co., for a voyage from Port Elizabeth and East London, South Africa, to Boston, the hire being a lump sum of $110,000, payable on arrival at the port of discharge. The voyage was completed and the charter hire duly paid, except the sum of $40,040, which the respondents refused to pay, and which constitutes the amount sought to be recovered in the first libel.

In the first part of the charter party the Svalen is described as being "of the burden of 1,812 tons, or thereabouts, net register measurement, and estimated about 10,000 bales capacity." The charter party also provides in a later clause:

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of wool in customary compressed bales under deck."

The customary compressed bales of South African wool as found in the trade vary in cubical contents from 16 cubic feet to about 30 cubic feet; they average about 23 cubic feet. The Svalen loaded all she could hold, and the total number was only 6,360, instead of 10,000, as estimated in the charter party.

The respondents contend that the estimate in the charter party which has been quoted constituted an agreement on the part of the vessel that she could carry about that number of the customary bales. As she was unable to do so, they contend that they are not liable for the full charter freight, and by their cross-libel they claim damages from the vessel for her deficiency in this particular.

There was evidence that during the negotiations leading up to the charter party, the parties acted on the assumption that the average bale of South African wool contained 16 cubic feet. Mr. Freeman, who acted as broker in the charter, testifies that he so understood the matter and so informed Trottier. Trottier died in military service in 1918 and his testimony never was taken. Under the circumstances, I admitted testimony of his partner, Mr. Ide, as to what Trottier said to him about the matter; but I do not think that it tends to discredit or even seriously contradicts Mr. Freeman's account of the negotiations. Trottier appears not to have known the average cubical con-

tents of a South African bale; neither did Freeman, and they both assumed for the purpose of the charter party that it was about 16 cubic feet. In so doing they made a serious mistake, although acting in entire good faith. The real question is whether the resulting loss should be borne by the owner or the charterer.

The expression, "estimated about 10,000 bales capacity," is not contained in what may be termed the covenanting parts of the charter party. It is used in connection with the description of the vessel. The word "estimated" implies an opinion or judgment formed with reference to two determining factors, viz. the capacity of the vessel and the size of the bales. There was no deception in the estimate. The parties exchanged views as to the size of the bales, and both apparently mistook the size of a minimum bale for that of an average one. The Svalen was able to carry about 10,000 16-foot bales; her actual capacity was as understood.

No decision very close to the present case has been called to my attention. In Brawley v. United States, 96 U. S. 168, 24 L. Ed. 622, it was held that, where a contract for the sale of goods related to a certain definite lot, the expression "about," or "more or less," did not amount to a warranty of quantity, "but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it." 96 U. S. 171, 172 (24 L. Ed. 622). Here the parties were contracting for the services of a certain vessel. Her owners did not in terms warrant her capacity. They stated their estimate of it with reference to a standard as to which—as it turned out—both they and the charterers were incorrectly informed. This mutual mistake of fact rendered the estimate quite inaccurate. It would be going a good way to say, under such circumstances, that the owners in effect guaranteed the substantial accuracy of their estimate, or the correctness of the assumptions of fact on which it rested. The true view seems to me to be that suggested by the Brawley Case, supra, that all that was required of the party making the estimate was that it should be made in good faith and without gross disregard of facts. The charterers got the full cargo space that they understood they were getting. They are in reality complaining that they did not get almost 50 per cent. more for the same money.

Decrees for libelants in first case and for respondents in cross-suit.

THE VOLUNTEER.

THE SOUTH JACKSONVILLE.

(District Court, S. D. Florida. April 19, 1922.)

No. 1299.

1. Collision ⇐98—No duty to sound whistle, when similar lights shown.
There was no duty resting on the master of either of two vessels to sound his whistle in a river, when each vessel showed the same colored light.

2. Collision ⇐93—Ferryboat held at fault in colliding with tug and barge.
Pilot of ferryboat, after leaving slip to cross river, *held* at fault in not seeing the lights of a tug and barge, with which it collided.

In Admiralty. Libel by the Savannah-New York Transportation Company against the tug Volunteer and the ferryboat South Jacksonville, in which a cross-bill was filed by the Jacksonville Ferry & Land Company, owners of the ferryboat, against the tug Volunteer and the barge Chehaw. Decree against the ferryboat in favor of libelant, and dismissing the libel against the tugboat and barge.

W. M. Toomer and Stanton Walker, both of Jacksonville, Fla., and Hitch & Denmark, of Savannah, Ga., for libelant.

Geo. C. Bedell, of Jacksonville, Fla., for the Volunteer.

John E. & Julian Hartridge, of Jacksonville, Fla., for the South Jacksonville.

CALL, District Judge. This is an action brought by the Savannah-New York Transportation Company, owners of the barge Chehaw, against the tug Volunteer and ferryboat South Jacksonville, on account of a collision on the 29th of September, 1919, while said barge was being towed by the Volunteer, between said barge and the ferryboat South Jacksonville. A cross-libel was filed by the Jacksonville Ferry & Land Company, owners of the ferryboat, against the tug Volunteer and the barge Chehaw, seeking to recover for damages received by the ferryboat in the collision.

There can be no question of the right of the libelant to recover on its libel; the only question is from which, or both, of the respondents such recovery shall be had. This is determined by ascertaining from the testimony whether one or both of the boats libeled were guilty of negligence proximately causing the collision. This question, it seems to me, can be decided upon the testimony of Manucy, the pilot of the ferryboat, in the pilot house and having charge of the navigation of the vessel prior to and at the time of the collision.

The tug Volunteer, before daylight on the morning of September 29th, made fast to the barge on her port quarter, above the bridge across the St. Johns river, came through the draw, and was proceeding down the river in an easterly direction with her tow. The ferryboat left her slip on the south side of the river, proceeding to her slip on the north side. According to the testimony, no whistles were blown by

either boat, except the long blast required by the pilot rules, upon a boat leaving her berth. The wind was north-northeast, and the tide on the south side of the river was ebbing, but not strong, about high water slack. All the vessels had their proper lights burning; the tug showing the regulation towing lights.

[1] According to Manucy, the ferryboat came out of the slip and headed up the river, about northwest, in order to allow for the set of the ebb tide and also, I apprehend, because the location of the slip on the north side is a little to the west of the slip on the south side. In any event, the ferryboat, after coming out of the slip, showed her green light to the persons on the tug and barge, and this continued to show until Manucy put his wheel to starboard, thus turning the ferryboat to enter her slip upon the north side of the river, when her red light showed. It was then for the first time that Manucy discovered the proximity of the tug and tow. After the ferryboat was turned, and the red light shown, and the discovery of the tug and tow by Manucy, everything possible to avoid a collision seems to have been done on the tug and ferryboat. A consideration of the courses the tug and ferryboat were on when each was showing the green light convinces me that the cause of the collision was the failure of the pilot on the ferryboat to see the lights on the tug and barge, and that this failure was negligence, without which there would have been no collision.

It is sought to fasten neglience upon the tug, because she sounded no whistle indicating that she intended passing to either starboard or port. This claim I do not think tenable. It was natural for the men upon the tug and barge, seeing the ferryboat come out of her slip and head up the river, showing her green light, to have concluded that she expected to pass astern of the tug and barge to reach her slip. That this is reasonable is shown by Manucy's own testimony, where he says: "In fact, I would have been in better position to have made my slip." There was no duty resting upon the master of either boat to sound his whistle when approaching another vessel, each showing the same colored light, and this was the case in the present instance, until the ferryboat turned to starboard and headed for her slip on the north side. Then such whistles would have been worse than useless.

Again, it is said that the tug should have sounded her whistle when coming through the draw; but this position is not tenable. The rule to which reference was made contemplates an entirely different surrounding then existed in the instant case.

[2] I find that the cause of the collision was the failure to maintain a proper lookout on the ferryboat, which would have discovered the position of the tug and barge, and therefore the ferryboat must respond to the damage resulting from said collision to the barge.

What I have heretofore said disposes of the cross-libel filed herein.

A decree against the ferryboat South Jacksonville in favor of the libelant, and dismissing the libel against the Volunteer, will be entered.

An order dismissing the cross-libel against the Volunteer and barge will be entered.

CALLAHAN v. CAPRON CO.

(District Court, D. Rhode Island. May 5, 1922.)

No. 139.

Patents ⇐210—Defendant held entitled to use invention of foreman made on defendant's time.

Where the inventor was defendant's foreman, and worked on the invention during the time paid for by defendant, and using defendant's materials and the assistance of its toolmaker, for the purpose of perfecting a device which could be marketed by defendant in place of a device it had been making, which infringed another patent, defendant is entitled to use the invention under an implied license for shop right, even though it did not pay the cost of obtaining the patent.

In Equity. Suit for infringement of patent by Charles J. Callahan against the Capron Company. Bill dismissed.

Perley H. Plant, of Providence, R. I., for plaintiff.

Horatio E. Bellows, of Providence, R. I., for defendant.

BROWN, District Judge. Infringement is charged of letters patent, No. 1,377,804, to Charles J. Callahan, dated May 10, 1921, on application filed February 26, 1921, for collar holder. The collar holder is for use with soft, turn-down collars, for engaging the opposed edges of the collars, to hold the same in position.

Though the answer denies the validity of the patent, this defense was not pressed at the hearing. The defendant admits the manufacture of the patented device, but contends that it has an irrevocable license. or shop right, for the reason that the patented device was produced by its employees, one of whom was the patentee, Callahan, during their working hours, and with material and labor paid for by the defendant. The patentee, Callahan, was employed as foreman of the defendant's shop; defendant being a manufacturer of jewelry of various kinds.

At the time of the plaintiff's employment as foreman, the defendant was selling a collar holder which it purchased in an unfinished condition, and which it polished, colored, electroplated, and put on cards.

Upon being notified that this was an infringement, the plaintiff, in the course of his duties as foreman, undertook to make a collar holder as a substitute for the one they were then using, which would avoid infringement. The work which finally led to the development of the special form of device shown in the patent in suit covered some weeks, during which there was experiment, the production of various models, and a close co-operation between the plaintiff and defendant's tool maker, Horter; in fact, the testimony of Horter in connection with the various exhibits produced by him, raises a doubt as to whether the conception of providing the ends of the collar holder with "opposed rolls" to permit the ready insertion and removal of the fabric, was not Horter's idea, rather than Callahan's.

The mechanical changes necessary to avoid the claim of infringement are little different from such rearrangement of form or design as is to be expected in the ordinary practice in manufacturing jewelry establishments, and such as would be expected from the ordinary skill of a foreman. Assuming, however, that the change passed the range of ordinary mechanical skill, and came within the field of patentable invention, it is evident that it was produced for the purpose of enabling the defendant to continue to offer to the trade a collar holder without subjecting it to claims for infringement, and the work of doing this was assumed by Callahan as a part of his duties as foreman.

While the material supplied by the defendant was of slight value, yet there is evidence that a substantial amount of the plaintiff's own time, as well as the time of a skilled tool maker, was devoted to this work at the expense of the defendant. It also appears that tools were made, and that a considerable number of goods was manufactured and marketed before any claim was made by Callahan that, as an inventor, he was entitled to a royalty. There was evidence of conversations with Corcoran, who was the defendant's bookkeeper and at times acted as assistant manager, as to a royalty, and an offer by the plaintiff to the bookkeeper Corcoran to give to him, individually, a one-half share of the patent upon payment by him of one-half the expenses of taking the patent out. Callahan, however, seems to have made no claim for compensation or royalty to the principal officers of the defendant, until after the defendant had put the goods upon the market in considerable numbers. It is true that the defendant did not advance any sums for the taking out of a patent; on the other hand, it seems that Callahan sought to patent this for his own benefit and that of Corcoran, without consulting the officers of the company.

To enjoin the defendant from the use of this device would result in depriving it of the benefit of the services and time of its foreman and tool maker, for which it has paid them.

Having in mind the reasons which led to the making of this device, the co-operation of defendant's employees in its production in the course of their ordinary employment, and the putting of the goods on the market before any claim to royalty was made by Callahan, I am of the opinion that the present case falls within the line of cases which have upheld an implied license or shop right, and that it would be inequitable to grant an injunction.

The bill will be dismissed. A draft decree may be presented accordingly.

UNITED STATES v. GERACI et al.

(District Court, S. D. Florida. March 9, 1922.)

No. 933.

Conspiracy ⟸43(6)—Indictment held not to charge an offense.

An indictment for conspiracy to commit an offense against the United States by violating Federal Control Act, § 11 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾k), which did not allege any facts showing an intention to commit any act which is made an offense by said section, *held* insufficient.

Criminal prosecution by the United States against N. Geraci and others. On demurrer to indictment. Demurrer sustained.

William M. Gober, U. S. Dist. Atty., of Lakeland, Fla.
H. S. Phillips, of Tampa, Fla., for defendant Geraci.

CALL, District Judge. In the above case the indictment charges a conspiracy to commit an offense against the United States; that is to say, to violate section 11 of the Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾k), in this, to wit: That false and fraudulent claims should be presented to the railroad, then under federal control, for damages to freight received over said railroad, when such freight was received in good order. The overt act alleged shows that certain employees of the road falsely certified to such damages.

Section 11 of the act denounces three things as a crime against the United States: (1) To violate or fail to observe any of the provisions of the act; (2) interfere with or impede the possession, use, operation, or control of the roads under federal control; (3) violate any provision of any order or regulation passed pursuant to the act.

It is not sufficient to allege in an indictment that the purpose of the conspiracy was to violate the provisions of section 11 of the act. This would be too general. The allegation must be followed by setting forth facts which show what provision of section 11 was intended to be violated. A careful reading of the indictment will show that there is no charge of the violation of either of the offenses above noted denounced by the section.

I do not think a conviction or acquittal under this indictment could be pleaded in bar to another prosecution for a conspiracy to present false and fraudulent claims against the United States, and therefore the demurrer will be sustained.

Order.

This cause coming on to be heard upon the demurrer and motion to quash the indictment, and the same having been argued and submitted, it is considered by the court that said demurrer be and the same is hereby sustained.

DRYDEN et al. v. RANGER REFINING & PIPE LINE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 25, 1922. On Petition for Rehearing, May 11, 1922.)

No. 3812.

1. Bankruptcy ⇐16—"Principal place of business" of corporation is where its principal business activities are carried on; "business of corporation."

The business of a corporation is its activities in the acquisition or production of that which its charter authorizes it to acquire or produce and its dealings with its customers, and its principal place of business, within the meaning of Bankruptcy Act, § 2(1), being Comp. St. § 9586(1), is where such activities are carried on.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business; Principal Place of Business.]

2. Bankruptcy ⇐16—"Principal place of business" of corporation held in district where it conducted the greater part of its business, and not where it had its general offices.

A Delaware corporation had its general office in Kansas City, Mo., where its general books and records, except its stock records, were kept. Its business was the producing and refining of petroleum and sale of its products. It also owned tank cars, which it used and sometimes leased, pipe lines, etc. It owned one refinery, and seven filling stations on leased ground in Kansas City, and some small wells in Kansas; but the greater part of its property and the chief seat of its production and sales were at Ranger, Tex., where it owned and operated wells, two refineries, loading racks, pipe and water lines, and where its bills were paid and most of its sales were made, though larger contracts were submitted for approval to the Kansas City office. Its gross revenue from its business there, exclusive of the production of its Texas wells, was 4½ times as great as that received in Missouri. *Held*, that its principal place of business, within the meaning of Bankruptcy Act § 2(1), being Comp. St. § 9586(1) was in Texas, and that the court in that district had jurisdiction of proceedings in bankruptcy against it.

Appeal from the District Court of the United States for the Northern District of Texas; James C. Wilson, Judge.

In the matter of the Ranger Refining & Pipe Line Company, alleged bankrupt. From a decree dismissing the petition for want of jurisdiction, J. E. Dryden and others, petitioners, appeal. Reversed.

Joseph Manson McCormick, of Dallas, Tex., Frank Hill Rawlings, of Fort Worth, Tex., Francis Marion Etheridge, of Dallas, Tex., Power, Dryden & Rawlings, of Fort Worth, Tex., and Etheridge, McCormick & Bromberg, of Dallas, Tex., for appellants.

Wilmot M. Odell and Perry G. Dedmon, both of Fort Worth, Tex., George H. Imbrie, I. J. Ringolsky, M. L. Friedman, and Ringolsky & Friedman, all of Kansas City, Mo., Marks & Flaherty, of Ranger, Tex., Francis C. Downey, of Kansas City, Mo., and Cooke, Dedmon & Potter and Goree, Odell & Allen, all of Fort Worth, Tex., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The Ranger Refining & Pipe Line Company is a corporation chartered under the laws of Delaware, with its prin-

cipal office in Wilmington, Del. The by-laws provide that the corporation might also have an office in Dallas, Tex., and at such other places as the board of directors might appoint, or the business of the corporation might require; that the directors might hold their meetings, and keep the books of the corporation, other than the original or duplicate stock ledger, outside of Delaware.

On April 20, 1920, the directors by resolution established the general offices of the corporation at Kansas City, Mo. It was ordered that all stockholders' and directors' meetings should be held there, and all records, except where otherwise required by law, should be kept there. Previously an auditor's office, covering all business of the company, had been at Dallas, Tex. This was moved to Kansas City.

The business which the corporation was carrying on was the producing and refining of oil and gasoline and its sale to the public; also the using and sometimes leasing of tank cars which it owned, and the maintenance and use of certain racks, pipe lines, and water lines. While its charter authorized other business, no others had been, or were being, conducted.

The corporation owned one refinery and seven filling stations (on leased ground) in Kansas City. It owned in Texas two refineries, certain pipe lines, loading racks, six miles of water lines, and considerable other property. The chief seat of its production of oil and gas, and where it sold the greater part thereof, was at Ranger, in the Northern District of Texas.

The court found that the value of its property in Texas was at least five times as much as that in Missouri. The only property of the alleged bankrupt in Oklahoma was stock in another corporation owning certain oil leases not producing. The alleged bankrupt owned some small oil wells in Kansas. During the preceding six months, the income from these wells was $8,197.46. The production of oil and gasoline by said corporation in Texas was not less than 10 times as great as in Missouri. The gross revenue was approximately 4½ times as great, excluding the production from the oil and gas wells in Texas. The indebtedness against the corporation is $1,558,318.17. That held in Texas is $616,719.47, in Missouri $199,945.39, and outside of Missouri and Texas $741,653.31.

At Kansas City were kept the general books of the corporation. These, so far as the Texas business was concerned, were compiled from reports made from Ranger and Wichita Falls. At Ranger were kept books showing all activities of the two refineries there. At Ranger were initiated and closed all contracts for sales of the product of the two refineries, except for a small quantity of residuum sold to the Warren Oil Company. On large contracts the Ranger office consulted with, and made its contracts on the assent of the Kansas City office. That office had nothing to do with obtaining, closing, or filling the contracts, and all money thereon was collected at Ranger, though ultimately remitted to Kansas City. The traffic manager was located at Ranger, and handled there all the tank cars wherever they might be. The Wichita Falls business and production were small.

On April 27, 1921, certain creditors filed a petition in involuntary

bankruptcy against said corporation, alleging that for the greater part of the preceding six months it had had its principal place of business at Ranger, Tex. On May 5th receivers were appointed on a petition filed in said proceedings. On April 29, 1921, a like petition in involuntary bankruptcy was filed against said corporation at Kansas City, Mo., alleging that to be its principal place of business, and receivers were appointed in said proceedings on May 2d.

By proper pleadings the jurisdiction of the court was attacked in the Texas proceedings, on the sole ground that the principal place of business was at Kansas City, Mo. A reference to a special master was ordered, who took evidence in Texas and Missouri, and reported his findings of fact and conclusions of law, and, as his ultimate finding, that the principal place of business was at Ranger, Tex.

On exceptions, the District Court adopted in the main the master's special findings of fact, but held thereon, as an ultimate conclusion of fact, that Kansas City was such principal place of business, dismissed said bankruptcy proceedings in Texas for want of jurisdiction, and revoked the order appointing receivers, directing that application for allowances for services rendered by the receivers or their attorneys should be filed within 10 days, taxing costs against the petitioning creditors, with the right to them to move to retax said costs, and retained jurisdiction for the purpose of enforcing the administrative orders made.

This appeal was taken which raises the points: (1) That on the facts found by said court the principal place of business of said corporation was at Ranger, Tex. (2) That, if the court had no jurisdiction, it had no authority to retain the case for any purpose, or to tax costs against the appellants.

Bankruptcy Act, § 2, provides that the District Courts shall have power—

"to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their territorial jurisdiction for the preceding six months, or the greater portion thereof," etc. 30 Stat. 545, U. S. Comp. St. § 9586.

The residence and domicile of the bankrupt in this case, a corporation chartered under the laws of Delaware, is at Wilmington, Del. Southern Pacific Co. v. Denton, 146 U. S. 202, 205, 13 Sup. Ct. 44, 36 L. Ed. 942; Shaw v. Quincy Mining Co., 145 U. S. 444, 449, 12 Sup. Ct. 935, 36 L. Ed. 768. Jurisdiction, therefore, in either Texas or Missouri, must rest on the location of the principal place of business in said state. The act does not confer jurisdiction on the district in which the principal office of the company is located. The principal place of business of a natural person, equally with that of an artificial one, will confer jurisdiction.

[1] The Bankruptcy Act is one intended to deal with failures in business of those who are entitled to its benefits or subject to its administration. The business of a corporation is its activities in the acquisition or production of that which its charter authorizes it to produce or acquire, and its dealings with its customers, not its relations with its own employees or officers in its internal government, or in

applying to them the checks it may have devised in carrying on its business as security against the improvidence or negligence of agents.

For example, if a corporation had its sole place of manufacturing a product, and where it dealt with the public, at a given place, and a general office, where it produced and sold nothing, at another, but from which it gave directions to its employees at the first place, would the fact that it required its manager at the first place to submit all large transactions made by him to the approval of such office, and to remit the proceeds of his sales to it, prevent the place where the stock and manufacture was had, where its contracts were negotiated, and finally concluded, and its bills paid, from being its principal place of business? Can it alter the fact that a small part of its business of production and dealing with the public is done at the place where the general office is located, at which its internal management is carried on, when the bulk of its property, production, and business dealings, are elsewhere? We think not.

[2] Here creditors, in reliance on the fact that the chief production of this corporation takes place at Ranger, that the great majority of its dealings of all sorts with the public are carried on and closed there, and that its bills arising from this business are there paid, have instituted proceedings in bankruptcy in the district in which Ranger is located. The question is: Shall their proceeding be dismissed, on the ground that Ranger is not the principal place of business? That the fact that directors and stockholders meet at a place does not fix that location as the principal place of business is well settled. Continental Coal Corporation v. Roszelle Bros., 242 Fed. 243, 155 C. C. A. 83; In re Elmira Steel Co. (D. C.) 109 Fed. 456.

The appellants insist that the present case falls under the decision in Continental Coal Corporation v. Roszelle Bros., 242 Fed. 243, 155 C. C. A. 83, which affirms 235 Fed. 343. In that case a mining company, chartered under the laws of Wyoming, owned coal mining property in Kentucky and Tennessee. Its only operated coal mines were in Bell county, in the Eastern district of Kentucky. It had a retail yard for the sale of coal in Louisville, in the Western district of Kentucky. The mining and shipment of coal and sales of merchandise, timber, and lands, and purchases of supplies and equipment for the mine, were conducted in Bell county; large purchases being required to be first submitted to the Chattanooga, Tenn., office. The maps and original deeds to its Kentucky property were kept in Bell county. A vice president and general manager lived there, and had charge of the mining and its other activities there.

"The corporation's principal office has all the time been in Chattanooga, which is in the Eastern district of Tennessee, and its principal stockholders and all its directors and officers—except the vice president and general manager, the chairman, and another member of the executive committee—have lived there. In this Chattanooga office the president, secretary and treasurer, and sales manager gave their entire time to the company's business, exercising a general direction and supervision over the business, and communicating daily, by mail and telephone, with those in charge at the mines and of the various operations connected therewith, and from whom, as well as from those in charge of the timber, secret service, and legal departments, reports were regularly received. The financial management was exercised at the Chatta-

nooga office, including the borrowing of money, the remittance of funds to meet the pay rolls (made out at the mines), the payments for purchases (by checks drawn at the mines and countersigned at the Chattanooga office), and the sales of coal (some of which was bought by the company from other producers) on orders (partially at least through traveling salesmen) received and passed on at the Chattanooga office, copies of the orders being sent to the office at the mines for filling. Remittances for coal sold were also received at the Chattanooga office, and deposited in the company's account at the bank in that city, where its principal banking business was done. The only bookkeeping done at the Chattanooga office seems to have related to the 'general accounts.' The company had no property in Chattanooga, aside from its office furniture and equipments, books, files, and records. * * *"

Involuntary proceedings in bankruptcy were filed in the Eastern district of Kentucky, and subsequently the corporation filed a voluntary petition in the Eastern district of Tennessee. The question raised was in which district was the principal place of business.

"In a well-considered opinion Judge Cochran has discussed the pertinent features of the case, and has stated reasons for his conclusion that the Eastern district of Kentucky was the bankrupt's principal place of business. We agree with the conclusion and with the reasoning on which it is based. * * * We are impressed that the dominating feature of the bankrupt's business—that which gave it distinctive character—was the mining of coal. As was well said by Judge Cochran: 'It is the production end of his [the mine operator's] business that is the prominent feature and is expressed in his name. No one ever speaks of a manufacturer or mine operator as a merchant or seller of goods, but always as a manufacturer or mine operator.' Taking into account the entire situation, we are better content with the view that the debtor's principal place of business was the place where these extensive mining operations, as well as the other business mentioned, were carried on, where the maps and original deeds of the company's property were kept in a vault prepared for that purpose, where this large number of company houses and the important commissary stores were maintained (a village of themselves), where the bulk of the bankrupt's property was situated, and where suits and liens against it would naturally be enforced (in fact, several personal injury suits were pending when the testimony below was taken), and where its superintendent and manager actually resided, rather than the office in Chattanooga, in which the books were kept, the general guidance of its business effected, and from which the selling was conducted." Continental Coal Corporation v. Roszelle Bros., 242 Fed. 243, 245, 247, 155 C. C. A. 83, 87.

Appellees admit that the above case was correctly decided on its merits, but insist that while it is true, if the entire production of a mining or other company is located in one district, such district will be considered the location of the principal place of business, notwithstanding the company has a general office elsewhere, which exercises supreme control over the mining or other operations, and which negotiates the sales of the product of such operations, this is not the case where such company has mines or factories in more than one district, as to which the general office exercises this supervision and activity, regardless of the relative value of the two properties or the quantity of production by each, although the production and business in one district may much predominate. The basis of this distinction is not perceived. If the exercise of control and the making of sales by such office in one case does not constitute an office where the principal business is transacted, how can that office any more become the principal place of business because it deals with four-fifths of its product drawn

from one source and one-fifth from another source, instead of drawing it all from one source?

Nor can it be seen, if the place of production by the mines or refinery determined the principal place of business, that the production of only one-fifth of the total production in the same district where such general offices were located would any the less prevent the district of the location of the plant, producing four-fifths of the whole, from being the principal place of business. If, on the other hand, dealing with the public is also to be looked to in determining the location of the principal place of business, then in the case at bar there is not only more than five to one of property and production in the Texas district, but sales made, in at least the same proportion, and the conduct of all other business with the public is there, as against that conducted by the Kansas City office.

Appellees rely with confidence on the case of Burdick v. Dillon (In re Matthews Consolidated Slate Co.), 144 Fed. 737, 75 C. C. A. 603, as holding that the office which exercises supreme control and direction of the business conducted elsewhere will be considered the principal place of business of the corporation. The facts of this case, however, do not apparently consider that the supreme direction of the other agents of the corporation alone constitutes such office the principal place of business. There the principal dealings with the public were conducted by the Boston office. The case sustains the view that the place where the corporation conducts the greater part of its dealings with the public will be considered the principal place of business of the corporation rather than an office for the general control of its intra-corporate affairs. The Circuit Court of Appeals thus states the contention:

"It is the appellant's contention that the principal place of business was at the place where the quarries and mills were located, and where the working operations were conducted, rather than at the Boston office, where supreme direction and control were exercised and the bulk of the sales was negotiated." Burdick v. Dillon, 144 Fed. 737, 738, 75 C. C. A. 603, 604.

In the opinion of the District Court, which is adopted by the Circuit Court of Appeals, speaking of the Boston office, it is said:

"The minutes of the directors and the corporation books of account were kept there. Its correspondence was conducted from there. The great bulk of sales of the product of the quarries and mills was negotiated there or from there: about 1 per cent. only of the total sales being made from Poultney. All bills for produce sold were sent out from there, being there made up from shipping slips forwarded there from Poultney. * * * One regular salesman was employed, who was to be found there, except when on the road, and who was never to be found at the quarries or at Poultney. When on the road, his reports were all made to the Boston office, and all orders from him were received there; but only a small proportion of the sales was made by him." In re Mathews Consolidated Slate Co., 144 Fed. 724, 729.

The court held that under these facts the Boston office was the principal place of business. It might be so held where the bulk of the business of the corporation in dealing with the public—that is, its sales—were negotiated, concluded, and collections made, at that place.

Where a corporation conducts its business at a number of places,

no one of which is plainly the place where its business is principally conducted, one of such places, where a substantial business is transacted, and from which general supervision of all of its business is exercised, may be properly held to be the principal place of business of such corporation.

"It is not easy, nor is it required, to lay down any general rule for determining which one of several places at which a corporation does business is its principal place of business." In re Worcester Footwear Co. (D. C.) 251 Fed. 760, 761.

No general rule is here attempted. In the present case, not only the great excess of property is located in the Texas district, and the great bulk of production there made, but by far the greatest amount of sales, dealing with the public, the end for which the production was had, was negotiated and completed at the Ranger office. The very name of the corporation pointed to Ranger as the place where its principal business would be conducted, and, while by no means conclusive; is a circumstance to be considered. Therefore, whether the place where the bulk of its property is located, where the greatest production of its output occurs, or where its sales and business are conducted, be considered, Ranger was the office of its principal business activities, and the District Court of that district had jurisdiction of the petition filed therein on April 27, 1921.

The decree dismissing said cause for want of jurisdiction is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

On Petition for Rehearing.

PER CURIAM. The business of the bankrupt, Ranger Refining & Pipe Line Company, is the production and refining of oil products and the sale of them to the public. Whether the production and refining of such products or their sale is considered the principal business of said bankrupt, the great bulk of each business is conducted at Ranger, Tex. An adjunct to this business, to wit, the furnishing of tank cars, is also conducted from this point. The public, dealing with the bankrupt, dealt in the main with and through the Ranger office.

The control exercised by the Kansas City office was an intracorporate control, not the transaction of business of production or with the public, except in the comparatively small volume of production there had, and of sales there made. Considering the production of the articles dealt in and the dealings with the public as constituting the business which is meant in the expression in the Bankruptcy Act, "principal place of business," we adhere to the conclusion that Ranger, Tex., was the bankrupt's principal place of business.

Petition for rehearing denied.

NORFOLK & W. RY. CO. v. FT. DEARBORN COAL & EXPORT CO.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1922.)

No. 1944.

1. Carriers ⟸94(4)—Value and not cost is measure of damages for coal confiscated by carrier without malice.

In an action against a carrier for the confiscation of coal shipped by plaintiff over its line, where the evidence showed the confiscation was to meet the carrier's needs and was not malicious, the measure of damages was the market value of the coal at the time and place of confiscation, and not the cost of the coal to the shipper.

2. Carriers ⟸94(3)—Evidence offered by defendant held to show damage was market value of credit in coal pool.

In an action against a carrier for confiscation of coal delivered to it for transportation, evidence offered by defendant that the coal, which plaintiff intended for export, was to be delivered to a coal pool at the point of destination, from which the shipper had no authority to divert it, and that on delivery there it would be merged in the pool, and the shipper given only a credit for an equal amount of coal in the pool, shows that the damage to the shipper by the confiscation of the coal was the market value of the credit for that amount of coal in the pool.

3. Trial ⟸49—Rejection of defendant's offer of evidence of market value held not sustainable, as relating only to contract coal.

In an action for the confiscation of coal by a carrier, the rulings of the trial court in excluding evidence as to the market value of the coal cannot be sustained, on the theory that the offered evidence referred to the value of contract coal, and not to spot coal, which included the coal in controversy, and which had a value widely differing from contract coal, where the rejection of the offers was not based on the ground they related to contract coal, but on the ground the measure of damages was the price paid for the coal, and some of the offers were broad enough to embrace spot as well as contract coal.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; George W. McClintic, Judge.

Action at law by the Ft. Dearborn Coal & Export Company against the Norfolk & Western Railway Company. Judgment for plaintiff on directed verdict, and defendant brings error. Reversed.

John H. Holt, of Huntington, W. Va. (Theodore W. Reath and F. Markoe Rivinus, both of Philadelphia, Pa., and Holt, Duncan & Holt, of Huntington, W. Va., on the brief), for plaintiff in error.

George S. Couch and Malcolm Jackson, both of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., on the brief), for defendant in error.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

KNAPP, Circuit Judge. During the months of July and August, 1920, the Ft. Dearborn Coal & Export Company, plaintiff below and herein so called, purchased from the Old Dominion Coal Corporation, on board cars at the mines of the Mud Lick Coal Company, at Stone, Ky., a quantity of run of mine coal, intended for export. A stipula-

tion of the parties, entered into before plaintiff's declaration was filed, is to the effect that the coal so purchased consisted of 897 tons of run of mine coal, which was shipped by the Old Dominion Corporation over the lines of the Williamson & Pond Creek and Norfolk & Western Railways, consigned to the Ft. Dearborn Company at Lamberts Point, Va., for export, but was confiscated en route by the Norfolk & Western, at Bluefield, W. Va., and used by it for fuel purposes, without the knowledge or consent of the Ft. Dearborn Company. Pursuant to this stipulation plaintiff filed its declaration in trespass on the case, alleging damages to the amount of $50,000, and issue was joined by defendant's plea of "not guilty."

At the trial, after reading the stipulation in evidence, plaintiff's president was allowed to testify, over repeated objection, that the aggregate price paid for the coal was $15,234.19, or, a little under $17 per ton on board cars at the mines, and that the Old Dominion Company had brought suit therefor in the circuit court of Kanawha county, W. Va., and recovered a judgment against plaintiff for the principal sum of $15,234.19, with $1,084.05 interest, or a total of $16,318.24, which judgment it had paid. There was no attempt to show the market value of coal at the point of shipment, at the place of confiscation, or at destination; the only proof of damages offered by plaintiff being the price it paid for the coal. On cross-examination the witness testified that this coal was intended for export; that it was shipped under permits, and would have gone into pools 5 and 7 at Lamberts Point; that for coal so moving under permit, after it passed the Bluefield scales, defendant would arrange a credit to the consignee in the pool to which it was going; that the consignee would receive such credit before the coal arrived at destination; and that it then lost its identity. He was thereupon asked the following question:

"Then really what you lost, as I understand you, by the confiscation of this coal, was the credit for that amount of tons in the particular pool to which it was going?"

Plaintiff's objection to this question was sustained, as were also its objections to a number of similar questions put to defendant's witnesses showing or tending to show, as the avowals declare, that all coal shipped to tidewater over defendant's lines during the months of July and August, 1920, was shipped to certain pools, under the articles of organization and rules of the Lamberts Point Coal Exchange, of which plaintiff was a member; that the coal in suit, if it had not been confiscated, would have gone into pool 5 or 7, and that plaintiff had no power to divert it to any other place or purpose; that this coal, if it had not been confiscated, would have passed to the credit of plaintiff in the pool to which it was consigned, upon estimated weights made at Bluefield, which credit would have been available under ordinary circumstances, for loading into vessels, at least three days before arrival of the coal at the pool; and that all coal to tide, during the months named had to be shipped on permits of an agent of the Interstate Commerce Commission, as appeared from certified copies of the Commission's orders tendered with the avowal in that regard.

The trial court likewise excluded all testimony offered by defendant as to the circumstances under which the coal in question was taken, to meet the charge in the amended declaration that it was "willfully, maliciously, and forcibly" appropriated; all testimony as to large quantities of other coal confiscated during the same months, and for which the owners voluntarily presented bills and accepted payment at prices very much below the price paid by plaintiff for the coal in suit; and all testimony as to the lower market prices prevailing at the time, for both contract and "spot" coal, at Bluefield and in neighboring districts. In short, the rulings under review were apparently based upon, and are consistent only with, the theory that the measure of damages in this case was the price which plaintiff paid for the coal. Accordingly, at the conclusion of the testimony, a verdict was directed in its favor for $16,318.24, the amount of the judgment it had paid, and defendant comes here on assignments of error.

[1] We are unable to sustain the plaintiff's contention. Its coal was wrongfully taken, to be sure, because taken without consent or any warrant of law. But plaintiff made no effort to prove the malice, which it had amended its declaration to set up, while defendant offered to show, and presumably could have shown, that the taking was necessary to the discharge of its public duties. The case of record, therefore, is the ordinary case of conversion, and no reason is perceived for not applying the ordinary measure of damages in such case, namely, the market value of the property at the time and place of confiscation. Plaintiff is, of course, entitled to be made whole, not as against an improvident purchase or a falling market, but for the actual loss it suffered by defendant's appropriation of its coal.

[2] On the offers and avowals of defendant it must be assumed, as plaintiff's president testified, that the coal sued for, if it had not been taken, would have gone into certain pools at Lamberts Point; that plaintiff had no right of diversion "to any other place or purpose"; that, after passing the scales at Bluefield, this coal in transit would have had practically the same status as though delivered at the pools; that its identity would then have been lost, and plaintiff entitled merely to a credit in the designated pools for the same number of tons of coal of corresponding grade. This being so, it seems plain that plaintiff's actual loss was the market value of the credit which it would have received, if its coal had not been confiscated, and that market value, presumably capable of ascertainment, measures the damages which plaintiff may rightfully recover. Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. Ed. 801.

[3] It is argued that at the time in question there was a wide difference of value between contract coal and "spot" coal; that plaintiff's coal, moving to tidewater for export, was spot coal; that defendant's offers all related to contract coal, and not to spot coal; and that therefore the only proof of the value of plaintiff's coal was the proof of what plaintiff paid for it. The argument is far from convincing. Even if it be granted that evidence of the cost of confiscated property is any evidence of its value in a suit for conversion—and no case is cited which supports the proposition—it would be sufficient to point

out that defendant's offers do not appear to have been rejected on the ground that they were confined to contract coal, but rather on the ground, as we warrantably infer, that the measure of damages was the price paid for the coal. Moreover, some of the offers were broad enough in terms to embrace export as well as contract coal, as, for example, the table furnished the Senate Committee by the Interstate Commerce Commission, showing the prices of both contract and spot coal, in July and August, 1920, in the Eastern division of the United States, which includes the territory here involved; and to this it may be added that the ruling on the question above quoted, and like questions afterwards propounded, was in effect a ruling that proof of the value of coal for export, going into a pool at Lamberts Point, would also be held inadmissible.

Further discussion is not needed. It is enough to say that in our judgment the case was tried on an erroneous theory of liability, and therefore defendant is entitled to another day in court. On the record here presented the proper measure of damages is, as above stated, the value of the credit which plaintiff would have received, if its coal had not been confiscated; but this will not be controlling on a new trial, if the facts then disclosed are materially different from the avowals of defendant in connection with its rejected proofs.

Reversed.

RUBAIZ v. TUCSON GAS, ELECTRIC LIGHT & POWER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1922.)

No. 3791.

Appeal and error ⊂=71(4)—Order on receiver's report as to priority of claims held not final decree.

An order directing the receiver to pay to a judgment creditor of the defendant corporation the net receipts of the property, up to the date of the intervention by the trustee to secure the bondholders, in preference to the plaintiff, whose claim was not reduced to judgment, and further providing that the receipts thereafter should be first applied to the mortgage debt in the event there was a foreclosure, and reserving the right to apply such proceeds to the judgment if there was no foreclosure, was a final decree only in so far as it related to the payment to the judgment creditor, so that an appeal by such creditor from the order relating to priority of the mortgage debt must be dismissed.

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Suit in equity by the Tucson Gas, Electric Light & Power Company against the Tucson Rapid Transit Company, in which Edwin F. Jones was appointed as receiver of defendant corporation, and in which Asma Rubaiz intervened as a judgment creditor of the defendant company, and the International Trust Company intervened as trustee under the mortgage securing the corporation's bonds. From an order instructing the referee as to priority of the claims of the interveners, Rubaiz appeals. Appeal dismissed.

Richey & Richey, and Moore & Frawley, all of Tucson, Ariz., for appellant.

S. L. Kingan, John H. Campbell, and A. R. Conner, all of Tucson, Ariz., for appellees.

Before ROSS, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The complaint of the Tucson Gas, Electric Light & Power Company against the Tucson Rapid Transit Company, owning and operating a street railway in Tucson, was filed in the United States District Court of Arizona on February 20, 1919. The action was to recover a judgment of $62,062.43 upon certain promissory notes then due and unpaid, together with interest thereon. It was alleged in the complaint that on March 15, 1906, the defendant executed a deed of trust to the International Trust Company of Colorado; that the trust deed conveyed to the trustee all of defendant's property, real, personal, and mixed, that it then had or might thereafter acquire or become possessed of; that the conveyance was made to secure the payment of certain bonds about to be issued by the defendant in the aggregate sum of $300,000, together with interest thereon at the rate of 6 per cent. per annum; that trust bonds in the aggregate sum of $150,000 were to be issued forthwith; that of said last amount, bonds aggregating $114,800 were issued and were then outstanding; that the accrued and unpaid interest on said bonds amounted to $73,000. It was further alleged that in the month of January, 1918, one Asma Rubaiz brought an action against the defendant for personal injuries sustained by her by reason of the negligence of defendant's employees, and that a judgment had been obtained by Rubaiz against the defendant for the sum of $4,500, and that the judgment was then unpaid. It was alleged that for many years defendant, in operating its street railway, had not been able to earn interest and operating charges, and that the defendant was insolvent. It was further alleged that, if the creditors of the defendant or the owner of the judgment in said personal injury action should press their demands, the result might be disastrous to the public, by reason of the inability of defendant to operate its street railway system. The plaintiff represented that, for the purpose of preserving the property, a receiver should be appointed, with the usual power and authority to collect all the assets of the defendant company and to operate said street railway system under the direction of the court. A receiver was accordingly appointed February 21, 1919.

On April 1, 1920, Asma Rubaiz filed her petition in intervention in this action, alleging that there was due on her judgment the sum of $4,552.75, together with costs, amounting to $106, and that the judgment was a prior lien on the personal property of the defendant. On April 26, 1920, the International Trust Company filed its petition and complaint in intervention, and leave to intervene was granted by the court on April 29, 1920. The complainant asked that its claim be declared prior and superior, over and above the necessary expenses of operation and the expenses of the receivership that might thereafter be incurred from said operation.

The receiver, in his first report, dated April 26, 1919, described the property owned and operated by the defendant, and its liabilities, including the judgment and costs in the case of Asma Rubaiz v. Tucson Rapid Transit Company, which was then pending on appeal in the Supreme Court of the state. He also described the line of defendant's street railway along certain streets of the city of Tucson, its condition, and the condition of the crossings at certain points, particularly the crossing at Stone avenue, where the line of the street railway crosses five tracks of the Southern Pacific Railway Company. In the receiver's second report, dated June 23, 1919, he reported the operations of the defendant and the unsatisfactory condition of the crossing at Stone avenue. In the receiver's third report, dated April 23, 1920, he reported on the operations of the defendant for the year, and again called attention to the Stone avenue crossing, and the fact that the city council of Tucson had passed an ordinance to have Stone avenue paved at the crossing to a designated point. The order of the city directed the paving of four blocks by the street car company in accordance with the terms of defendant's franchise. The receiver also called attention to the fact that the franchise specifically provided that it might be declared forfeited upon the failure to pave at any time when required by the city council. He reported the filing of the petition by Asma Rubaiz to have her judgment, which then amounted to about $5,000, paid out of the funds then in the hands of the receiver. He also reported that state and county taxes amounting to $674 would be due May 1, 1920, and that the bondholders would intervene in the suit and seek to have the money in the hands of the receiver applied to the interest of their mortgage, or to the use and protection of the property covered by the mortgage, claiming that the money in the hands of the receiver should be applied to the payment of their interest pro tanto, and that the same should be applied to the paving of the road so that the property might be preserved. The receiver requested the instructions of the court.

In the receiver's fourth report, filed May 24, 1920, he again called attention to the fact that the money in his hands was claimed by Rubaiz in satisfaction of her judgment; that the trustee for the bondholders also claimed that it had a first lien upon all the assets in the hands of the receiver; that the plaintiff was claiming an equitable lien upon the income of the property in payment of its debt. The receiver submitted the question of priorities to the court. On June 24, 1920, the court directed the receiver to pay on the Rubaiz judgment out of the funds in his hands the sum of $960.05, the net receipts of the defendant company from April 1, 1920, to April 27, 1920. Further action of the court upon this claim was taken under advisement. In the receiver's fifth report, dated April 4, 1921, he reported the operations of the defendant, and that he had on hand the sum of $11,756.19; that he had appeared before the city council and explained the situation of the company with respect to the paving of Stone avenue as ordered by the council. The city council in office while these matters were under consideration had given place to a new city council, and no further proceedings had taken place to compel the paving of Stone avenue.

On April 18, 1921, the court rendered an opinion in which the proceedings hereinbefore referred to were reviewed, and in which it was held that the net proceeds of the operation of said street railway company after April 26, 1920, should be applied on the mortgage debt due the International Trust Company upon the foreclosure of such mortgage, in the event there was a foreclosure. In the event the mortgage is not foreclosed, the court reserved the right to apply such amount of the net proceeds of the operation of the street railway company as might not be necessary for the operation and preservation of the property in the hands of the receiver to the payment of the Rubaiz judgment lien. The court concluded its opinion by entering an order that the receiver was authorized to advertise for bids for the paving of Stone avenue as in said ordinance and franchise provided, and submit the bids to the court for approval or rejection, and, if any bids were approved by the court, that said receiver be authorized to enter into a contract for the doing of such work, and that the same be paid for out of the moneys in his hands not otherwise necessary for the operation of the said street railway.

We are advised by a receiver's report filed in the District Court February 4, 1922, and brought here upon a suggestion of a diminution of the record, that the receiver has, in obedience to the order of the court, paved certain crossings and has repaired the pavement on certain other portions of its line of street railway. The report contains a copy of the proceedings of the city council, from which it appears that the city council has withdrawn its order with respect to the paving by the Transit Company of certain other portions of its tracks.

It appears that the lower court ordered the payment of $960.05 on the Rubaiz judgment, being the net proceeds of the defendant company from April 1, 1920, to April 27, 1920, because on April 1, 1920, when Asma Rubaiz filed her petition for intervention, she was the only intervener claiming the right under a final judgment to be paid in full out of the income of the property. The intervention of the trustee was not filed until April 26, 1920. Between April 1st and 26th Rubaiz was the only party before the court holding a judgment lien who claimed the right to immediate payment out of the property acquired as the proceeds of its operations by the receiver. The Light Company is not a judgment creditor, and its right of payment has not yet been determined by a final decree, and the right of the trustee to be paid upon its mortgage not yet foreclosed is in a like position. They all are matters still in the breast of the court, and so reserved, as has been further action upon the Rubaiz claim.

The errors assigned are substantially that the court found that the filing of the petition for intervention by Rubaiz did not create a lien in her favor on income theretofore accumulated, and that the court found that the filing of said petition did not create a lien in her favor on the net income then in the hands of the receiver, and that the court did not direct the receiver to pay her claim in accordance with the prayer of her petition. The substance of these assignments is that the court erred in not paying the Rubaiz claim in full. But it appears that there is no final judgment or decree with respect to the matters in con-

troversy, except the partial payment on the Rubaiz claim, from which no appeal has been taken; that there is no final judgment or decree with respect to the plaintiff's claim to be paid the amount due on its notes for principal and interest, or its priority with respect to other claims; that there is no final judgment or decree with respect to the intervention of the trustee for payment on the mortgage held by it, or its priority with respect to other claims; and that the priority between the unpaid remainder of the Rubaiz claim to be paid out of operating income, and the priority for current expenses incurred for such paving and repairs to streets as were ordered by the city council and carried out by the defendant to preserve its franchise, is not now a question before the district court. It therefore follows that, as this court can only exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, we have no jurisdiction of the appeal.

It is accordingly dismissed.

PHILADELPHIA & R. RY. CO. v. EISENHART.

(Circuit Court of Appeals, Third Circuit. April 28, 1922.)

No. 2829.

1. **Master and servant ⟸129(6)—Violation of Safety Appliance Act must be proximate cause of injury.**

   A freight conductor, who was injured when couplers uncoupled and cars broke away and collided with a car on which he was riding, was entitled to recover under Safety Appliance Act March 2, 1893, § 2 (Comp. St. § 8606), if the defective coupler was the proximate cause of the injury, though accident was not caused by the conductor going between the cars to couple or uncouple them, the question as to the railroad's liability for failure to comply with the statute, depending on whether noncompliance therewith proximately caused the injury, without regard to the place and character of the work.

2. **Master and servant ⟸265(6)—Violation of Safety Appliance Act inferred from opening of couplers.**

   In action for injuries to freight conductor, sustained when cars parted on opening of couplers, the mere opening of the couplers *held* to warrant submission of whether the couplers were defective, in violation of Safety Appliance Act March 2, 1893, § 2 (Comp. St. § 8606).

3. **Master and servant ⟸112(1½)—Railroad's duty under Safety Appliance Act absolute.**

   Railroad's duty, under Safety Appliance Act March 2, 1893, § 2 (Comp. St. § 8606), to keep its couplers in a safe condition, is absolute, and is not discharged by the exercise of reasonable care and mechanical skill to properly equip cars with safe couplers.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by Samuel D. Eisenhart against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Clarke Mason, of Philadelphia, Pa., for plaintiff in error.

Frank F. Davis, of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The cars of a freight train were being distributed to several tracks in the yards of the defendant at East Penn, Pennsylvania. Eisenhart, the conductor, was riding on a draft of two cars which had been cut from the train and kicked to a siding. His task was to stop them at their destination. While these cars were still in motion the train parted by reason of the opening of couplers and another draft of cars broke away and, following down on the same track without a brakeman, collided with the car on which Eisenhart was riding, throwing him to the ground and causing him injury.

Eisenhart brought this action, charging negligence to the defendant for violating both the Safety Appliance Act and the rule of common law. Safety Appliance Act, § 2, 27 Stat. 531, and amendments (Comp. St. § 8606). He had a verdict. The defendant sued out this writ of error.

The case was tried mainly on the liability of the defendant for operating a car with a defective coupler in violation of the Safety Appliance Act, carrying, of course, the advantage to the plaintiff of relief from the law of assumption of risk and contributory negligence. The defendant maintains by this writ that under the evidence, as well as by a proper interpretation of several decisions of the Supreme Court construing the Safety Appliance Act, the plaintiff did not bring himself within the Act and that, in consequence, his right to recover, if any, was on the counts charging negligence under the rule of common law with its burden of assumption of risk and contributory negligence, and that, accordingly, the trial court erred in submitting the case on the statute.

Obviously, the plaintiff's injury was due to the uncoupling of the train at a place at which uncoupling was not intended and at which the plaintiff was not working. For evidence of negligence in support of the counts under the Safety Appliance Act the plaintiff relied upon the inference of a defective coupler, drawn from the fact that the couplers uncoupled, and upon testimony to the effect that when examined after the accident the couplers showed lost motion between the lock and knuckle, enough to have caused the cars to part.

Regarding as the test of compliance with the statute the equipping of cars "with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," the defendant introduced evidence to the effect that the couplers were of an accepted type and in good condition, and had, both before and after the accident, coupled and uncoupled in the way provided by the statute. Having complied with this statutory standard, the defendant maintains that nothing more was required of it; and that, as the plaintiff was not injured by reason of the couplers failing to meet this standard but was injured some distance away by reason of a collision, the case comes within the decision of the Supreme Court in Lang v. New York Central R. R. Co., 255 U. S. 455, 41 Sup. Ct. 381, 65 L. Ed. 729, where it was said that the Safety Appliance Act "was intended to provide against the risk of coupling and uncoupling

and to obviate the necessity of men going between the ends of cars. It was not * * * to provide a place of safety between colliding cars," quoting from S. L. & S. F. R. R. Co. v. Conarty, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290. Reliance by the defendant upon its interpretation of the Lang decision compels a review of several decisions of the Supreme Court bearing on the Safety Appliance Act.

The first is the Conarty Case. In this case a car without a coupler or drawbar at one end was on a switch awaiting removal for repair. A switching engine with which the deceased was working came along the same track and a collision ensued. The deceased was standing on the footboard at the front of the engine and was caught between the engine and the body of the car. Had the coupler and drawbar been in place they would have kept the engine and the car sufficiently apart to have prevented the injury. They would not have prevented the collision.

The question arose whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Act required that the car be equipped with automatic couplers and drawbars of standard height. Inquiring into the general purpose of the act and the evil it was intended to prevent, the Supreme Court alluded to the danger to men going between cars to couple and uncouple them and said that the principal purpose of the enactment of the statute was "to obviate the necessity for men going between the ends of the cars." It found that the deceased, "who was not endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit." Holding that the plaintiff was not within the class of persons for whose benefit the statute was enacted, the court denied recovery. This decision was regarded, either rightly or wrongly, as an interpretation of the Act limiting its application, so far as automatic couplers are concerned, to those whose duty it is to couple and uncouple cars. In considering the effect of this decision upon later decisions and upon the case at bar it is pertinent to note that the court very carefully pointed out that

"It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of [the] provisions [of the Act] but only that had they been complied with it would not have resulted in injury to the deceased."

In Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, the next case in order, an engine, pushing a car ahead of it, came into a switch and attempted to couple a draft of five cars. It struck the cars with such force that the couplers refused to couple automatically by impact and the whole draft was driven down the track and came into collision with a standing train with such violence that the plaintiff, who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track and injured. As the plaintiff did not sustain injury when coupling or uncoupling cars, the defense was based on the claim that it had been decided in the Conarty Case that the Safety Appliance Act is "intended only for the benefit of employés injured when between cars for the purpose of

coupling or uncoupling them." The Supreme Court, evidently desiring to dispel this view, said:

"While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employés who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employés only when so engaged. The language of the acts * * * makes it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in or the work which he may be doing at the moment when he is injured."

Again pointing out that in the Conarty Case it was not claimed that the *collision* resulting in the injury was proximately attributable to a violation of the Safety Appliance Act, the court laid down a rule—from which it has not departed—that

"Carriers are liable to employés in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty."

The court sustained the judgment on the finding that the failure of the couplers automatically to couple by impact was the proximate cause of the collision and resultant injury.

Later came Minneapolis & St. Louis Railroad Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995, a case in which a train parted because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes on the detached draft upon which Gotschall was riding and a sudden jerk which threw him off the train under the wheels—facts singularly similar to those of the case at bar. While the case went off on another question, the court sustained the judgment for the plaintiff consistently with its former pronouncement that whenever the failure to obey the safety appliance laws is the proximate cause of the injury the carrier is liable.

Such was the law until Lang v. New York Central R. R. Co., supra. In this case a car without a drawbar or coupler was standing on a siding. The decedent was a brakeman riding on a draft of cars kicked toward the crippled car. He knew the condition of the car. A collision occurred and the decedent was crushed between the car upon which he was riding and the standing car. It was not intended that he should couple his draft with the defective car, but that he should stop his draft before it reached the car. For some reason he failed to do so and collision followed. Recovery was not allowed.

The plaintiff in error regards the law of the Lang Case as a reversal to the law of the Conarty Case, not as explained in the Layton Case, but as it was first popularly understood. This position is taken, doubtless, because the court cited and affirmed the Conarty Case. But the court also affirmed the Layton Case, restating with emphasis the rule of proximate cause which, being invoked in the Layton Case, distinguished that case from the Conarty Case, saying:

"But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and so the case declares, * * * carriers are liable to employés in damages whenever the failure to obey these safety

appliance laws is the proximate cause of injury to them when engaged in the discharge of duty."

The court held in the Lang Case, as in the Conarty Case, that "the collision was not the proximate result of the defect" in the safety appliance, or, stated differently, "that the collision under the evidence cannot be attributed to a violation of the provisions of the law, 'but only that, had they been complied with, it [the collision] would not have resulted in injury to the deceased.'" The judgment for the defendant was sustained.

[1] We cannot agree with the plaintiff in error in its contention that the Supreme Court in the Lang Case construed the Safety Appliance Act as restricting the liability of carriers to equipping cars with couplers of the standard required and as limiting its protection to employés in the act of or at the place of coupling and uncoupling cars. Whatever difference there may be in the opinions, the three cases cited, as also the Gotschall Case inferentially, were tried and decided on the principle of causal relation between the fact of delinquency and the fact of injury, that is, they were, with entire consistency, tried on the question whether on the facts of each case the carrier's failure to obey the statute was or was not the proximate cause of injury to the employé, without regard to the place and character of his work. This is the test of liability.

Returning to the case at bar, we find that the learned trial judge submitted the case on the question of proximate cause strictly in line with these decisions. Therefore, he did not commit error in principle.

The remaining assignments of error question the sufficiency of the evidence to sustain the submission and challenge the adequacy of the charge.

Maintaining there is no testimony to prove the way in which the train separated, the defendant complains particularly of that part of the charge in which the trial judge said:

"I say to you, as a matter of law, under the evidence in this case, if it has been of that degree of strength and kind to carry conviction to your minds, you may find that the real cause of the injury to this man was this defective coupling. If you do, I say to you the plaintiff is entitled to recover. If the plaintiff is entitled to recover, of course, he is entitled to your verdict, as a matter of law. But if this evidence has failed to persuade you that you should come to that conclusion, then your verdict should be in favor of the defendant, and you are done with the case."

[2] As the whole controversy had revolved around the question whether the couplers at the place where the train parted were defective, we think this charge was proper, if warranted by the evidence. The fact is the couplers opened, the train parted and a collision followed as a direct result. No one disputes this. There was testimony by one witness to the effect that there was lost motion in the coupler parts which explained their action. This was testimony of a defect. We think it was admissible. But even if it were not sufficient, the case was properly submitted and the verdict should be sustained on the inference of the defendant's negligence to be drawn from the mere opening of the couplers. M. & St. L. R. R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995.

At the end of an elaborate charge, including the instruction quoted, counsel for the defendant, conceiving that the learned trial judge had not adequately presented the defendant's side of the case on the evidence produced in its behalf, hastily drafted and presented an additional point to be charged to the jury. The trial judge, feeling that he had covered the point, refused to charge it. The point is as follows:

"If the jury believe under all the evidence produced in this case that the couplers, which it was testified separated, were in proper condition of construction and repair, and that they were in as safe a condition for railroad operation as reasonable care and mechanical skill could make them, capable of coupling automatically by impact in the manner required by the Safety Appliance Act, then you may find that the defendant has performed its legal duty, and your verdict may be for the defendant."

The curious thing in this situation is that, if the trial judge had attempted to cure the questioned adequacy of his charge by allowing the point, he would have injected a fatal error into a charge otherwise without error, because the point itself contained an error of law.

The defendant might have asked, in the terms of the point, for an instruction to the jury that if they believe under all the evidence that the couplers "were in proper condition of construction and repair, capable of coupling automatically by impact in the manner required by the Safety Appliance Act, then [they] may find that the defendant has performed its legal duty." This would have been an instruction on the absolute duty of the carrier to conform to the Act. But the defendant so framed its point that the instruction it asked for was the qualified duty of a carrier at common law—that if the jury believe the couplers "were in proper condition of construction and repair, *and that they were in as safe a condition for railroad operation as reasonable care and mechanical skill could make them,* capable of coupling automatically by impact, * * * then [they] may find that the defendant has performed its legal duty."

[3] We think this qualifying phrase vitiated the whole point because the Safety Appliance Act imposes an absolute duty upon the carrier to keep its couplers in a condition of construction and repair to meet the safety requirements of its provisions. Having first met the statutory requirement by properly equipping the cars, the carrier cannot escape its duty by later making an effort of reasonable care and mechanical skill to maintain them at that standard. The Congress imposed the duty initially and continuously, it being construed by the courts as "an absolute and unqualified duty to *maintain* the appliance in secure condition"—"an absolute duty to provide and *keep* proper couplers *at all times.*" St. L., I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 294, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061; C. B. & Q. R. R. Co. v. United States, 220 U. S. 559, 575, 576, 31 Sup. Ct. 612, 55 L. Ed. 582; United States v. A., T. & S. F. Ry. Co., 163 Fed. 517, 90 C. C. A. 327; Delk v. St. L. & S. F. R. R. Co., 220 U. S. 580, 586, 587, 31 Sup. Ct. 617, 55 L. Ed. 590; Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 43, 36 Sup. Ct. 482, 60 L. Ed. 874.

Obviously, the duty of the carrier "is not that of exercising reasonable care in maintaining prescribed safety appliances in operative condition." Its duty is no longer the qualified duty of the rule of common

law. It is an absolute duty prescribed by the statute. It does not stop with the installation of safety appliances; it requires that they shall be kept safe. As the point in question contained a qualification which nullified the whole instruction, the trial court committed no error in refusing to charge it.

Therefore, we are of opinion that the judgment below must be affirmed.

KURTZ et al. v. BELLE HAT LINING CO., Inc.

(Circuit Court of Appeals, Second Circuit. April 10, 1922.)

No. 273.

1. **Patents ⟸36—Invention is question of fact, to be decided on evidence.**
Invention is a question of fact, to be decided on the evidence, which generally does not give rise to conflicts of fact in the ordinary sense of that phrase, but does raise differences as to the inferences to be drawn from facts in themselves uncontradicted.

2. **Patents ⟸35—Condition of trade to be considered in determining invention.**
In determining whether there is invention, it is proper to bear in mind the condition of the trade, as well as the art to which the patent is allied.

3. **Patents ⟸35—Decision as to invention is governed largely by results obtained.**
Decision as to invention is reached very largely from examination of the results obtained, among the results evidencing invention being simplicity, economy, novelty, utility, and commercial success; and imitation of an article by a defendant, who denies invention, has often been considered conclusive evidence of what defendant thinks, and persuasive of what the rest of the world ought to think.

4. **Patents ⟸328—1,216,140, for hat lining, held to disclose invention.**
The Kurtz patent, No. 1,216,140, for a hat lining, in which an uncovered cord is sewed between the crown piece and side piece to produce an ornate seam, *held*, in view of its commercial success, to disclose invention over the prior art.

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

Suit in equity for infringement of a patent by Alfred Kurtz and another against the Belle Hat Lining Company, Inc. Bill dismissed, and plaintiffs appeal. Reversed.

Action is upon patent to Kurtz, 1,216,140, dated February 13, 1917, for "lining for hats." The patent contains two claims, both in suit, of which the second is most specific and is as follows:

"A hat lining comprising a crown piece, a side piece, an uncovered cord exposed between said crown piece and side piece, and means for securing said crown piece, side piece and cord together for forming an ornate seam between said crown piece and side piece; said means embodying a single row of stitching passing through said crown piece, side piece, and cord."

On July 25, 1916, there issued to one Rawak patent 1,191,996, for "lining for hats," of which the single claim is: "A hat lining comprising a crown member, an apron member, a folded strip having its meeting edges secured between the meeting edges of the crown and apron members, and forming an annular pocket projecting from the juncture of said crown and apron members, and a core inclosed within said annular pocket."

In Kurtz v. Blatt (D. C.) 263 Fed. 392, this Kurtz patent was in suit against another alleged infringer. Decision was that patentable invention was displayed by Kurtz over Rawak, there being in the opinion of Mayer, J., "no prior art worthy of comment except the" lining patented by Rawak. In the present litigation Knox, J., in the court below, held that Kurtz displayed nothing patentable over Rawak, and dismissed the bill for lack of invention. Whereupon Kurtz appealed.

Oscar W. Jeffery, Philip C. Peck, and Tobias A. Keppler, all of New York City, for appellants.

Irving M. Obrieght, Morris Hirsch, and George C. Dean, all of New York City, for appellee.

Before HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The record in the cause reported in 263 Fed. 392, is an exhibit in this case. We have examined it, and are of opinion that, though the cause at bar was tried with more elaboration and at greater length, there is no substantial difference between the two proceedings. In both, defendants wasted much time in fruitlessly endeavoring to show prior uses; but in this case Mr. Rawak himself appeared as the principal witness for the defence. His evidence accentuates the truth stated by Judge Mayer at the earlier trial—that there was no prior art except Rawak. Yet the question presented by this patent, and also by that of Rawak, and by the litigation over them, is a larger one, viz. whether, in the crowded art of manufacturing clothing and parts of clothing with the needle and needle appliances, either Rawak or Kurtz displayed what it is so easy to name and so difficult to ascertain, invention.

Hat linings, especially for the head coverings of women, are and long have been a separate article of manufacture and commerce. They are made literally by the million, and sold both to hat manufacturers, milliners, and persons intending to make their own headgear. Historically the occupation, as a separate art or trade, begins with a lining something like a bag without a bottom; whereof one edge is fitted to the lower portion of the hat and the top gathered with a "drawstring" in the crown. This kind of lining required more material than would fit snugly to the interior of the headgear, and was thought to lack, not only economy, but neatness of appearance. A "piping" or "edging" is a very old device of the needle trades, and consists essentially in the insertion of a piece of material between the two parts of a seam, in such manner that the inserted material projects at and along the seam, producing (as has been thought) decorative effect as well as strength.

Rawak's patented device exhibits a piping at the seam between the crown and apron or side, which together make up the hat lining of commerce. His piping, being formed by a "folded strip," may and does have inserted into its projecting "annular pocket" any convenient material; e. g., a cord or other stuffing. It is, we think, proven that this device has attained a large measure of success, principally through the efforts of Mr. Rawak himself; he being a very large manufacturer of hats. It is also proved as requiring more material and costing more than other linings. It is in short a rather superior article, grade for grade, of material, and is probably a favorite in the comparatively ex-

pensive lines of ready-made hats. What Kurtz did was to wholly abolish the inserted material which makes Rawak's "annular pocket," and to take the cord (which may be used as a stuffing for Rawak's pocket) and by one line of sewing unite crown, apron, and cord in such manner as to show the cord and form what he calls an "ornate seam."

Any cord that will hold the thread will do, and if the cord used by either Kurtz or Rawak is stiff enough, both or either will tend to strengthen the lining in position and hold it in place. Kurtz's lining has attained great popularity, doubtless assisted by quite modern trade methods; but the proof is ample of enormous production, marked commercial success, and almost complete replacement in the cheaper grades of linings of the old drawstring device in favor of Kurtz.

This patentee obtained his patent over Rawak (cited against him of record) by a very frank statement in the Office, which had objected that no mechanical advantage was pointed out. Kurtz replied:

"It is thought that mechanical advantage, where the filling member is an ornament, and permanently and structurally incorporated in the article, is obvious as compared to the [alleged] anticipating structure [Rawak's], where the ornamental member is covered, and is not permanently or intimately incorporated in the resulting structure."

Thus is presented the question of invention, admittedly one of fact, yet also one as to which courts, composed of lawyers, have long been anxious to act with uniformity and along lines of thought which will result in precedents, instead of mere incidents. Despite the warning of Justice Brown in McClain v. Ortmayer, 141 U. S. 419, 427, 12 Sup. Ct. 76, 35 L. Ed. 800, that the word "invention" "cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involved an exercise of the inventive faculty or not," the effort still continues. Prof. Robinson analyzed all of these attempts down to his date of publication (1890), which was but a few months before Brown, J., pronounced the effort futile. Rob. Pat. vol. 1, p. 116 et seq. Yet there remains as always worthy of consideration the learned author's dictum that "the mental faculties involved in the inventive act are the creative and not the imitative." Section 78. In comparatively late years efforts at positive statement have been limited to such generalizations as that—

"Invention, in the nature of improvements, is the double mental act of discerning, in existing machines or processes or articles, some deficiency, and pointing out the means of overcoming it." General Electric v. Sangamo, 174 Fed. 246, 251, 98 C. C. A. 154, 159.

What may be called negative definitions or partial descriptions are still and always have been very common. Thus:

"Every result obtained by deliberate reflection and experimentation with well known appliances, or parts thereof, is not necessarily invention within the * * * patent laws." Lord v. Payne (C. C.) 190 Fed. 172.

"Invention involves conception of at least some function, as well as the selection of the means whereby that function can be operatively secured." U. S. Co. v. Hewitt, 236 Fed. 739, 150 C. C. A. 71.

If * * * the mind advances from the known to the unknown by a transition natural to the ordinary instructed intellect, there is no invention." Farnham v. U. S., 47 Ct. Cl. 207.

Again a certain device was invention because—

"It was a true discovery. It involved uncovering a thing which, while long capable of being done, was never before thought of. It also afforded a medium or means for bringing the discovery into practical action, and put it into the hands of others, there to be turned to pleasurable and profitable uses." Cunningham v. Æolian, 255 Fed. 897, 900, 167 C. C. A. 217, 220.

The enormous multiplication of improvement patents has produced such sayings as:

"It often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device de novo. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before." Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 198 (39 L. Ed. 275).

It has even been thought necessary of late to dwell upon the presumptions; thus a given device—

"certainly [was] not in an exact repetition of the prior art. It attained an end not attained by anything in the prior art. * * * It possesses such amount of change from the prior art as to have received the approval of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. Its simplicity should not blind us as to its character; * * * knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing * * * was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration." Diamond, etc., Co. v. Consolidated, 220 U. S. 428, 434, 31 Sup. Ct. 444, 447 (55 L. Ed. 527).

[1] The foregoing quotations, which might be multiplied, only prove the truth of Justice Brown's dictum, and enforce the other truth which we attempted to point out in Kimball v. Noesting (C. C. A.) 262 Fed. 148, viz. that invention is a question to be decided on the evidence. The problem is the more difficult because evidence as to invention does not often give rise to conflicts of fact in the ordinary sense of that phrase; it does, however, give rise to acute differences of opinion as to the inferences to be drawn from facts in themselves uncontradicted; and this is as true of what is called "opinion evidence" as it is of testimony regarding things visible or tangible. It is probably for this reason that experience has dictated some canons of decision (they are not rules of law) as to how the problem of invention is to be approached.

[2] Thus it has been well said that "in determining this question it is proper to bear in mind the condition of the trade as well as the art to which the patent in suit is allied." Warren, etc., Co. v. American, etc., Co. (C. C.) 133 Fed. 304, 306. And similarly that the "effort [of the court] must always be to view the subject matter from the standpoint of the art concerned." Kurtz v. Blatt (D. C.) 263 Fed. 392, 394. It is also the duty of the court to construe patents liberally, so as to effect their real intent. Bossert v. Pratt, 179 Fed. 385, 387,

103 C. C. A. 45. And cf. Auto Vacuum Co v. Sexton, 239 Fed. 898, 153 C. C. A. 26.

Yet, when all has been done, the question of invention may "be answered differently by persons of equal intelligence." Bossert v. Pratt, supra, 179 Fed. 386, 103 C. C. A. 46. We think, also, courts have always endeavored to observe at least some of Prof. Robinson's guiding rules (supra), as that the nature of an invention is usually ascertained from examining the inventive act from which patented matter results; for invention always generates a new idea, although a patentee must create the means, and not merely perceive the end.

[3] Result is that study of well-considered decisions under this head will always show that result is reached very largely from examination of "the results obtained." Doble v. Pelton, etc., Co. (C. C.) 186 Fed. 526. Results are described by abstract nouns, like "simplicity," "economy," etc., and, while it is always admitted and stated that the mere attainment of such desirable results is not invention, they always have been and must be used as evidence or indicia of invention, and the weight and probative effect of such marks of excellence have varied, and always must vary within limits according to the personal equation of the fact trier.

Thus, while neither simplicity, cheapness, nor utility—nor all three combined—constitute invention, they have been deemed most potent evidence thereof. Barry v. Harpoon Co., 209 Fed. 207, 126 C. C. A. 301. Simplifying form and cheapening cost have been accorded the same potency (Hunt v. Milwaukee, etc., Co., 148 Fed. 220, 78 C. C. A. 116), although, of course, such excellence must always be accompanied by a "different result" (Bernz v. Schaefer [D. C.] 205 Fed. 49, 52). Indeed, it has been thought that simplicity alone, though "cited as evidence of lack of invention, to our minds shows a high order of novelty and invention" (Consolidated, etc., Co. v. Window Glass Co. [C. C. A.] 261 Fed. 362, 375), and to the same point Hills v. Hamilton Co. (D. C.) 248 Fed. 499.

Utility, though itself not invention, nor conclusive evidence thereof, has been practically accorded the greatest weight. Union, etc., Co. v. Peters, 125 Fed. 601, 60 C. C. A. 337; Woerheide v. Johns-Manville, 220 Fed. 674, 136 C. C. A. 316. Cf. Greenwald v. La Vogue, 226 Fed. 448, 141 C. C. A. 278. Novelty, likewise, has been pushed to the front as a piece of evidence. Concrete, etc., Co. v. Meinken (C. C. A.) 262 Fed. 958, 965.

The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think. David v. Harris, 206 Fed. 902, 904, 124 C. C. A. 477; Smith v. Peck (C. C. A.) 262 Fed. 415, 417. Commercial success has been too recently and too often considered to justify much citation; but, however unsafe as a guide (Boston, etc., Co. v. Automatic [C. C. A.] 276 Fed. 910), it has always been a powerful piece of evidence, especially when the prior art shows no success along the same lines (David v. Harris, supra).

The list of laudatory epithets descriptive of what is considered evi-

dence is by no means exhausted; the "marked superiority of the article" constructed under the patent (Frost v. Cohn, 119 Fed. 505, 56 C. C. A. 185); "a marked improvement in product" (Greenwald v. Enochs, 183 Fed. 583, 106 C. C. A. 351); the "ingenuity and popularity" of the patentee's product (Fligel v. Sears, 254 Fed. 698, 166 C. C. A. 196); the "unchallenged supremacy" of the same (Consolidated, etc., Co. v. Firestone, etc., Co., 151 Fed. 237, 80 C. C. A. 589); and even the aid given by the patented article in "advertising and identifying" an entirely different product (Fonseca v. Suarez, 232 Fed. 155, 156, 146 C. C. A. 347—have all been used, and we think properly so, as evidence of invention.

Patentability has often been found "in discovering what is the difficulty with an existing structure" and correcting the same, even though "the means" are old and their mere "adaptation to the new purposes involves no patentable novelty." Miehle, etc., Co. v. Whitlock, 223 Fed. 647, 650, 139 C. C. A. 201. Hindsight, or wisdom after the fact, has always been looked upon with disfavor; e. g., Faries Co. v. Brown, 121 Fed. 547, 550, 57 C. C. A. 609.

[4] If we viewed this hat lining, or any hat lining, in the light of our own experience, it would appear trivial and unworthy the dignity of patent protection; but, looking at it through the evidence and (we hope) with the eyes of the hat lining trade, this patent represents a large and successful business. It is in the minds of all those who deal in hat linings, of the utmost importance. No one ever made a lining of such simplicity, cheapness, and general adaptability as has Kurtz, and he has done it by mechanical means of winning simplicity, to all of which defendant has testified by deliberately imitating Kurtz's product and engaging in expensive litigation to defend the imitation.

We are of opinion upon this record that Kurtz's hat lining is novel, useful, and displays patentable invention.

Decree reversed, with costs.

THE COAMO.

THE ESSEX.

(Circuit Court of Appeals, Second Circuit. April 10, 1922.)

Nos. 268-270.

Collision ⊂⊃63—Steam vessel and tug both held in fault.

A collision at sea, on a calm, clear day, between a steamship and a barge in a crossing tow, *held* due to faults of both the towing tug and steamship; the tug, which had the steamship on her starboard hand, being in fault for not keeping out of the way, as required by article 19 of International Rules (Comp. St. § 7858), but keeping her course and speed, and the steamship for not sooner realizing the danger, and when it was realized for turning directly into the tow.

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

Suit in admiralty for collision by the Lehigh Coal & Navigation Company against the steamship Coamo (the New York & Porto Rico Steam-

ship Company, claimant) and the steamtug Essex (the Northern Transportation Company, claimant). Decree for libelant against the Coamo alone, and her claimant appeals. Modified.

The Coamo is a freight and passenger liner, and when on a voyage from New York to Porto Rico came in collision with the barge Allentown, which was the middle vessel of a tandem tow of three in charge of the tug Essex, which was at the time bound from Boston for Norfolk. The boats in her tow were empty coal barges. The place of collision was some 8 miles, or a little more, off Asbury Park on the New Jersey coast. The time was in the middle of the afternoon of a fair, clear day, with wind and tide negligible. The District Court held the Coamo solely at fault, and from decrees accordingly the owners of that vessel prosecuted these appeals.

T. Catesby Jones and C. Andrade, Jr., for appellees owners of the Allentown.

Burlingham, Veeder, Masten & Feary, of New York City (Chauncey I. Clark and Charles E. Wythe, both of New York City, of counsel), for the Coamo.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett and Albert T. Gould, both of Boston, Mass., of counsel), for the Essex.

Before HOUGH, MANTON and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The law applicable is sufficiently stated in The Binghamton (C. C. A.) 271 Fed. 69, 71 viz.: It is the duty of the privileged vessel to keep her course and speed until a departure is necessary to avoid immediate danger; while the burdened vessel, when on a crossing course, "so as to involve risk of collision," shall keep out of the way of the other. The Beryl, L. R. 9 P. D. 137; The Aurania (D. C.) 29 Fed. 98. It is not suggested that the trial court failed to accept this rule; the question here and below is whether on the facts proved one or both vessels violated it.

It is not disputed, nor disputable, that a more inexcusable collision has rarely been presented to any court. It occurred on a fair, clear day, in waters most familiar and then uncrowded, and between vessels which could without difficulty have seen each other for miles, and were (as to tug and steamer) full powered, fully manned, and in perfect repair. These are material facts in considering the probability of collision occurring without mutual fault.

Some of the facts, and those the most important, are (as found below) so firmly settled by the evidence as to require no more than summary statement. Coamo is a single screw steamer, 377 feet long and 46 feet beam, with a gross tonnage 4,384 and i. h. p. 3,500. She came out of New York Harbor and passed close to Scotland Light, then steered S. ½ E. (magnetic). She was making less than her full sea speed, or about 12 knots, because her engines were not yet hot. She kept this course steadily for about an hour, until her helm was suddenly put hard astarboard, and so kept with unabated speed until she ran into the Allentown, striking the latter on her starboard side near the bow at an angle of about 4 points. This relation of the vessels at collision is sworn to by the Allentown's master, and, if not confirmed,

certainly not contradicted, by a photograph taken from the Essex at the moment of collision and now in evidence. The Essex had passed close to Fire Island Lightship, and had there laid her course W. S. W. magnetic, making 5 knots (rather more than less), and maintained that course steadily until collision had occurred. Having regard to the length of the tug, of the first barge, and the connecting hawsers, the distance from the bow of the Essex to that of the Allentown was between 2,500 and 2,600 feet, and from the Essex's bow to the point of collision fully 2,600 feet. The barges followed true behind the Essex; they were steering, as did that tug; and the Allentown never changed her wheel, nor sought to, before collision. She therefore was also heading W. S. W. when hit.

Thus, as found below, the vessels were on crossing courses, and the Essex the burdened one. The conduct of the Essex arose from the delusion (it is as found below nothing else) that she was the privileged vessel, because Coamo was overtaking her. The only explanation of this delusion is ignorance. The witnesses from the tug do not appear to know what "overtaking" means. Thus the tugmaster testified on direct examination that he observed the Coamo "almost abeam," and confirmed that observation by taking a compass bearing of her, and found her bearing from him W. N. W.; and he was steering W. S. W. In other words, he asserted that a vessel 4 points on his starboard bow "was almost abeam." Such use of words and interpretation of the rules of navigation rank him with that second officer in the Binghamton, supra, who thought he had the right of way off Barnegat because he was bound for New York, and with the harbor pilots, who have maintained that "the first man that blows the whistle has got the right of way." The Umbria, 153 Fed. 851, 83 C. C. A. 33; The Georgic (D. C.) 180 Fed. 863, 871. With the trial judge, we lay aside the testimony from the Essex in regard to Coamo's movements. Yet, with the burdened tug holding on without the slightest reference to the steamer, the latter alone was condemned, on the ground that, although Coamo's navigation "was in fact caused by the Essex's failure to act," yet such navigation was the result of the man in charge of the steamer "losing his head," and therefore hard astarboarding when the two vessels were "at least a mile apart," and so, to all appearance, deliberately running down the Allentown—as many of the witnesses declare with the usual marine extravagance in descriptive epithet.

We quite agree that Coamo's second officer, who had been left in charge by the master after setting the course off Scotland Light, did lose his head most completely; yet it is upon the perturbed observation of such a man that the Essex's entire case rests. This second officer finally stated on cross-examination that, with the tug above five points on his port bow and distant between a mile and a mile and a half, he put his wheel hard astarboard and kept it so until collision. Upon this statement rests the argument for the Essex and the decision below, for it is obvious that, with the vessels in that position and each steadily travelling along its existing course, the swifter steamer would by holding her course and speed have passed in perfect safety across the Essex's bow.

The trouble with this statement is that it cannot possibly be true. Coamo is an ordinary type of single screw passenger boat, steering quite handily. It is a matter of record in reported cases (The Lepanto [D. C.] 21 Fed. 651; The Aurania, [D. C.] 29 Fed. 98, 121, and especially The Normandie [D. C.] 43 Fed. 151, 159), and in published works of approved authority (Knight's Modern Seamanship, p. 195), how, with what speed, and with what radius of turning, vessels both smaller and larger than the Coamo will act under a hard over wheel. Within limits, the shorter the ship and slower the speed, the shorter the turning radius; but, if Coamo had been as long as the Normandie, supra, instead of some 90 feet shorter, she would have turned a complete circle, starting at 12 knots, on a diameter of 4,430 feet; while, according to Knight, the diameter of the turning circle at "fair speed" will only vary between 3½ lengths for a 350-foot vessel, to 4½ lengths for one 500 feet long. Knight's fair speed is apparently 10 knots.

Thus, if Essex was only a nautical mile away when she bore 5 points on Coamo's port bow, and the latter vessel put her helm hard astarboard, the steamer would have turned completely round before she got within 1,000 feet of the tug, and hitting the Allentown 2,500 feet astern of Essex by this maneuver is sheer impossibility. Yet it is admittedly true that at some time Coamo did hard astarboard, and that under that wheel she did strike the Allentown at an angle of 4 points; therefore the inquiry is: How (upon the courses above stated) could such a collision have taken place?

Since the Allentown, heading W. S. W., was struck at an angle of four points on her starboard side, the colliding vessel was necessarily heading at collision approximately E. S. E., which means that Coamo under her hard astarboard helm had changed her course 5½ points to port in order to hit Allentown. But at 12 knots a longer vessel than Coamo will swing 6 points in 2 minutes 56 seconds; and the first effect of the hard over wheel is to reduce speed, so that the average speed of the first 8 points of turn is 10.6 knots. This is a demonstration that Coamo travelled slightly less than 3,000 feet from her S. ½ E. course in order to hit Allentown, and that barge was struck at a point 2,600 feet behind the stern of the Essex, steering the same W. S. W. course.

The matter need not be pursued further, for it is a necessary conclusion that Coamo's second officer finally "lost his head" and hard astarboarded when his vessel was about 2,700 feet from the intersection point of the courses of tug and steamer, and the Essex at that moment was not over 500 feet therefrom. In other words, the probabilities are that, had both the vessels maintained their course and speed, the Essex might have cleared the Coamo, and the latter fouled the towline; but collision with some portion of the tow was inevitable.

We are persuaded that the one witness who did not lose his head was the quartermaster at the wheel of Coamo, who testified that, when he got the order to hard astarboard and obeyed, the Essex was a little on his port bow.

"Q. She was not, any part of her, ahead of you? A. Might have been a very little, but not much.

"Q. Your best judgment is about a point on your port bow? A. Yes, sir.

"Q. Was there anything on your starboard side to have prevented you from putting your wheel hard astarboard and going to starboard at that time? A. Not that I saw, sir."

We see the picture as did Quartermaster Rooney, and find the Essex in fault for having produced, by violation of article 19 of International Rules (Comp. St. § 7858), a position of danger, and the Coamo at fault for not sooner realizing that danger, and, when it was realized, for doing exactly the wrong thing. In such a situation as this, arguments concerning orders in extremis are not profitable, for there was no excuse in permitting the situation to become in extremis.

Decree modified, so as to hold both Coamo and Essex in fault, with damages appropriately apportioned. The costs of this court to the appellant; costs of the court below to be divided.

LOGUE v. FERRIS.*

(Circuit Court of Appeals, Eighth Circuit. April 8, 1922.)

No. 5857.

1. **Courts ⇐201—Nebraska probate court, in discharge of powers granted, can construe will disposing of real estate.**

Under Const. Neb. art. 6, § 16, giving county courts probate jurisdiction, but denying them jurisdiction in actions in which title to real estate may be drawn in question, and Rev. St. Neb. 1913, §§ 1206, 1494, 1495, 1497, 1499, the probate court, when acting in discharge of powers granted to it, has the incidental right to construe a will disposing of real property for the purpose of appropriately discharging its duty, notwithstanding the apparent constitutional limitation.

2. **Partition ⇐36—Cannot be decreed by the probate court between life tenant and remainderman.**

The power of the probate court to partition land belonging to the estate given by Rev. St. Neb. 1913, §§ 1494, 1495, 1497, 1499, can be exercised only among joint tenants, tenants in common, or coparceners, and cannot be exercised where the will, as construed by the court, gave to one of the parties a life estate, and to the other the remainder in fee.

3. **Judgment ⇐828(2)—Decree of Nebraska probate court, in partitioning real estate, that will gave only life estate to widow, is beyond its jurisdiction, and not conclusive.**

A decree by a Nebraska probate court, in the attempted exercise of its powers to partition real property devised by the will, that the widow of testator took only a life estate under the will, is beyond the jurisdiction of the probate court to render in such proceedings, so that such decree is not conclusive as to the construction of the will in a subsequent suit between the same parties.

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit in equity by Nellie B. Logue against Josie B. Ferris. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

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

*Rehearing denied July 7, 1922.

W. H. C. Taylor, of Medford, Okl. (H. F. Favinger, of Hastings, Neb., on the brief), for appellant.

D. S. Hardin, of Alma, Neb. (Richard Rumer and John C. Robertson, both of St. Louis, Mo., on the brief), for appellee.

Before SANBORN, STONE, and LEWIS, Circuit Judges.

LEWIS, Circuit Judge. Appellant, who was plaintiff below, is the relict of William T. Jennings, who died testate while seized in fee of 160 acres of farm lands in Harlan County, Nebraska.

Clause 3 of his will reads:

"I give and bequeath to my beloved wife, Nellie B. Jennings, all of my real estate of which I may die seized, and at her death, I direct that, what is left of the same, shall go to my beloved daughter, Josie B. Ferris, if my daughter has children living at her death, then and in that case I will and bequeath that it goes to her children share and share alike, and if she has no children living at the death of my daughter, Josie B. Ferris then in that case, I direct that what is left at her death, go to my next of kin or heirs according to the laws of this state."

It went to probate, and in due time the accounts of the administrator c. t. a. came on for final settlement and for an order of distribution; and thereupon the probate court entered this:

"Now on this 1st day of July, 1916, this cause comes on for hearing before the Court, on the final report of William Chapman, administrator of the estate of William T. Jennings, deceased, and on the petition of the said William Chapman for a final decree of heirship and for distribution in said matter and for discharge.

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

"The Court finds that said William T. Jennings was at the time of his death the owner of and in possession of the following described real estate to-wit; the south half of the northeast quarter and the north half of the southeast quarter of section 24, Twp. 1 north, of range 18, west of the 6th P. M. in Harlan County, Nebraska.

"The Court further finds that said deceased left as his next of kin and only legatees and devisees, under his last will and testament, the following named persons, to-wit; Nellie B. Logue, née Jennings, widow and Mrs. Josie B. Ferris, daughter, and that by the will of said deceased, that the said William T. Jennings devised all of his personal property after the payment of his debts, with the exception of $200.00, to his widow, and that said $200.00 was to go to his daughter Josie B. Ferris and the Court finds that the same has been paid and that the said Nellie B. Logue, née Jennings is entitled to the residue of the money now in the hands of the administrator, to wit, $1,190.37.

"The Court further finds that under and by virtue of the will of the said William T. Jennings, deceased and upon the request of Nellie B. Logue, née Jennings, that the Court assigns to the said Nellie B. Logue, née Jennings, a life interest in and to said estate, she waiving in open Court any other interest or claim in and to said real estate, to-wit, the south half of the northeast quarter and the north half of the southeast quarter of section twenty-four, township 1 north, range 18 west in Harlan County, Nebraska, and that he assigns the residue of said estate to Josie B. Ferris, she being the owner in fee simple thereof, as provided for by said will in case she die leaving issue, if not then said property to descend to the next of kin to the said William T. Jennings, deceased.

"It is therefore ordered considered and adjudged, by the Court, that the administrator pay to the said Nellie B. Logue, née Jennings, the sum of $1,190.37 and to take her receipt therefor and file the same in this Court, and that said real estate, to-wit, the south half of the northeast quarter and the north half of the southeast quarter of section 24, township one north, of range

18 west in Harlan County, Nebraska, be and the same is hereby assigned to Josie B. Ferris, subject to the life estate of the said Nellie B. Logue, née Jennings, and in case the said Josie B. Ferris should die without issue, then in that event said real estate shall descend to the heir at law of the said William T. Jennings, deceased and that upon complying with the order of this Court said administrator shall be discharged."

Afterward the appellant brought this suit. She alleges that she is in possession of the land, sets out the will and the order of distribution in hæc verba, claims that the court was without jurisdiction to make the order, avers that she took the fee under the will, that appellee asserts the fee to be in her, and that appellant has only a life-estate by virtue of the order; and prays that her title be declared and quieted against the adverse claims of appellee. The court sustained a motion to dismiss, on the ground that the order in probate was res adjudicata of the issue tendered. That conclusion was reached in this way: The Nebraska Constitution provides (article 6, § 16):

"County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons * * * and such other jurisdiction as may be given by the general law. But they shall not have jurisdiction * * * in actions in which title to real estate is sought to be recovered, or may be drawn in question."

And the State statute (Rev. Stat. 1913) provides (section 1206):

"The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons."

Section 1494 provides that, after the payment of debts, etc.:

"The county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same."

Section 1495:

"In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same."

Section 1497:

"When such estate shall consist in part of real estate, and shall descend to two or more heirs, devisees, or legatees, and the respective shares shall not be separate and distinguished, partition thereof may be made as provided by law," and

Section 1499:

"The partition, when finally confirmed and established, shall be conclusive on all the heirs and devisees and all persons claiming under them, and upon all persons interested."

The court, in a written opinion, said that the early construction of the Constitution and statutes by the Supreme Court in Dunn v. Elliott, 101 Neb. 411, 163 N. W. 333, Youngson v. Bond, 69 Neb. 356, 95 N. W. 700, 5 Ann. Cas. 191, and Orphan Asylum v. Shelby, 75 Neb. 591, 106 N. W. 604, was with the appellant, and that under the rulings in those cases the appellant was not barred by the order of the probate court; but that later cases in that court, Fischer v. Sklenar, 101 Neb. 552, 163 N. W. 861, and Gillespie v. Truka, 104 Neb. 115, 175 N. W.

883, were the other way, and that by them the issue tendered was foreclosed by the order. This was error; induced, perhaps, by the failure of counsel there as well as here, to present the case in its more comprehensive aspect.

[1] It will be conceded that if the probate court, in making the order, was acting in discharge of powers granted to it, the incidental right to construe the will for the purpose of appropriately discharging its duty, belonged to it, notwithstanding the apparent constitutional limitation; and in that event its construction of the will to the extent necessary in the discharge of its proper function would be res adjudicata, for in Orphan Asylum v. Shelby, supra, in considering the question the court said:

"And, finally, in Youngson v. Bond, 69 Neb. 356, the holding was that a suit by the administrator with the will annexed for the construction of a will, in order to enable him to administer the estate properly, was not maintainable in the first instance in the district court, and that the county court was not precluded from construing a will, in a proper case, and determining the effect and meaning of a devise of lands, so far as is necessary to give proper directions to an executor or administrator with the will annexed, but that the construction of the will in such a case is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue; that it adjudicates nothing beyond his rights and liabilities in the execution of his office."

Again, in Gillespie v. Truka, supra, it is said:

"The Constitution gives to the county court original jurisdiction of all matters of probate and settlements of estates of deceased persons, and denies to that court jurisdiction in actions in which titles to real estate are sought to be recovered or may be drawn in question. More or less difficulty arises in laying down rules of procedure at once consistent with these two provisions of the constitution and equitable in practice. * * * We have held that the title to real estate passes at once, upon death, to the heir, not by virtue of any administration of the estate or decree of the county court, but directly by operation of the statute of descent. In Dunn v. Elliot, 101 Neb. 411, 163 N. W. 333, where the county court had erroneously construed a will, and, accordingly, assigned land to certain heirs, we held that the court's decree, involving, as it did, title to real estate, was ineffectual to finally determine the rights of the parties, although permissible for certain purposes of administration. On the other hand, we have held that the county court, in the settlement of an estate, has jurisdiction to find who are the heirs of the decedent, which finding is binding upon all parties interested in the estate. Fischer v. Sklener, 101 Neb. 553, 163 N. W. 861. In the instant case, the county court might have assigned to plaintiff the share of the estate going to her. The question of heirship was never determined by the county court. That the plaintiff is the sole child and heir at law of the deceased is not and never has been a controverted issue of fact."

But see Pacific Bank v. Hannah, 90 Fed. 72, 79, 32 C. C. A. 522, and Rich v. Mining Co., 147 Fed. 380, 383, 77 C. C. A. 558. The principle is aptly stated in Appeal of Mack, 71 Conn. 122, 41 Atl. 242, thus:

"Reversal of the probate order [sustaining a trust] is asked for on the ground that the trust bequest is void, and therefore there is intestate estate, which the appellant is entitled to have distributed. This raises the question, can a court of probate pass judicially on the validity of a legacy? Courts of probate do not possess the right to try and finally determine disputed titles to property. * * * On the other hand, they have full and exclusive jurisdiction of the settlement of estates; and whenever, in such settlement, a judgment becomes necessary upon a controversy which is plainly within the

jurisdiction conferred by statute, involving the consideration of title or other matter which per se is without that jurisdiction, it is clear that the court has power to consider such question, so far as may be necessary to render its judgment. This power is unavoidably implied in conferring the exclusive jurisdiction; and its exercise is not the exercise of the common-law power of a court of general jurisdiction, but is an exercise of the statutory jurisdiction conferred. * * * It is evident that the question what is an exercise of the common-law power of determining title, as distinguished from an incidental consideration of a question of title necessary to an adjudication under the statutory power of settling an estate, may sometimes be difficult of answer. It is hardly wise to attempt the statement of a general rule; the line of demarkation can best be made clear through cases that test its application. This much, however, may be safely said: The trial of title is without the jurisdiction of the court of probate, and an adjudication where the court may incidentally consider such question must be made in respect to a matter clearly within its statutory jurisdiction, and which the court is required by law to determine, and the question of title must be so involved that the necessary adjudication cannot be had without considering it. * * * The finding of the court of probate involves only a conditional consideration of title, i. e. for the purposes of a judgment upon a matter within its jurisdiction."

Also it is said, In re King's Estate, 215 Pa. 59, 64 Atl. 324:

"The power to distribute includes the power to decide all questions necessary to a proper distribution."

[2] But what power or jurisdiction of the court was it attempting to exert in making the order? Clearly, the power to partition the land for the purpose of division, assumed to be given to it by sections 1494, 1495, 1497, and 1499, supra, of the State statute. But it is a fundamental rule, inherent in the nature of the subject and recognized by section 1497, that there can be partition of lands only among joint tenants, tenants in common or coparceners; and both the will and the order demonstrate that there were no such persons in this case. Indeed, the order eliminates the necessary condition on which partition may be made, it finds that the fee is in the daughter in remainder, subject to the widow's life estate. Freeman on Cotenancy and Partition (2d Ed.) §§ 87, 431. At common law partition dealt only with possession, and left the title as it found it. That rule has been changed in some states by statute, but we find no change in that respect of the court's powers in probate. Freeman, § 529 et seq. Woerner on American Law of Administration (2d Ed.) § 567, says:

"The current of authorities seems to establish the rule, that in the absence of statutory provision authorizing it, there can be no partition during the existence of the particular estate"

—such as homestead, dower or other life estate, and that as a general rule there is no power in probate courts to partition real estate, unless it has been expressly given by statute. The excerpt from Woerner is in consideration of the rights of cotenants in the remainder pending the lesser estate. To the same effect, Freeman, §§ 440, 441.

The Supreme Court of Nebraska, in Phillips v. Dorris, 56 Neb. 293, 76 N. W. 555, said:

"Only a joint tenant or a tenant in common of real estate can maintain an action for its partition. * * * Hurste v. Hotaling, 20 Neb. 178, 29 N. W. 299; Barr v. Lamaster, 48 Neb. 114, 66 N. W. 1110. If Miller died intestate,

the title to the lands which he owned at his death descended to and vested in his heirs at law; if he died leaving a will, the title vested in his devisee on probate of the will. Miller's administrator was neither a tenant in common nor a joint tenant of such heir or devisee. * * * The object of a partition suit is to assign property, the fee-simple title to which is held by two or more persons as joint tenants or tenants in common, to them in severalty."

In Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065, that court held:

"If the widow has a life-estate in the lands mentioned, the plaintiffs cannot maintain an action of partition against her. She is entitled to the full possession and absolute control during her life of said estate, provided she does not commit waste thereon, and the plaintiffs would have no right to disturb her possession."

The Supreme Court of Kansas, in Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334, held that the owner of a life interest could not maintain partition against the remainder-men, and that a decree setting over part of the property to the life tenant in fee simple was wholly void. In Smith v. Runnels, 97 Iowa, 55, 65 N. W. 1002, the will gave plaintiff all the estate of the testator for her sole use and benefit during her natural life; afterwards to be divided. Held, that it gave plaintiff a life estate in the testator's real estate, and the owner of a life estate in land cannot maintain an action of partition against the remainder-men to have it sold.

[3] We do not, of course, decide that the appellant has only a life estate, we express no opinion on that question, we have only taken the case on the basis of the finding in that respect in the order. There was, then, no ground on which to claim that the power of the court was being exerted to partition the land, hence it cannot be maintained that the court exercised in making the order an incidental and necessary or implied power in construing the will that it might thereby discharge a duty expressly imposed on it. It made no division of the land, it could not do so. But it plainly violated the constitutional inhibition in assuming the right to consider and determine a question of title, and nothing else. Its action, therefore, in making the order in respect to the title to the land was void, because it exceeded its power and went beyond the jurisdiction to which by the constitution it is restricted. The unmistakable terms of the will called for an order directing the administrator to deliver possession to the widow,—nothing more; beyond that the probate court had no occasion to go.

Reversed and remanded with directions to overrule appellee's motion to dismiss, to permit her to answer, if she be so advised, and to dispose of the case as right and justice may require.

MOBILE SHIPBUILDING CO. v. FEDERAL BRIDGE & STRUCTURAL CO.

(Circuit Court of Appeals, Seventh Circuit. February 25, 1922. Rehearing Denied April 5, 1922.)

No. 3001.

1. **Judgment ⊜160—Affidavits as to defense on merits held insufficient to require opening default.**
   Where the court gave defendant repeated opportunities to present affidavits showing a defense to the merits, the first affidavits being based only on information and belief, and the subsequent affidavits showed, contrary to defendant's claim, that it had assumed the obligation of the contract sued on, there was no error or abuse of discretion in the refusal to open the default.
2. **Contracts ⊜187(1)—Suit on assumption of contract can be maintained by other party to original contract only in equity.**
   At common law, as interpreted by the federal courts, a party to a contract which had been assigned by the other party to a stranger, who assumed to perform the other party's obligations, could not maintain an action at law on the assumption of the obligation, but could maintain a suit in equity.
3. **Contracts ⊜175(1)—Presumed to have been made in common-law jurisdiction.**
   In the absence of any showing to the contrary, the court will presume that the contract in suit was made in a common-law jurisdiction.
4. **Courts ⊜372(4)—Federal courts are not bound by state court's interpretation of common law.**
   The federal court in an action brought therein is not bound, in determining the rights of the parties, by the interpretation placed upon the common law by the courts of the state where the contract was made, but will determine the common law independently of the holding of the state court.
5. **Appeal and error ⊜883—Defendant, consenting to trial at law, waives objection remedy was in equity.**
   A defendant, who consented to the trial at law of an action brought against him on his assumption of the obligation of a contract made between plaintiff and defendant's assignor, waives his right to object that plaintiff's remedy was by suit in equity, and the judgment for plaintiff will not be reversed under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), authorizing transfer of causes to the law side of the court when they are erroneously brought as suits in equity, and Act March 3, 1915, § 274b (Comp. St. § 1251b), permitting equitable defenses in actions at law, and authorizing the appellate courts on review, either by appeal or writ of error, to render such judgment on the record as law and justice shall require, especially where a jury was waived and the facts found by the trial court, who would also find the facts if the judgment were reversed and the cause transferred to the equity side.

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

Action at law by the Federal Bridge & Structural Company against the Mobile Shipbuilding Company. Judgment for plaintiff, for $149,301.70, with interest and costs, and defendant brings error. Affirmed.

E. E. Jacobson, for plaintiff in error.

Amos C. Miller, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Describing the parties as they appeared in the District Court, it appears that plaintiff brought this action to recover damages for defendant's failure to carry out a contract which had been negotiated with the Kelly-Atkinson Construction Company, and which had been assigned to defendant. This contract provided for the fabrication by the plaintiff of all the structural material necessary for the completion of 18 composite cargo-carrying steamers for the United States Shipping Board Emergency Fleet Corporation. It was charged that defendant agreed to "assume, keep, and perform all the terms of said contract on the part of said Kelly-Atkinson Construction Company to be kept and performed."

Plaintiff fabricated the material for 6 of such steamers, for which it was paid. Defendant then canceled its contract, and plaintiff sought by this action to determine and recover its damages. Defendant defaulted, but subsequently moved to set aside the default, and to file its pleas and affidavit of merits. The motion was denied, on the ground that the supporting affidavit was insufficient; but leave was granted to renew the motion, if satisfactory supporting affidavits were presented. Availing itself of the opportunity thus presented, defendant renewed its motion and sustained its application by affidavits of an officer and an engineer of the Kelly-Atkinson Construction Company. These affidavits, instead of supporting the defendant's contention, tended strongly to establish the plaintiff's allegations. The motion to open the default was therefore denied, and counsel thereafter stipulated "that a jury shall be waived in said cause, and the cause submitted to the court for the assessment of damages." Upon the issue of damages much evidence was received, supplemented by numerous exhibits, which contained a mass of figures on costs, maintenance charges, equipment expenses, etc. Defendant attacked plaintiff's figures on the ground that much of the loss indicated might have been avoided, had the plaintiff devoted its plant to other construction work, etc.

The court, while making no special finding, found "the issues for the plaintiff and assessed the plaintiff's damages at the sum of $149,301.70." Our examination of the testimony convinces us that there was ample evidence to support the amount of damages fixed by the court. It would serve no useful purpose to go into the mass of figures to sustain this conclusion. There was evidence tending to show that plaintiff's damages exceeded the amount of recovery, and we conclude the trial judge did not err in making its determination.

[1] We have likewise examined the record to determine whether defendant was erroneously denied its motion to open the default. It appears that defendant was granted repeated opportunities to present affidavits of merits in support of its plea; that several such affidavits were on information and belief, and disclosed no personal knowledge on the part of the affiant. Finally, however, defendant presented the affidavits of certain officers of the Kelly-Atkinson Construction Company, and these affidavits showed that defendant assumed the obligations due plaintiff under the contract. There was, therefore, clearly no error or abuse of discretion on the part of the court in adjudging defendant in default.

Defendant's liability turned upon its assumption of the obligations of the Kelly-Atkinson Construction Company under its written contract with plaintiff. While the court was justified in recognizing the action as a default, we do not agree with plaintiff's counsel that a cause of action sufficient to support an action at law was disclosed. Plaintiff's position, to quote its own language is:

"The declaration was based, not upon a novation, but upon the assumption by defendant of the liability of the Kelly-Atkinson Construction Company under the contract of August 11, 1917, upon which contract of assumption the plaintiff, though it was not a party thereto, is permitted to sue."

Respecting its legal position counsel further says:

"The law is well settled, it is true, that in England and in certain jurisdictions in this country the assumption by C. of the obligations in a contract between A. and B. does not create a liability from C. to A.; but the law in Illinois is just the contrary, and the federal courts will follow the decisions of Illinois in this respect."

If this position be sustained, then an affirmance of the judgment necessarily follows. It must be admitted that in most jurisdictions, upon facts similar to those disclosed in this case, A. may sue C. in an action at law and recover. For collection of cases, see Williston on Contracts, vol. 1, § 381; 9 Cyc. 378. That he cannot do so in all of the states must also be recognized. See Williston on Contracts, supra, and 9 Cyc. 375.

[2] The federal courts have taken the position that such a liability cannot be enforced in an action at law. National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75; Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300. Liability may be enforced, however, in a suit in equity. Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Union Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613; Dancel v. Goodyear Shoe Machinery Co., 144 Fed. 679, 75 C. C. A. 481.

[3] We have searched the record in vain for any evidence disclosing the situs of the execution of the contract between defendant and the Kelly-Atkinson Construction Company. In the absence of any showing to the contrary, the court will presume that the contract was made in a common-law jurisdiction.

[4] However, even if it were shown that the contract was made in Illinois, the federal court in an action brought therein, in determining the rights of the parties, will not be bound by the interpretation placed upon the common law by the courts of Illinois, but will determine the common law independently of the holdings of such state courts. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

[5] But does it necessarily follow that, because a demurrer to the

declaration might have been sustained, we must reverse the judgment here rendered? The case was fully tried by the court without a jury. The facts respecting liability are not in serious dispute. The parties have fully and fairly litigated the question of damages. If we were to reverse the judgment, it would not be with directions to dismiss, but to transfer the cause from the law to the equity side of the calendar. The district judge who presided over the law action would sit as chancellor in the equity suit, and upon the same evidence no doubt make the same findings. Unless required by the rules and the established precedents, we are unwilling thus to pay tribute to form. Many of the federal cases referred to were decided prior to the announcement and general application of the equity rules.

Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) reads:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

Under this rule it has frequently been held that the court does not lose jurisdiction of the cause because of the failure of the litigants to pursue the proper remedy. Where a suit in equity is brought and relief cannot be granted because the litigant has an adequate remedy at law, the court retains the jurisdiction and gives the complainant an opportunity to recover in an action at law. Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C.) 225 Fed. 769; Wineman & Sons v. Reeves, 245 Fed. 254, 157 C. C. A. 446; Fay v. Hill, 249 Fed. 415, 161 C. C. A. 389; Equitable Trust v. Ry. Co., 250 Fed. 327, 162 C. C. A. 397; American Falls Milling Co. v. Standard Brokerage & Distributing Co., 248 Fed. 487, 160 C. C. A. 497; Brown v. Kossove, 255 Fed. 806, 167 C. C. A. 134; Pierce v. Nat. Bk. of Commerce in St. Louis (C. C. A.) 268 Fed. 487. In Chicago Bonding & Surety Co. v. U. S. et al., 261 Fed. 266, this court held:

"Citing Illinois Surety Co. v. U. S., 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, appellant insists that only an action at law is permissible, and therefore we should reverse the decree, with direction to dismiss the bill for want of jurisdiction or want of equity. The United States, for the use of claimants, began its pursuit of appellant by an action in debt. But, conceiving that a suit in equity was necessary, or at least more adequate, plaintiff moved to transfer the cause to the chancery side. Transfer was made without objection. After appellant had answered the bill and intervening petitions without raising any objection to a trial in chancery, counsel for plaintiff noticed the then recent decision above cited, and moved to transfer the cause back to the law side. In opposing the motion appellant made the following record: 'Chicago Bonding & Surety Company, being present in court by its solicitor, objects to said transfer, and now consents to this cause remaining on the equity side of the court.' Whereupon plaintiff's motion was denied. Without moving for a transfer to the law side, appellant participated in the trial before the master, and then objected to the report on the ground that plaintiff had an adequate remedy at law. Plainly the assignment of error based on the overruling of that objection is unavailable. The District Court, on one side or the other, had jurisdiction of the subject-matter, and the parties were before it. Appellant was heard by the court without a jury, as its solicitor insisted it should be heard. If the recited entry is not formally sufficient as a waiver of jury trial, at least that entry and appellant's conduct thereunder suffice to stop appellant from blowing hot and cold. Sanders v. Riverside, 118

Fed. 720, 55 C. C. A. 240; Illinois Surety Co. v. U. S., 215 Fed. 334, 131 C. C. A. 476; U. S. v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934."

The practice thus announced is reaffirmed, and we are disposed to carry it still further. In view of the apparent purpose of this rule 22 and of the decisions thereunder, we feel justified in announcing that a defendant who either requests or consents to a trial of controverted issues in an action at law, when he could have transferred the cause to one in equity, thereby waives his right to later object to the disposition of the controversy in an action at law. Especially should this rule prevail where, on the trial of the law action, the parties waive a jury and the judge becomes the trier of the facts as well as of the law.

A situation somewhat analogous to that in the instant case is presented where a litigant challenges the venue of the court. It is elementary in such a case that defendant's consent or his general appearance constitutes a waiver. So in the present case the court had jurisdiction of the action on one side of the court or the other. Defendant was not entitled to have the action dismissed, but the court, had the defendant so requested, might have transferred it to the equity side and proceeded to a final hearing. Defendant did not see fit to object. At no time was it suggested to the District Judge that defendant wished the issues involved heard and disposed of in an equity suit. Every plea filed by defendant indicated its desire to have the matters litigated in an action at law. It joined in a stipulation to waive a jury and proceeded to a hearing on the merits. It should not now be heard for the first time to challenge the District Court's right to proceed as was here done.

Further support for this position may be found in section 274b, c. 90, Act March 3, 1915 (Comp. St. § 1251b). This section reads:

"That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

It has been held that the effect of this statute is to "substantially abolish all technical distinctions between proceedings at law and in equity." U. S., to use of Morris, v. Richardson, 223 Fed. 1010, 139 C. C. A. 386. Whether such a conclusion is entirely justifiable or not we need not determine. It is apparent, however, that Congress by the last two sentences intended to extend the authority of the appellate court so that such judgments may be entered "as law and justice shall require." See, also, section 269, Judicial Code (Comp. St. Ann. Supp. 1919, § 1246). It may be added that no assignment of error fairly presents this question, but we have nevertheless fully considered it.

The controversy having been fully and fairly heard and the court,

with the consent of the parties, having disposed of the merits of the controversy, and having rendered a judgment which meets with our approval, we conclude that the judgment should be, and it is, hereby affirmed.

BRICTSON MFG. CO. v. CLOSE et al.*

(Circuit Court of Appeals, Eighth Circuit. April 5, 1922.)

No. 5944.

1. **Corporations ⟸308(4)—Agreement to pay salary as part consideration for license under patent is binding.**
   An agreement by a corporation to pay a stipulated salary to its president and general manager for his services, made as part consideration for the transfer to it of the president's manufacturing business and the license to use his patent, is valid and binding, especially where the stockholders who objected thereto became such after the contract was made and was part of the records of the corporation.
2. **Corporations ⟸609—Court of equity has no jurisdiction to dissolve solvent corporation managed without fraud.**
   A court of equity, which has expressly found that the managing officer of a corporation was not guilty of dishonest or fraudulent conduct, and did not contemplate doing anything he was not legally entitled to do, and also found that the corporation was solvent, had no jurisdiction to dissolve the corporation and to wind up its affairs.
3. **Corporations ⟸393—Courts cannot meddle in business affairs.**
   A court of equity is without power to intermeddle with the business affairs of the corporation, which includes the determination whether to carry out the purpose to construct a new factory for which stock had been issued and sold, and whether the patents it had a license to use granted any right of value, or its business justified continuation, in view of the large salary it had agreed to pay its president.
4. **Receivers ⟸36—Appointment is ancillary remedy.**
   The appointment of a receiver is an ancillary remedy to preserve the corpus pending judicial determination of the rights of the litigants, and cannot be granted, where the bill prayed for no ultimate relief which the court could grant, and the facts did not call for any relief to complainants.
5. **Receivers ⟸6—Should not be appointed, if there is other relief not so severe.**
   The appointment of a receiver is a drastic remedy, and is never granted, if there be other relief not so severe.

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

Suit in equity by H. E. Close and others against the Brictson Manufacturing Company. From an order appointing a receiver for defendant corporation, defendant appeals. Reversed, with directions to dismiss the bill.

M. E. Culhane, of Brookings, S. D., and William M. Giller, of Omaha, Neb. (Weaver & Giller, of Omaha, Neb., on the brief), for appellant.

Francis A. Mulfinger, of Omaha, Neb. (Robert J. Webb, of Omaha, Neb., and Lawrence W. Rice, of Valentine, Neb., on the brief), for appellees.

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

*Rehearing denied July 7, 1922.

Before SANBORN and LEWIS, Circuit Judges, and VAN VALKENBURGH, District Judge.

LEWIS, Circuit Judge. Prior to November, 1916, O. A. Brictson had been manufacturing and selling at Brookings, South Dakota, improved automobile tires. His improvement, for which he had obtained U. S. Letters Patent in 1910, consisted, generally, of rows of metallic rivets through the tire, arranged in staggered relation and having their outer or exposed ends enlarged and flattened, the purpose being, as shown in the specification, to protect the outer surface of the tire. In the month named he and others who joined with him organized, under South Dakota laws, the appellant corporation, which immediately took over all of his interest and all of the assets of that business, including rights under the patent, as his licensee. The authorized capital of the company was $5,000,000, divided into 50,000 shares, of which 40,000 were common and the remainder preferred stock, of which Brictson, in consideration of the transfer to the company, received all of the common stock and 1,000 shares of the preferred stock, but at once donated back to the company 8,000 of the common and 250 of the preferred. In further consideration of the transfer he was permanently employed to manage the company's business at a salary of not less than $7,500 for the first year and not less than $10,000 per year thereafter. All of this is shown by contract entered into between him and the company, and by the minutes of its board of directors held in January following. The board at that meeting authorized the sale of 5,000 shares of the preferred, giving therewith as a bonus a certain number of shares of the common which had been donated by Brictson. The company then submitted to the proper State authorities in South Dakota, Iowa and Nebraska its proposed plan of disposing of its stock under the requirement of what is called the Blue Sky Law, and the plan was approved. A written form of subscription for shares was made out in which it was stated that 20 per cent. received for the stock would be allowed as commission to the selling agent, and the appellees made their subscriptions on those forms. Later it was decided to change the place of manufacture from Brookings to Omaha, Nebraska, and ground at the latter place was purchased for that purpose and the company's offices were moved to Omaha.

In August, 1921, the appellees, eight in number, filed their bill in this case as stockholders. All but two of them had five shares each of the preferred stock, the other two ten each. They alleged that the preferred stock was sold for the purpose of establishing a factory at Omaha, that $28,000 of the company's money had been invested in a site for that purpose but that the factory had not been built, that the company was still carrying on a small business at Brookings, that the small plant at Brookings was not worth more than $8,000, that O. A. Brictson had represented that his patent rights were worth $1,000,000 and had received in consideration therefor all of appellant's common stock, but that in fact said patent rights were not valuable, that four years have passed since a site for the new factory was purchased at Omaha, that Brictson's salary of $10,000 a year is exorbitant, that more

than $300,000 has been received from the sales of preferred shares, that dividends have been paid on the preferred shares out of the money for which they were sold, that a majority of the directors have sold out and resigned, and that Brictson is in charge of the company's business and of all of its assets, that no meeting of stockholders or of the board of directors had been held in 1921, that on account of these facts the purposes for which the appellant was incorporated have failed and are impossible of being carried out, and that the only object in continuing the company is to enable Brictson to draw a large salary and remain in control of the company's affairs. It was alleged that the appointment of a receiver was necessary to preserve the company's assets, prevent waste and reckless extravagance, and to administer the company's affairs in an honest, business-like and impartial manner, until such time as the stockholders may determine and assert their real wishes as to whether the company should be liquidated or whether it should be continued under efficient management or reorganized, or some other steps taken by the stockholders upon which they might ultimately decide. There were intimations that Brictson might dispose of or hypothecate the company's assets, and also that he might be guilty of some fraudulent conduct to the detriment of the company, but there was no direct allegation to that effect, nor that any such things had ever been done by him. It was not alleged that the company was insolvent. The answer denied all intimations of fraudulent conduct on the part of Brictson, alleged that he was and had been drawing the salary fixed in a contract between him and the company, that the company was solvent, that it was carrying on its business at a profit, that the patent rights which he transferred to the company were of great value, that all dividends had been paid out of net profits, that its assets in the hands of Brictson were being carefully preserved and that there was no occasion or necessity for the appointment of a receiver, and prayed that the bill be dismissed.

The record is voluminous, and was made up in violation of Equity Rule 75b, with no apparent excuse therefor. Its more than 500 pages ought to have been condensed into less than a third that much. The court heard the parties at length, granted the prayer of the bill and appointed a receiver; and from that action the company brings this appeal. Judicial Code, § 129 (Comp. St. § 1121).

The record discloses beyond question that at the time the receiver was appointed the company had in bank more than $15,000, that its accounts receivable were that much or more, that it held solvent bills receivable for more than $60,000, that it had more than $60,000 face value in United States bonds and War Savings stamps, that the real estate which it had purchased at Omaha for its factory site was worth more than $37,000, that it had other property, real and personal, worth several thousand more, and that its liabilities did not exceed $5,000. Brictson is the company's President and Treasurer. Dividends may have been declared and paid on the preferred stock when it was unwise to do so; but it was not shown that they were taken from receipts of stock sales, otherwise than as that fact might or might not be deduced in the matter of bookkeeping. There is room for some contro-

versy on the inquiry whether those receipts are represented in full in the assets, and also whether some part of those receipts were not used for current expenses.

[1] For obvious reasons the court did not undertake to pass on the question as to whether the company was bound by its contract and obligated to pay Brictson the salary he was drawing. He is not a party to this suit. The agreement between him and the company that he should be paid the stipulated salary was a part of the consideration for which he transferred to it the manufacturing plant at Brookings, all of the property in connection therewith, the good-will of the business that he had been theretofore conducting, and the right to make the tire as his licensee under his patent. Brictson has fully performed that contract on his side, and we are not advised of any principle in law or equity that will relieve the company from its obligations under it, and we find nothing in the record that causes us to doubt that it is a valid and binding obligation between those who made it. Moreover, it was fully disclosed on the company's records, and the appellees did not become interested in the company as stockholders until after the contract was made. It was not concealed from them, and they are not in a position to attack it on any ground.

[2] The trial court, in passing on the facts, expressly exonerated Brictson from dishonest or fraudulent conduct, and from all intimations that he contemplated doing anything as an officer of the company that he was not lawfully entitled to do. It found that he had carefully looked after and preserved the company's assets which came into his hands. No other finding could have been made on the facts. The court did not have jurisdiction to dissolve the corporation and wind up its affairs. Cook on Corp. (4th Ed.) § 629; Conklin v. U. S. Shipbuilding Co. (C. C.) 140 Fed. 219; Arents v. Tobacco Co. (C. C.) 101 Fed. 338, 344; Maguire v. Mortgage Co., 203 Fed. 858, 122 C. C. A. 83.

[3] Laying out of consideration the foregoing, as must be done, there is nothing left in the bill except complaints concerning the proper management of the company's affairs, by eight dissatisfied stockholders who have, in the aggregate, fifty shares. But a court is without power to intermeddle with the business affairs of a corporation. This court declared in Republican Mountain Silver Mines Co. v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776:

"A court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business."

And Cook, in section 684, says that "the discretion of the directors or a majority of the stockholders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved," is a principle clearly, firmly and very properly established beyond any question. Undoubtedly, the removal of the factory to Omaha and the time for construction of proper buildings for that purpose was a question wholly intra vires, to be controlled by the stockholders and the board of directors, each speaking on appropriate occasion under the charter and

by-laws, and there was no showing that the officers were directed to proceed in that matter after the site was purchased, or at any time; on the contrary, there was testimony that that had not yet been done because of present extremely high cost of erecting the proper structure. But in any event, as already said, those are matters not for the consideration of a court, but must rest with the corporation.

[4, 5] Again, an application for a receiver is an ancillary remedy, brought with the purpose of incidentally aiding in the procurement of other ultimate relief. It seeks to preserve the corpus pending judicial determination of the rights of the litigants, which must be appropriately sought in the pending cause. It is recognized by all the authorities that the appointment of a receiver is a drastic remedy, and is never granted if there be other relief not so severe. 1 Morawetz on Private Corporations (2d Ed.) § 281; Sidway v. Land & Live Stock Co. (C. C.) 101 Fed. 481; Price v. Bankers' Trust Co. (Mo. Sup.) 178 S. W. 745. But no ultimate relief was prayed for in the bill which the court could grant, nor would the facts call for or support any ultimate relief to complainants. The court, in ruling on the facts, seemed to doubt that the patent called for a useful improvement, and expressed the opinion that it only embodied a novelty in tire construction; but the court had no right to decide that the company could not make and sell a novelty, if that were within its charter powers and it chose to do so. It then concluded that a receiver should be appointed because the business that the company was then conducting was small, and that Brictson's salary was so large that if something were not done by the court the assets would be consumed in the payment of his salary. As already said, the matters thus complained of and considered were within corporate action only. We are clearly of opinion that there was no basis, either in pleadings or facts, upon which a receivership can be rested, and that there was an abuse of discretion in granting it; and following the rule announced in Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, the order will be reversed, with directions that the receiver be required to return all property in his hands to those from whom he received it, that he be thereupon discharged, and that the bill be dismissed at complainants' costs.

BINDERUP v. PATHE EXCHANGE, Inc., et al.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1922.)

No. 5907.

Commerce ⊜40(3)—Courts ⊜289—Leasing of films by branch managers within state, to whom producers had shipped films from without state, held not "interstate commerce."

Where motion picture producers shipped films to their branch offices, which thereafter leased the films to theaters within the state and furnished films from the storehouses within the state, theater proprietor's action against producers for conspiracy to ruin his business by refusal to furnish him with films in violation of the Sherman Anti-Trust Act (Comp.

St. §§ 8820–8823, 8827–8830) *held* not within the jurisdiction of the United States District Court; the transactions not involving "interstate commerce."

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

Sanborn, Circuit Judge, dissenting.

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

Action by Charles G. Binderup against the Pathe Exchange, Inc., and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Dana B. Van Dusen, of Omaha, Neb. (C. P. Anderbery, of Minden, Neb., and Norris Brown and Irving F. Baxter, both of Omaha, Neb., on the brief), for plaintiff in error.

William Marston Seabury, of New York City (John J. Sullivan, Arthur F. Mullen, and Eugene N. Blazer, all of Omaha, Neb., on the brief), for defendants in error.

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

TRIEBER, District Judge. The parties will be referred to herein as they appeared in the court below; the plaintiff in error as plaintiff, and the defendants in error as defendants.

The action is to recover threefold damages in the amount of $240,051, under the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830); the jurisdiction of the court being invoked solely upon the ground that the injury complained of is for a violation of that act of Congress, there being no diversity of citizenship. Neither the jurisdiction of the court nor the sufficiency of the complaint was questioned by the defendants by demurrer or any other motion, but defendants filed their answers and went to trial on the issues made by the pleadings. The trial was to a jury.

After counsel for the plaintiff had made his opening statement to the jury, the defendants moved for a directed verdict on the petition and opening statement of counsel. By leave of the court plaintiff amended some of the paragraphs of his petition, and thereupon the motion for a directed verdict was by the court sustained. To reverse this judgment, entered on the directed verdict of the jury, this writ of error is prosecuted. The court, as stated in a memorandum opinion, sustained the motion for a directed verdict upon two grounds:

First, that "the petition, as amended, does not show with sufficient clearness that the court has jurisdiction"; and, second, that "it fails to show with sufficient clearness or certainty any combination or conspiracy for an illegal purpose, or any combining together in concert to use illegal means, sufficient to justify the court in proceeding further in the trial of the case."

As the jurisdiction of the court is one of the grounds upon which the court directed a verdict, it must be disposed of first, as, if sustained, the court will be without jurisdiction to rule on the other contentions of the defendant—that the allegations of the complaint fail to state a cause of action, entitling plaintiff to recover a judgment against them, or the second ground which the court below stated for directing the verdict.

The complaint, after having been amended, charges the defendants to have conspired to ruin his motion picture business, and succeeded in their purpose by refusing to supply him with picture films. It alleges that he was the owner and operator of several motion picture theaters in different cities in the state of Nebraska, and also in the business of selecting and distributing to a circuit of moving picture theaters, commonly known as "the Binderup circuit," programs of moving picture films and advertising matter accompanying the same, through an agreement entered into between himself and the parties operating said moving picture theaters, in 20 cities named, all in the state of Nebraska; that the defendants, during the year 1915 and ever since then, and for several years prior, were engaged in the moving picture business either as producers and manufacturers of moving picture films, or as distributors thereof, or both; that the manufacturers made them in states other than the state of Nebraska, and when completed they were perfected and approved by them in the city of New York, and then they would publicly announce, by an extensive system of advertising, that the picture would be sent out from New York to their various branch offices in the various states of the United States, and particularly Omaha, Neb., and by their Omaha branch distributed to their patrons in the states of Nebraska, Iowa, and South Dakota; that the defendants controlled the distribution of the entire production of films in the United States, and they cannot be procured from others; that the defendant Omaha Film Board of Trade is a Nebraska corporation. Its articles of incorporation, made a part of the complaint, shows that it is organized for the purpose of promoting good will among those engaged in the film and picture business, to adjust controversies among themselves; that it shall be composed of persons or corporations engaged in the film industry, particularly distributors.

The membership is dependent upon the conditions that: (1) Continues to be affiliated with the corporation. (2) Is connected with some branch of the film and motion picture business, maintaining an office in Omaha. (3) Is the manager or the executive head of the firm of the branch of the firm he represents. (4) Abides by the terms of the articles of incorporation and by-laws. It then provides for the limit of membership, the dues, and officers of the corporation.

The by-laws, so far as material to this cause, after providing for the time of meetings, election, and duties of the directors and officers, provide that membership shall be limited to one representative from any company or individual engaged in the film business, maintaining an office in Omaha, and continues as long as he abides by and performs the terms provided by the by-laws; that membership is a valuable concession and personal privilege, not assignable without the consent of the corporation. The corporation shall have full power and determine all matters relative to and arising out of violations of the by-laws and impose punishment therefor; that in order to defend members against imposition, wrongful failure to accept C. O. D. shipments of films, a clearing house may be established for protective information, which shall be furnished to members free of charge and members shall report

such acts to the secretary, whereupon the secretary shall write to the party committing said acts for an explanation. By vote of a two-thirds majority a member may be expelled after notice and a trial. The board of directors may offer its services to induce settlements of disputes between parties in the business, or affecting trade and commerce.

It is further alleged that the defendant Graham was the branch manager at Omaha of the defendant Pathe Exchange, Inc., of New York and Nebraska, and also the presiding officer of the board of directors of the defendant Omaha Film Board of Trade. It then sets out the names of the branch managers at Omaha of the other defendant producers; that in carrying on his business it was necessary for plaintiff to procure films through the Omaha branch offices at Omaha, Neb., and at times it became necessary, in order to supply the demands of plaintiff, for the defendants to procure films outside of the state of Nebraska; that owing to his successful and profitable business the cupidity of the defendants was aroused, whereupon some of the defendants, which are named, requested him to give them a share of his patronage, and, upon his refusal, threatened to put him out of business by starting an exchange at Holdredge, Neb., and supply by underbidding all of the theaters of which his circuit was composed; that in April, 1919, the defendants, for the purpose of enabling them to control prices and dictate terms upon which they would transact business with their patrons operating theaters in the states of Nebraska, Iowa, and South Dakota, caused the said Omaha Film Board of Trade to be organized; that in leasing their films from the New York offices through the branch offices in Omaha they entered into written and oral contracts with the plaintiff, in accordance with the terms and conditions set out in the articles of incorporation and by-laws of the Omaha Film Board of Trade; that the title, control, and right to recall said films at all times was retained by the home offices in New York of the defendants; that plaintiff's business in the early part of 1919 had grown to large proportions and prior to September, 1919, was procuring pictures from some of the defendant film producers, who were members of the Omaha Film Board of Trade, and because he refused to buy from other members a spirit of hostility was aroused on their part against him, and they brought great pressure on the others, with whom he was dealing, to cease doing business with him; that thereupon all the defendants unlawfully combined in restraint of trade among the several states, with the intent of preventing him from continuing his said business, and for the purpose of monopolizing the business of distribution, and lease or sale within said territory of picture film programs, and eliminating the competition of plaintiff within said territory. To carry the conspiracy into effect, defendants caused false charges to be made against him before said Board of Trade, and without notice he was placed on the black or blue list of said Board of Trade, whereupon each of the defendants at once ceased and refused to transact any business with him, and ever since have refused to do so, by reason whereof his business has been ruined; that they sent notices thereof to the various moving picture theaters, comprising the Binderup circuit, that on and after September 15, 1919, they would have to order their programs and serv-

ice from the Omaha exchanges, as they would discontinue supplying the Binderup circuit with any programs, films, advertising matter, or service; that on September 1, 1919, he was removed from the so-called black or blue list, whereupon representatives, with whom he had no business dealings before, solicited his business, which he declined; that on November 10, 1919, defendants caused further charges to be made against him by members of said Board of Trade, and he was again placed on the black or blue list without notice or hearing; that he was denied service, as he was told, until his name was removed from the black or blue list; that a meeting of the grievance committee was had, at which a resolution was adopted that "he be kept on the black or blue list indefinitely, and that he be not supplied with any service whatsoever, for bookings for any house that does not actually and wholly belong to him outright, and none for these unless he deposit $1,000, subject to forfeit, if he violates any of the rules of the association"; that he refused to do so, and ever since the defendants have refused to have any dealings with him canceling unexpired contracts he had with them; that by reason of these acts he has suffered damages in the sum of $240,051, and prays judgment for treble that sum.

As there is no diversity of citizenship, the jurisdiction of the court could only be maintained, under the Sherman Anti-Trust Act, if the acts complained of involved interstate commerce. From the allegations in the complaint it is apparent that no shipments of programs, films, or advertising matter are ever made from the city of New York, to the motion picture theaters, but they are shipped to their respective branch offices in Omaha, Neb., and by them leased and furnished to the plaintiff or other theaters from their storehouses in Omaha. That being the fact, they had reached their destination in the movement from New York, and had come at rest in Omaha, and thereupon they ceased to be in interstate commerce, unless shipped from Omaha to another state, when they would again be in interstate transportation, but independently of the former shipment from New York. American Steel & Wire Co. v. Speed, 192 U. S. 500, 521, 24 Sup. Ct. 365, 48 L. Ed. 538: General Oil Co. v. Crain, 209 U. S. 211, 230, 28 Sup. Ct. 475, 52 L. Ed. 754; Banker Bros. v. Pennsylvania, 222 U. S. 210, 32 Sup. Ct. 38, 56 L. Ed. 168; Bacon v. Illinois, 227 U. S. 505, 33 Sup. Ct. 299, 57 L. Ed. 615; Public Utilities Com. v. Landon, 249 U. S. 236, 245, 39 Sup. Ct. 268, 63 L. Ed. 577; Southern Pacific v. Arizona, 249 U. S. 472, 477, 39 Sup. Ct. 313, 63 L. Ed. 713. In the General Oil Co. Case the court said:

"It [the oil] had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, etc., v. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state, beyond a mere halting in its transportation. It required storage there, the maintenance of the means of storage, of putting it in and taking it from storage."

In Banker Bros. v. Pennsylvania the right of the state to tax defendants on sales of automobiles made in Pittsburgh, Pa., was in is-

sue. The facts were that the defendants kept no machines in stock, but would obtain them from a manufacturer in another state. A purchaser would order the machine from the defendants in Pennsylvania; the order being addressed to the defendants, the manufacturer's name (the Pierce Company) not appearing on the order. The defendants would forward the order to the Pierce Company, who would ship it to the defendants, at Pittsburgh, Pa., with draft on defendants attached to the bill of lading, less the commission. On paying the draft, the Banker Bros. would take up the bill of lading, receive the car from the carrier, and then deliver it to the buyer on his paying the balance of the purchase money. It was held that the Banker Bros. had the title and the shipment had become at rest in the state of Pennsylvania, though shipped in interstate commerce, and therefore subject to the tax imposed by the state.

In Bacon v. Illinois, it was held:

"Property brought from another state, and withdrawn from the carrier, and held by the owner with full power of disposition, becomes subject to the local taxing power, notwithstanding the owner may intend to ultimately forward it to a destination beyond the state."

In Southern Pacific Co. v. Arizona, it was claimed that—

"The proposed movement of the shows was 'interstate in character,' because they were engaged in a tour, beginning at the city of El Paso, Tex., and designed to extend through the states of Arizona and New Mexico and into the state of California, of which tour the movement from Tucson, Ariz., to Phœnix, Ariz., was a part."

In denying this contention the court said:

"At that time the shows were in the exclusive possession and control of the owner, exhibiting for six days at Tucson, and the application to the Southern Pacific Company, which was refused, shows incontrovertibly that the transportation to Tucson had terminated, and that no other transportation had then been contracted for. * * * The mere intention of the shipper to ultimately continue his tour beyond the state of Arizona did not convert the contemplated intrastate movement into one that was interstate."

In Public Utilities Com. v. Landon, the Kansas Natural Gas Company owned a system of pipe lines extending from Oklahoma to Kansas, and transported and sold natural gas to local companies in Kansas for ultimate sale by them to their customers, accepting therefor a definite proportion of the gross amount paid by the customers to the local companies. Permanent physical connections permitted gas to pass from the Natural Gas Company's pipe lines into the mains of the local companies. The question involved was whether the gas supplied by the local companies, after having been received from the Natural Gas Company, which transported it from Oklahoma, was interstate commerce. The court held it was not. In the opinion it said:

"That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. American Express Co. v. Iowa, 196 U. S. 133, 143; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229; Haskell v. Kansas Natural Gas Co., 224 U. S. 217. But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burnertips by the local companies operat-

ing under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. Rearick v. Pennsylvania, 203 U. S. 507, 512; The Pipe Line Cases, 234 U. S. 548, 560. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains. The court below erroneously adopted the contrary view and upon it rested the conclusion that the public commissions were interfering with establishment of compensatory rates by the receivers in violation of their rights under the Fourteenth Amendment."

Counsel for plaintiff relies upon cases like Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336; Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565. But they are clearly inapplicable. In those cases orders were taken for goods to be shipped from other states. They were shipped to the agent of the vendor, who delivered them to the parties who had given him the orders. The goods were never placed in stock, but delivered as they arrived.

There is no allegation in the complaint of the case at bar that his orders for films were sent from New York or any other state, and shipped to the Omaha branch for delivery to him. On the contrary, the allegations are that, after receipt of them by the managers of the Omaha branch, plaintiff would lease them from the manager. Wagner v. City of Covington, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. 157, is conclusive as to the inapplicability of these cases to a state of facts as alleged by plaintiff in his complaint.

In our opinion the complaint fails to show that the transactions complained of were in interstate commerce, and for this reason the court properly directed a verdict. As to the other ground which the court mentioned for directing the verdict, we need not pass on it, nor would it be proper to do so, as the court was without jurisdiction.

The judgment is affirmed.

SANBORN, Circuit Judge (dissenting). The question in this case is: Do the facts alleged in the complaint show that the business conducted by the plaintiff, the contracts made and transactions had by him with the defendants, or any of them, which he alleges they conspired to suppress, and did suppress, constitute interstate commerce? The complaint contains averments of these facts:

Certain defendant corporations of the state of New York, named in the complaint, which either manufactured, owned, or distributed, from their places of business in New York City, moving picture films, which they had there completed or approved, and who, for convenience, will be termed "producers," after perfection and approval of these films,

were accustomed publicly to announce from time to time by advertisements that these films would be released, which meant that they would be sent out from New York by express or parcel post to branches or agents which they had in various cities, one of which was in Omaha, Neb., to be delivered by the agents to those who hired and paid for the use thereof by displaying them in the theaters in the vicinities of these respective branches or agents. The plaintiff was the owner of one theater, the operator of two or three others, and for the operators of several other theaters he selected, secured, and distributed to them the use of picture films which producers leased for this purpose. The defendant producers leased the use of their films for exhibition by the plaintiff, and by the operators in Nebraska and vicinity for whom he selected such films, from their New York offices through their branch offices or agents in Omaha. The producers accomplished this by entering into written and oral contracts with the plaintiff substantially on the terms and conditions set forth in Exhibits A, B, and C, attached to the complaint. By the terms of these contracts the producers retained the title, the control, and the right to recall these films at their home offices in New York.

The nature of these contracts and the character of the commerce transacted under them appears from Exhibit A, which was a contract between the defendant, the Goldwyn Corporation of New York, a producer, styled in the agreement the "exchange," and the plaintiff, Binderup, lessee of the moving picture films described therein, who was called in the contract "exhibitor." By this agreement the "exchange" agreed to furnish the "exhibitor," at the former's branch office in Omaha, one print of each of 26 photoplays, beginning with the motion picture released September 9, 1917, to let to the exhibitor the right and license publicly to exhibit and display each of said prints in the Opera House Theater, in the city of Franklin, Neb., and at no other place, and that the exhibitor should have the right to the first run of each of said prints in Franklin, Neb. The exhibitor agreed to accept and publicly exhibit for two consecutive days the first of the prints on September 27, 1918, and each successive print every second Friday thereafter for a like number of days; that he would pay the exchange for the use of and the right to exhibit each of said prints for the number of days specified $10; that he would deliver back to the exchange and pay the cost thereof at its branch office, if in the same city in which the exhibitor's theater was located, or if the exchange maintains no office in said city (and it probably did not in Franklin) to the office of the express company or other carrier designated by the exchange, or if an express carrier or other carrier is not so designated, to the nearest proper express company, or to the most rapid carrier service, immediately after the close of the performance upon the last day of exhibition of the respective prints, each of the prints in the metal can and shipping case furnished therewith, correctly and legibly addressed for reshipment in accordance with direction and advices previously given or to be given by the exchange, and that he would pay all expenses or other carriage charges incurred in shipping the films to the exhibitor.

This contract contained also agreements that it should not be binding

upon the exchange, unless countersigned and approved on its behalf by one of its officers in the city of New York, and that it and every term and condition thereof should be deemed an agreement made, executed, and delivered in the state of New York, and that they should be construed according to the laws and statutes of that state. The sample contracts, Exhibits B and C, attached to the petition, differed from Exhibit A in the names of the producers, the moving picture films described, and other such details; but they contained substantially the same provisions that have been recited from Exhibit A. There are other averments in the complaint which point in the same direction as those which have been recited.

The averments recited, however, have convinced me that these contracts, the shipments of the films from New York to Nebraska for the plaintiff pursuant thereto, the delivery thereof to the plaintiff by the agents or branches of the producers in Omaha for his use in accordance with the terms of the contract, all constituted parts of interstate commerce between the plaintiff and the New York producers, which, according to the averments of the plaintiff, their alleged unlawful acts first unreasonably restrained and then suppressed. If the producers had agreed with the plaintiff to sell these films to him and to ship them to their branches or agents in Omaha, and there to deliver them to him upon his call and if they had performed that contract, there could be no doubt that the transactions between the producers and the plaintiff constituted interstate commerce. It seems to me that contracts to lease the use of films, to ship the films from New York to Nebraska and deliver them upon the call of the lessee at the branches or offices of the agents of the producers in the same way, and the performance of such contracts, must also constitute such commerce.

The averments of this complaint are in effect that the entire business and all the transactions between the defendant producers and the plaintiff were founded upon these contracts between the producers, corporations of the state of New York, whose officers in New York executed and approved them, and the plaintiff, a citizen and resident of the state of Nebraska. These contracts provided that they should be construed by the laws and statutes of New York, that the producers would lease to the plaintiff, a Nebraska operator, for temporary display, and would ship from New York to him, to be delivered to him at Omaha by their branches or agents on his call, these moving picture films, which he agreed to display in theaters in the vicinity of Omaha, and immediately thereafter to return them to the producers. In my opinion, these agreements were contracts to engage in interstate commerce. Their performance was interstate commerce. The alleged conspiracy of the defendants to suppress that commerce, and its suppression, constituted a violation of the Anti-Trust Act of Congress. The court below therefore had jurisdiction of the issues presented by the averments of the complaint and the denials of the answers in this case. United States v. Motion Picture Patents Co. (D. C.) 225 Fed. 800; United States v. United States Shoe Machinery Co. (D. C.) 234 Fed. 127, 143, 144; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 17, 84 C. C. A. 167; Swift & Co. v. United States, 196 U. S.

375, 396, 397, 25 Sup. Ct. 276, 49 L. Ed. 518; Loewe v. Lawler, 208 U. S. 274, 300, 302, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Dahnke-Walker Milling Co. v. Bondurant (December 12, 1921) 257 U. S. —, 42 Sup. Ct. 106, 66 L. Ed. —; Lemke, Attorney General, v. Farmers' Grain Co. (February 27, 1922) 257 U. S. —, 42 Sup. Ct. 244, 66 L. Ed. —.

And it seems to me that the judgment of the court below ought to be reversed, and this case ought to be remanded to that court for a new trial.

PAYNE, Director General of Railroads, Etc., v. BLEVINS.

(Circuit Court of Appeals, Fourth Circuit. March 21, 1922.)

No. 1881.

1. **Negligence ⟸85(2)—Contributory negligence of boy depends on age, knowledge, and surrounding circumstances.**

   In determining whether a boy was contributorily negligent three tests are to be applied; his age, his knowledge, and the circumstances surrounding the case.

2. **Negligence ⟸136(29)—Contributory negligence of child for court on conclusive evidence.**

   Whether a boy 13 years of age was capable of negligence contributing to his death is a question for the court, where the evidence admits of but one conclusion, and the fact is one about which reasonable minds cannot differ.

3. **Negligence ⟸136(29)—Contributory negligence of boy under 14 for court on clear evidence.**

   The rule established by the Supreme Court of Appeals of Virginia that a boy under 14 years of age is presumed to be incapable of negligence, but that such presumption may be rebutted by evidence, does not prevent the court from holding him capable of such negligence as matter of law, if the evidence admits of no other conclusion.

4. **Railroads ⟸382(1)—Thirteen year old boy held capable of appreciating danger from train.**

   A boy 13 years and 3 months of age, who had lived for several years adjacent to a railroad track and had worked in coal mines, and occasionally had ridden on the trains, and who was shown to be bright and intelligent, was, as a matter of law, capable of appreciating the danger of going on a railroad track in front of an approaching train.

5. **Railroads ⟸398(4)—Contributory negligence of boy going on track shown.**

   In an action for the death of a 13 year old boy, who was capable of appreciating the danger of going on a railroad track, evidence *held* to show that the approaching train could have been seen and heard by him, though no warning signals were sounded, and it was backing without a headlight on the tender, so that he was negligent in going on the track in front of it.

6. **Railroads ⟸396(1)—Presumption person looked and listened does not apply, where contradicted by fact.**

   The presumption that a person looked and listened as required by ordinary care before going on a railroad track does not apply, where the evidence shows he could have seen and heard the approaching train, if he had done so, but nevertheless went on the track in front of the train.

7. **Railroads ⟸398(1)—Evidence held to show cause of boy's death was speculative, not supporting recovery.**

   In an action for the death of a 13 year old boy, who was found injured on the side of a railroad track shortly after a train had passed, evidence

held to show that plaintiff's contention he was sitting on the track, where he could have been seen by defendant's employees in time to have avoided the accident, was contradicted by the physical facts, and that the defendant's theory that he was injured by a rock thrown by another boy, or by attempting to board the train as it came by was equally plausible, so that the cause of his death was speculative, and there could be no recovery therefor.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by A. L. Blevins, as administrator of the estate of Burton Blevins, deceased, against John Barton Payne, Director General of Railroads and Agent. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 264 Fed. 1005.

Samuel K. Funkhouser and Waller R. Staples, both of Roanoke, Va. (Staples, Cocke & Hazlegrove and Smith & Funkhouser, all of Roanoke, Va., on the brief), for plaintiff in error.

William H. Werth, of Tazewell, Va., for defendant in error.

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

WATKINS, District Judge. For convenience the plaintiff in error will be designated in this opinion as defendant, and the defendant in error as plaintiff, since they occupied these positions in the trial court and are so designated in the pleadings.

This action was instituted by A. L. Blevins, as administrator of the estate of his son, Burton Blevins, for damages for the death of the latter, who was approximately 13 years and 3 months of age. It is alleged that the death was caused by the negligent operation of one of the trains of the Norfolk & Western Railway Company, then in charge of the Director General of Railroads of the United States Railroad Administration. The action was brought against both the Director General and the railway company, but upon motion was dismissed as to the latter, and judgment was recovered against the former only. There is a branch line of the railway company extending from Richlands, on its main line, to a coal operation at Jewel Ridge, a distance of seven miles; the line passing and serving several other coal operations between these two points. At one of these, termed Seaboard, plaintiff and his said son were living on August 29, 1918, when the injuries occurred. This branch line runs in a general northerly direction. About one-fourth of a mile north of Seaboard a wagon road extends north and south almost parallel with and near to the railroad track on the eastern side thereof, and on and immediately east of this highway are a number of small residences, the front portions of which are about 50 feet from the railroad track. From the roadway to the place of the accident there is an embankment several feet in height, leading up to the railroad, immediately west of which is a rocky cliff. From one of the aforementioned residences the partitions had been removed, and, on the night of the accident and for several nights prior thereto, religious services were held therein by a sect known as the "Holy Rollers,"

whose exercises, when the train passed on that night, were characterized with considerable emotional noise; there being a general indulgence in shouting, singing, and dancing.

Both plaintiff and his son attended these services, and, at their conclusion, plaintiff testified that he saw his son pass out of the front door and walk on towards the railroad track, and that he did not see him again until he was found injured, some 3 to 5 minutes after the train passed. He further testified that "the train passed after the church had been dismissed; just immediately the train came, and he did not come out of the church door until after the meeting was dismissed." Mrs. Horton, one of plaintiff's witnesses, living about 100 yards north of the church, testified that "immediately after the train passed her house she slipped back on the porch and heard the noise of the people excited over finding the boy." S. W. Ball, another witness, testified that he was the first man to reach Burton Blevins in about 10 or 12 minutes after the train passed. He found the boy "lying on the east side of the railroad track with his head against the head of the ties, about square with the track, and his feet down off the bank, lying on his side, his face north." Plaintiff testified that the boy was found almost directly opposite the church door, about 50 feet therefrom, "lying with his head almost against west end of cross-ties—end next to church—and body nearly at right angles to track," and that he was found from 3 to 5 minutes after the train passed. No one testified as to the movements of the boy from the time he passed out of the church until after the injury. There was a fracture of his skull, about 2 inches wide and 3 inches long, on the left side of his head just above the ear; the skull being crushed in and some of the brain being destroyed. The physicians who examined him found no other bruises or abrasions about his person. He was carried to the hospital, where, after lingering 37 days without regaining the power of speech, he died.

It is admitted "that, at and along the tracks of the railroad north and south of the place of the alleged accident, the people of that vicinity, including all ages and sexes, and at all times, whenever they desired to do so, had for many years used said track habitually as a walkway at all hours of the day and night." On the night in question the train, as was its custom, had gone up the line to Jewel Ridge, delivering cars to the various coal operations along this branch line, and as it passed the church was drifting down grade at the rate of 12 to 15 miles per hour, and consisted, at this time, only of a tender, locomotive, and caboose, proceeding in the order named. The night was dark, it was misting rain, and the train was an hour or more late. In his declaration, plaintiff alleges that his intestate attended the religious services at the aforementioned church, and at their conclusion went across to the railroad track and sat down on the rail or cross-ties, and there waited for his father to come out of the church and go home; that it was long after the hour at which the engine and tender usually made its final trip, and at an hour at which it would not be expected to pass over the tracks. The allegations of negligence are to the effect:

"That while plaintiff's intestate was so sitting upon the track or cross-ties said engine and tender came along said track from some point above or north

of said church, and going down grade towards Richlands at a high rate of speed, to wit, at the rate of ——— miles per hour; that said engine and tender was running with the tender in front; that it had no headlight in front, and had no brakeman or other employee, on the front end or elsewhere, to keep and maintain a reasonable lookout to discover pedestrians who might be upon the track at that hour; and that no employee anywhere on said engine or tender did in fact keep and maintain any sort of lookout to discover persons who might be on said track, and no such employee did in fact discover plaintiff's intestate on said track in time to prevent injuring him; but plaintiff alleges and avers that it was a light night, and that plaintiff's intestate could have been discovered in his situation of danger, even without a headlight, in time to have prevented his injury, had a reasonable lookout to discover him been maintained by the employees in charge of said engine and tender; and plaintiff alleges and avers that the time in question was the usual time at which said religious services had been concluded every night since the said continuous revival had been in progress."

While it is also alleged that the train was drifting down grade, at a high rate of speed, making no noise and giving no warning of its approach, and that its approach was not discovered nor could have been anticipated by the deceased, there is no charge of negligence for failure to give signals or warning of the approach of the train. The essence of the charge is failure to discover plaintiff's intestate *sitting* on the track, because of neglect to maintain a proper lookout and to have such headlight in front of the train as to enable employees to discover the boy in his alleged position of peril. The accident did not occur at or near a crossing, and there is no allegation that the deceased was attempting to cross the track, or that he was walking along the track. The presiding judge held that neither the crossing signal statute (Code Va. 1919, § 3958) nor the headlight statute (Code Va. 1919, § 3976) of the state of Virginia was applicable to the case, but that the jury might determine whether the duty rested upon those in charge of the train, in the exercise of ordinary care towards persons who might be on or too near the track at or near the place of injury, to give warning of the approach of the train by either blowing the whistle or ringing the bell, and also that the fact that there was no reflector headlight at the front end of the train is of course a fact to be considered by the jury. There was no testimony that any bell was rung. While the testimony as to the blowing of the whistle was conflicting, it was admitted that there was no reflector headlight in front of the train, and although the engineer and fireman claimed that there were red and white lights on the tender at the front end of the train, this was disputed by witnesses for the other side. It was admitted by the train crew that the lights were insufficient to have discovered an object on the track for any considerable distance in front of the train or within time to have stopped the train after discovering such object.

It is not the province of this court to pass upon the preponderance of the evidence with reference to the negligence complained of. The declaration charges, and there was sufficient evidence to justify a verdict, that there was a failure to exercise ordinary care in the operation of the train. Upon conclusion of the plaintiff's evidence in chief, and also upon the completion of all the testimony, defendant made motions for the direction of a verdict in its favor upon several grounds, which need not be recapitulated in detail in this opinion. Among these

were included the claims that there was a failure to show that the injury was caused by any act of the Director General or his agents, that the question as to how the injury occurred was left entirely to speculation, and that plaintiff's intestate was guilty of contributory negligence. Upon refusal of these motions and entry of judgment a writ of error was sued out, and the case comes here on numerous assignments of error, both because of the refusal of said motions, and because of the refusal of certain of requested instructions to the jury, as well as alleged erroneous instructions. The discussion and determination of the questions involved in the three grounds above outlined for instructed verdict will so effectively dispose of all the questions involved that it will be unnecessary to take up the assignments of error in detail.

The first question to be determined is whether under the testimony the plaintiff's intestate must be presumed as a matter of law to have been capable of contributory negligence. The court declined to instruct the jury as a matter of law that he was so capable. But two witnesses were examined as to his capacity, both of these being sworn on behalf of the plaintiff. A. L. Blevins, plaintiff, himself stated that his son, Burton Blevins, was born June 5, 1905 (and was, therefore, approximately 13 years and 3 months of age at the time of the accident), and that he was—

"a bright, sprightly boy, who went to school in winter and worked in the mines in the summer, earning $2 per day."

Dr. I. W. Cunningham testified:

"Was Blevins' family physician; known Burton 3 or 4 years. He was a bright, alert boy. * * * Burton had judgment and capacity for self-care under ordinary circumstances; capable of appreciating such danger as being on a railroad track, and capable of protecting himself; just an average boy; had more experience than average boy, but never indicated that he had more 'foresight' than average boy of 13 years would have; had worked in the mines a year or more. He had fully as much ability to appreciate the danger of being on the railroad track as the average boy of 14 or 15 years old, who did not have the experience that he had in the mine and working around trains."

Burton had lived at Seaboard on this line of railroad from 1916 until his death, and his uncle, a witness for the defendant, testified, without contradiction, that the boy—

"frequently tried to climb on and off moving trains or coal cars, but not as fast as 15 miles per hour, nor try to catch a light engine, and that he never knew Burton or any one else to try to jump on a train consisting only of engine and caboose."

It should be observed that this is not a case of one employed in the running of or injured by complicated machinery, and that the question of capacity to understand danger related only to coming in contact with a moving train of cars, the danger of which must have been obvious to one even younger and of less understanding than deceased, and it is not a case of one attempting to cross a railroad track while engaged in driving a horse, automobile, or other vehicle with his attention absorbed thereby, nor is there anything to indicate that he was not in full possession of his faculties. There was a total absence of evidence to show that there was any handicap to the prudence which

should have been exercised by a bright, alert boy over 13 years of age familiar with his surroundings.

[1] In the case of Railroad Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114, the court said:

"The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. * * * Of an infant of tender years less discretion is required, and the degree depends upon his *age and knowledge.* * * * The caution required is according to the maturity and capacity of the child, and this *is to be determined in each case by the circumstances of that case.*" (Italics ours.)

This rule was reaffirmed in Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, and is recognized by the Supreme Court in all subsequent cases. It will be observed that three tests are to be applied—age, knowledge, and the circumstances surrounding each case.

[2] In applying the rule the courts of some of the states have fixed a definite age below which there is a presumption that children are incapable of contributory negligence. Some have followed by analogy the rule of the common law in criminal cases, holding that a child under 7 years of age is to be presumed, as a matter of law, incapable of contributory negligence, and that between the ages of 7 and 14 there exists such a presumption, but that the presumption may be rebutted by evidence. Some hold that, where the child is under 14 years of age, the question of capacity may be submitted to the jury for determination, but that the courts are without power to determine, however conclusive the evidence, that such infant is, as a matter of law, capable of such negligence. We can see no good reason for denying to the court in such cases the right, nor relieving it of the duty which exists in cases generally, to determine the question as one of law, where the evidence admits of but one conclusion, and where the fact involved is one about which reasonable minds cannot differ. As was said in the case of North Pennsylvania Railroad Co. v. Commercial Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287:

"It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

See Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Schofield v. Chicago, Milwaukee & St. Paul Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; Christensen v. Metropolitan St. Ry. Co., 137 Fed. 709, 70 C. C. A. 657.

In the case of Tucker v. Buffalo Mills, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957, the court said:

"Whether the infant is sui juris is a question for the jury, when the evidence as to age, intelligence, and capacity leaves the question in doubt, or leaves room for more than one inference; but, when the evidence is susceptible of but one inference, it is a question of law for the court."

In the case of Adams v. Nassau Electric R. Co., 41 App. Div. 334, 58 N. Y. Supp. 543, it was said:

"What is meant by the requirement that an infant non sui juris must exercise some care has reference to the obligation which the party inflicting an

injury upon such infant is under toward him, and is to be considered for such purpose. Children early learn that contact with some things will produce pain and injury, and their education with respect thereto proceeds with considerable rapidity. While they lack judgment to act with care and circumspection in respect to such matters, yet they are quite sensible of the necessity of avoiding contact with many objects which experience has taught will inflict harm. A child will not usually place his hand in the fire, as he early learns that if he does he will be burned; and he will not voluntarily run into a moving car, being sensible that pain will follow. A child of sufficient maturity to play about the streets * * * may be assumed to know that injury would result to him from such an act."

In the case of Schoonover v. Baltimore & O. R. Co., 69 W. Va. 560, 73 S. E. 266, L. R. A. 1917F, 1, Ann. Cas. 1913B, 964, the court said:

"If the act of an infant plaintiff is so obviously dangerous that no reasonable man can truthfully say children of his age do not ordinarily know it to be dangerous and voluntarily abstain from it, there is no more reason for submitting the question of contributory negligence to the jury than in the case of an adult plainly guilty of such negligence, and there is the same reason why it should not do so. Prudence and capacity to comprehend danger are not the only elements involved. These may be clear beyond doubt, as in the case of an adult. The defensive issue raised is negligence, in which the age, intelligence, and characteristics of the plaintiff are only factors. Hence it is fallacious to say that, because these are inferior to those of an adult, the issue must be submitted to a jury. Though inferior in that sense, they may be amply and indisputably such as to hold the plaintiff to responsibility for his acts, under the circumstances of the case. * * * If the court can say, and it does, as matter of judicial knowledge, that an adult ought to know certain things and be able to take adequate precaution for his own safety, why has it not the same power to say, as a mattter of judicial knowledge, that children of certain ages are able to comprehend and avoid certain kinds of danger?"

[3] The Supreme Court of Appeals of Virginia has held that children between the ages of 7 and 14 are presumed to be incapable of contributory negligence, but that this presumption may be overcome by evidence of capacity, etc., upon the introduction of which the question is one of fact to be determined by a jury. Trumbo v. City Co., 89 Va. 780, 17 S. E. 124; Roanoke v. Shull, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908; Norfolk Ry. Co. v. Higgins, 108 Va. 324, 61 S. E. 766. We do not understand, however, that more is intended in these decisions than to declare a general rule of law, nor that it was intended to deny the courts the right, on undisputed proof of facts upon which but one conclusion could be reached, to determine the question of capacity as one of law. In the case of Virginia-Carolina Railroad Co. v. Clawson's Adm'r, 111 Va. 313, 68 S. E. 1003, a very intelligent boy under 14 years of age, who had lived for several years in the immediate vicinity of the railroad and was frequently about the track, was killed, and the court said:

"The evidence, which as we have seen was undisputed on the point, leaves no room to doubt that plaintiff's intestate possessed ample capacity to have appreciated the danger of his surroundings, and his own negligence approximately contributed to the accident which cost him his life."

In McDaniel v. Lynchburg Cotton Mills, 99 Va. 146, 37 S. E. 781, where a boy 12 years and 8 months old, competent for the service

which he was employed to render, was injured, the court held that he came to his death as a result of his own persistent and reckless negligence, with which he was properly chargeable by reason of his maturity and intelligence. See, also, Seaboard, etc., Ry. v. Hickey, 102 Va. 394, 46 S. E. 392, relating to an intelligent boy upward of 8 years of age.

The whole question is elaborately discussed in the following cases and notes thereto; Holian v. Boston Elevated Railway Co., 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166; Jacobs' Adm'r v. Koehler Sporting Goods Co., 208 N. Y. 416, 102 N. E. 519, L. R. A. 1917F, 7; Mollica, Adm'r, v. Michigan Central Railroad Co., 170 Mich. 96, 135 N. W. 927, L. R. A. 1917F, 118; Kyle v. Boston Elevated Railway Co., 215 Mass. 260, 102 N. E. 310, L. R. A. 1917F, 164; and Bothwell, Adm'r, v. Boston Elevated Railway Co., 215 Mass. 467, 102 N. E. 665, L. R. A. 1917F, 167, Ann. Cas. 1914D, 275. The conclusion reached from a review of the authorities is thus stated in the note to the Jacobs Case, supra, L. R. A. 1917F, at page 91, as follows:

"But the correct rule appears to be that, since the presumption of incapacity on the part of an infant under 14 years of age is merely a prima facie presumption, and may be rebutted by evidence of unusual capacity and experience, contributory negligence may be shown as matter of law on the part of an infant under 14 years of age, even in those states which hold that infants under that age are presumptively incapable of contributory negligence."

This statement is made in the same note:

"A clear statement, in accord with the authorities, is that in a Missouri case, in which, in holding that a 13 year old boy was negligent as matter of law, under the circumstances, in attempting to cross a railroad track without looking or listening for a train, the court said: '* * * That rule requires that a child should be judged as a child, and not as a man. But the rule does not mean that the question is always to be submitted to a jury. Children may be declared as a matter of law non sui juris at certain tender years and with certain infantile judgments. Then, again, they may be declared sui juris as a matter of law when their age, capacity, and the circumstances under which they act are all considered. It may be taken as the most enlightened and accepted doctrine in the case of infants that generally the question of their contributory negligence is one for the jury. But it is not the accepted doctrine that it may not under given circumstances be dealt with as a matter of law. If the facts are few and simple, devoid of confusion and complications, and if the danger to be avoided is so apparent as to be within the easy comprehension of a boy of 13 years of age, if that boy is shown to be of bright intelligence and of a judgment training him to caution and care in the matter in hand—we say, all these things being admitted, then there is no reason why the judge on the bench may not as a matter of law under the facts of the given case declare there could be no two opinions among reasonable men about the negligence of such a boy, measured by the standard of an ordinarily prudent boy.' McGee v. Wabash R. Co. (1908) 214 Mo. 530, 114 S. W. 33."

[4] There being no dispute as to the intelligence, experience, and familiarity with surroundings of the deceased herein, and the danger to which he was exposed being one of easy comprehension to one of his age, understanding, and experience, a danger easily comprehensible and obvious to persons of very immature age, defendant was entitled to an instruction that he was, as a matter of law, capable of contributory negligence.

[5] Was the deceased guilty of contributory negligence? This question must be answered in the affirmative, if, in the exercise of his duty to look and listen before coming upon the railroad track, he must have seen and heard the train, or must have done so in ample time to have avoided the injury after being upon the track, if, indeed, he was on the track. We are not left to conjecture in respect to the noise or visibility of the train. While no one saw the accident, there were several who saw the train and heard the noise of it, although situated in positions less favorable for both sight and hearing than was the deceased. A. L. Blevins, the father, stated that he was standing at the south wall of the church—that is, at the opposite side from which the train was approaching—and that he—

"heard the clank of the driving rods, looked and saw the train as it passed south wall, saw no headlight, only the light from the ash pan."

Mrs. John S. Horton testified:

That she lived "about 100 yards north of the church, about 50 or 60 feet from the railroad track"; that she "heard train coming half a mile away, was outside, went up steps, across porch, through two rooms, into third room, and got to baby before train actually reached her house, but ran to do so. * * * Witness was outside the house, heard train coming, went in, and covered the baby's ears to keep it from waking; train never whistled or made much noise; if it had blown, or rung bell, would have been able to hear it."

Arthur Ball, another of plaintiff's witnesses, who was a considerable distance north of the church, testified that he got off the track for the train to pass and watched it approach; was positive that there were no lights of any description. John S. Horton, Jr., and Granville Houchins testified to the same effect as Arthur Ball. S. W. Ball, another of plaintiff's witnesses, testified:

"Was sitting in the church nearly opposite the south window, about between the south window and the door on the west side on the second bench from the west wall with my back toward the track; saw through the window the train pass; heard no whistle or bell, but with the racket going on in the house at the time couldn't say whether I would have heard whistle within 100 yards just north of the church. * * * My attention was first drawn to the train by hearing it running; the shouting and dancing in the church was general."

Thus it appears that every witness for plaintiff, with the single exception of the doctor, who was not examined on this point, testified to the seeing of the train, several both to seeing and hearing it, and that two of the principal witnesses, the father and S. W. Ball, were in positions much less favorable, because of the noise in the church, for hearing the approaching train. There can be but one inference from this testimony, and that is that, if the boy had looked and listened, as was his duty to do, he must have seen and heard the train. It appears further from the testimony that at the time he was struck, if he was struck, by the train, he must have been looking in the direction of the railroad track, because the blow received was on the left side, and the boy was found on the east side of the track, along which the train had passed coming from the north.

[6] It is a general rule of law that, in the absence of evidence to the contrary, one approaching a railroad track is presumed, because of

the instincts of self-preservation, to have looked and listened for trains that might be approaching. This presumption, however, is one of fact and not of law, and does not exist where it is incompatible with the conduct of the party to whom it is sought to apply it, and such conduct may be shown either by the testimony of eyewitnesses or by evidence of the physical surroundings and other conditions at the time. Wabash Railroad Co. v. De Tar, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. (N. S.) 352.

In Moore on Facts, § 221, it is said:

"It must be conclusively presumed that a pedestrian who stopped and listened within 6 feet of a railroad crossing could have heard a locomotive and train which struck him going at the rate of 15 miles an hour. In such a case his testimony that he did not hear the train was pronounced so contrary to the daily experience of common life, so at war with the conceded and indisputable physical facts in the case, that neither courts nor juries can, without stultifying themselves, yield to it an iota of probative force or effect. It is a proposition too monstrously improbable for rational human belief."

See, also, sections 160, 191, 280, and 556 referring to the same subject.

In the case of Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262, the court said:

"There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to. But, notwithstanding the incentives to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence."

In the case of Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403, it is held that while it will not be presumed, without evidence, that those exposed to danger do not exercise proper care in a particular case, still the infirmities of the human mind in ordinary men are such that they often do manifest a degree of negligence inconsistent with the care required of ordinarily prudent men under the circumstances, and that when such is the case they cannot obtain reparation for the injuries, even though the railroad company be at fault. And in the case of Northern Pacific Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, the court said:

"When it appears that, if proper precautions were taken, they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken."

And in the case of Elliott v. Chicago, Milwaukee, etc., Railway, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, it was said:

"But one explanation of this conduct is possible, and that is that he went upon the track without looking to see whether any train was coming. Such omission has been again and again, both as to travellers on the highway and employés on the road, affirmed to be negligence. The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom. * * * This is not a case in which one, placed in a position of danger through the negligence of the company, confused by his surroundings, makes perhaps a mistake in choice as to the way of escape, and is caught in an accident; for here the deceased was in no danger. He was standing in a place of safety on the south of the main track. He

went into a place of danger from a place of safety, and went in without taking the ordinary precautions imperatively required of all who place themselves in a similar position of danger."

See, also, Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; Schofield v. Chicago, Milwaukee & St. Paul Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Chicago Great Western Ry. Co. v. Smith, 141 Fed. 930, 73 C. C. A. 164; Tomlinson v. Chicago, M. & St. P. Ry. Co., 134 Fed. 233, 67 C. C. A. 218; Garlich v. Northern Pac. Ry. Co., 131 Fed. 837, 67 C. C. A. 237; 22 R. C. L. § 203.

In the case of Railroad Co. v. Houston, supra, the court said:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. * * * Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation."

To the same effect is Virginia-Carolina Railroad Co. v. Clawson, Adm'r, supra; Johnson v. Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; and Tucker v. Baltimore & Ohio Railroad, 59 Fed. 970, 8 C. C. A. 416.

[7] While it is true that no eyewitness testified as to the movements of the deceased after he left the church, there are still several undisputed facts as to his movements that must be borne in mind: First, he was at a point upon the railroad immediately opposite the church and nearest thereto—the point naturally to be first reached in approaching the track; second, his position, when injured, was immediately facing the track as shown by the location of the wound; third, he was not in the center of the track, but upon the east side thereof, as is shown by the position of the body and the fact that there were no other bruises or abrasions than the one wound upon the head; fourth, that if intending to use the track as a walkway, he had not carried out his purpose, but only approached the side of the railroad close enough to be injured.

It should be borne in mind that there was an embankment leading up to the railroad track and this fact, as well as his familiarity with the surroundings, advised him of his position. How long he had been in a position of danger, and the exact manner in which he was injured, if injured by the train, is left to pure speculation. It is significant that in instituting the action learned counsel for the plaintiff came to the conclusion that the case was one in which the defendant was seated in a posi-

tion of peril, which ought to have been discovered by the train crew in time to prevent the injury, and not that he was using the track as a walkway. In order to sustain this view, it is alleged that he was seated upon the track or rail waiting for his father to come out and accompany him home. In order to give force to the assertion that he was or should have been discovered in time for the injury to have been prevented, it is further alleged that it was a light night, and that he could have been discovered in his situation, even without a headlight, had a reasonable lookout been maintained by those in charge of the engine and tender. These allegations are not only not substantiated by any proof, but are wholly at variance with the testimony, which shows that the night was dark, instead of light, while the blow received contradicted any idea that the boy was seated in the position alleged. In the statement of the facts of the first trial the court said:

"The deceased was last seen, a very few minutes before the train passed, sitting on the end of a cross-tie, awake and looking west, thus presenting his right side to the track."

It was probably intended to say "looking east," as that would have been the natural position if he was waiting for his father, and the only position in which his right side could have been presented to the train. He was evidently on the east and not on the west side of the track. It will be noted that at the second trial this testimony, so obviously contradicted by the physical facts, was omitted. The theory of how the accident occurred, as set out in the declaration, must have been speculative, and, as stated, was proved erroneous by the testimony. Indeed, how the accident did actually occur is left largely to speculation. It was the theory of the defense that the boy was struck by another boy with a rock, because of some trouble which had occurred the night before, and that the position of the body and the absence of other bruises or abrasions wholly contradict the idea that the boy was struck by the train. While there was some evidence to support this view, it merely presents a question of fact, which is not to be considered in this opinion. It is mentioned only to show that the various theories as to the manner of the boy's death are based to such an extent upon inference and speculation.

In order to justify a verdict upon the particular grounds alleged in the complaint we must assume, without any evidence to support it, that the deceased was seated upon the track, and also that he had been upon the track long enough prior to the accident to have been seen by those in charge of the train, had they exercised due care, in time for them to have avoided the injury. In view of the testimony, it seems just as reasonable to assume that, if the injury was caused by the train, it was due to his suddenly stumbling upon the track as he climbed the embankment, or that, seeing and hearing the approaching train, which he was obviously facing, he might have attempted to swing it for the purpose of riding home. Either theory is as reasonable as that advanced in the declaration, and, while neither of these theories is established by the testimony, they are not so positively contradicted by admitted facts as are the allegations of plaintiff's declaration.

"Where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." Patton v. Texas & P. Ry. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.

"Where the evidence is sufficient only to give rise to mere conjecture in favor of the plaintiff, or to suggest merely a possibility of the truth being as claimed by him; * * * or the evidence in his favor is contrary to all reasonable probabilities, the jury are placed in a false position by being directed to determine upon which side are the major and controlling probabilities. The court in such circumstances, without a motion in that regard, should apply the law thereto and dispose of the litigation accordingly. Refusal in that regard, in face of a proper motion invoking judicial action, is no less than a denial of a right." Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357; Musbach v. Wisconsin Chair Co., 108 Wis. 57, 84 N. W. 36; Finkelston v. Chicago, M. & St. P. R. Co., 94 Wis. 270, 68 N. W. 1005.

See, also, N. & W. R. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; C. & O. R. Co. v. Heath, 103 Va. 64, 48 S. E. 508; Sorenson v. Menasha Paper Co., 56 Wis. 338, 14 N. W. 446; Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. 557, 70 C. C. A. 255; Smith v. Illinois Central, 200 Fed. 553, 119 C. C. A. 33; Carnegie Steel Co. v. Byers, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677; Atchison, T. & S. F. Ry. Co. v. De Sedillo, 219 Fed. 686, 135 C. C. A. 358; United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; United States v. Pugh, 99 U. S. 265, 25 L. Ed. 322; Manning v. Insurance Co., 100 U. S. 693, 25 L. Ed. 761.

Reversed.

TIERNEY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 2, 1922.)

No. 1917.

1. **Jury ⟸125—Common-law practice of calling jurors.**
   At common law the usual practice was to call each juror separately, ascertain his qualifications, and present him for challenge.
2. **Jury ⟸125—Common-law method of examination not essential.**
   Observance of the common-law practice of calling each juror separately, ascertaining his qualifications, and presenting him for challenge is not essential.
3. **Courts ⟸352—Federal court not bound to follow state statute in examining jurors.**
   A federal court is not bound to follow the state statute respecting the practice of calling jurors for examination, or the usual practice of the state court.
4. **Courts ⟸352—Federal District Court can examine jurors in any manner not impairing exercise of challenge.**
   A federal District Court is free to order any method in presenting qualified jurors which does not impair the free exercise of the right of challenge.
5. **Jury ⟸125—Method of presenting jurors held proper; "right of challenge."**
   Complaint cannot be made of the fact that the presiding judge ordered jurors divided into three panels of 12 each, and when case was tried one panel was called into the box, and the 12 examined on their oaths as to their qualifications, and if any were disqualified their places were filled

from the other panels, until 12 apparently qualified were obtained, and these 12 were presented to the accused and the government for the exercise of the right of challenge for cause, and, as a juror challenged retired, another was called to his place and examined, and this method proceeded until further challenge was waived or the right exhausted; the right of challenge being a right of rejection, not of choice.

6. **Criminal law ⊂=1166½(6)—No complaint of method of presentation of jurors, where peremptory challenge is not exhausted.**

An accused, who did not exhaust his peremptory challenges, could not complain that jurors had been improperly presented.

7. **Witnesses ⊂=337(5)—Accused may be asked on cross-examination whether he has been guilty of other like offenses.**

A defendant, indicted for carrying on the business of retail liquor without paying a special tax, could be asked on cross-examination if he had not been guilty of other like offenses, on the issue of his credibility.

Waddill, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Edwin Y. Webb, Judge.

Tom Tierney was convicted of carrying on the business of a retail liquor dealer without paying tax, and brings error. Affirmed.

Certiorari denied 257 U. S. ——, 42 Sup. Ct. 590, 66 L. Ed. ——.

B. J. Pettigrew, of Charleston, W. Va. (Barnhart, Horan & Pettigrew, of Charleston, W. Va., on the brief), for plaintiff in error.

J. N. Kenna, Asst. U. S. Atty., of Charlestown, W. Va. (L. H. Kelly, U. S. Atty., of Charleston, W. Va., on the brief), for the United States.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. The defendant, Tom Tierney, was convicted of carrying on the business of a retail liquor dealer without paying the special tax in November, 1918. At the term when he was tried the presiding judge, to facilitate business in the trial of accused persons, ordered the jurors divided into three panels of 12 each, numbered 1, 2, and 3. When a case was to be tried, one of these panels was called in the box. The clerk then examined the 12 on their oaths as to their qualifications. If any were disqualified, their places were filled from the other panels until 12 apparently qualified were obtained. These 12 were then presented to the defendant on trial and the government for the exercise of the right of challenge for cause or peremptory challenge without cause. As the juror challenged retired, another was called to his place and examined as to his qualification. This method proceeded until further challenge was waived or the right exhausted. The 12 jurors remaining in the box were then sworn to try the cause.

When the defendant was called on to exercise his right of challenge in this manner, his counsel, claiming the right to have presented at once 28 qualified jurors, challenged the entire panel of 12 as illegal. This claim and challenge was denied. The impaneling of the jury then proceeded in the method indicated, the defendant each time when called on to exercise his right of individual challenge refusing to do so and repeating the challenge to the whole panel.

The state statute allows in felony cases to the defendant 6 peremp-

tory challenges and to the state 2. The federal statute allows 10 and 6. Section 5579 (chapter 159, § 3) of the West Virginia Code requires a panel of 20 jurors to be qualified and presented for challenge. But there is no state or federal statute or rule of the District Court requiring 28; nor was there any federal statute or formal rule of the federal court on the subject.

The essentials to the free exercise of the right of challenge are: First, that the defendant shall have access to the list of jurors; and, second, that he shall have presented to him face to face for challenge jurors ascertained to be legally qualified. There is no complaint that the defendant did not have a list of all the jurors, but the contention is that 28 qualified jurors should have been presented together for challenge instead of 12.

[1-4] At common law the usual practice was to call each juror separately, ascertain his qualifications and present him for challenge. Layers' Case, 16 How. St. Trials, 135 (1722); Brandreth's Case, 32 How. St. Trials, 755 (1817); Regina v. Frost, 9 Car. & P. 129–137; United States v. Aaron Burr, 25 Fed. Cas. 55–83, No. 14,693; 1 Thompson on Trials, 107. But the observance of that method is not essential. Nor is the federal court bound to follow the state statute or the usual practice of the state court. The District Court was therefore free to order any method in presenting qualified jurors which did not impair the free exercise of the right of challenge. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Lewis v. United States, 146 U. S. 378, 13 Sup. Ct. 136, 36 L. Ed. 1011; St. Clair v. United States, 154 U. S. 134, 147, 148, 14 Sup. Ct. 1002, 38 L. Ed. 936; Hendrikson v. United States, 249 Fed. 34, 161 C. C. A. 94.

[5] The opportunity for comparison of jurors is greater when 12 are presented at once than under the common-law method of presenting each juror separately. The complaint against either method is met by the principle, so often repeated, that the right of challenge is a right of rejection, not of choice. The whole matter is so fully and clearly decided against the contention of the defendant in the opinion of the court in St. Clair v. United States, 154 U. S. 134, 147, 148, 14 Sup. Ct. 1002, 38 L. Ed. 936, that further discussion or citation seems unnecessary.

[6] Even if the jurors had been improperly presented, the defendant, not having exhausted his peremptory challenges could not complain of the error. Sawyer v. United States, 202 U. S. 150–165, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269; Conn. Mutual Life Ins. Co. v. Hillmon, 188 U. S. 208, 121, 23 Sup. Ct. 294, 47 L. Ed. 446.

[7] We have recently held that a defendant, indicted for violation of the liquor laws of the United States, may be asked on cross-examination if he has not been guilty of other like offenses, on the issue of the credibility of the witness. Fields v. United States, 221 Fed. 242, 245, 137 C. C. A. 98; Christopoulo v. United States, 230 Fed. 788, 791, 145 C. C. A. 98; Wharton's Crim. Ev. p. 1666; 1 Wigmore, p. 444.

Affirmed.

WADDILL, Circuit Judge (dissenting). The accused was indicted, tried, and convicted for a felony, and sentenced to the penitentiary for the period of one year and a day, and fined $1,000.

Section 287 of the Judicial Code (Comp. St. § 1264) provides that upon the trial of a criminal offense, in cases of treason or capital offense, the defendant shall be entitled to 20 and the United States to 6 peremptory challenges. On the trial of any other felony, the defendant is entitled to 10 and the United States to 6 peremptory challenges; and in all other civil and criminal cases, each party shall be entitled to 3 peremptory challenges.

The crucial question involved is whether the defendant in this case was accorded his right of peremptory challenge contemplated by this statute. As shown by the majority opinion, 36 jurors were drawn for the term, divided into three panels, Nos. 1, 2, and 3, respectively. Upon calling the case, jury No. 1, consisting of 12 men, was placed in the box, and examined as to their qualifications to serve, and upon objection by the government 3 of the jurors were excused, and 3 others chosen in their place, and, no challenge for cause being presented, the defendant was called upon to exercise his right of peremptory challenge to the 12 jurors thus selected. He thereupon, as he had done as soon as jury No. 1 was called, asked and insisted upon being furnished with a list of 28 jurors, from which the jury should be selected, and insisted that this right should be accorded him before being required to exercise his right of peremptory challenge, in order to intelligently make the same. This the court refused, and the 12 jurors then in the box were sworn to try the case, to all of which defendant duly excepted.

Was the defendant denied any right to which he was entitled by this method of selecting the jury? The impaneling of the jury, and the manner and method of exercising the right of challenge on the part of the accused, in the courts of the United States, is what is involved here. How this should be done seems to be fairly settled by decisions of the federal courts of last resort, as shown by three comparatively recent cases treating particularly with the subject, viz.: Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011; Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936—to which reference will be especially made. Three questions are definitely settled by these decisions, which may be briefly stated as follows:

(A) That while the qualifications and exemptions of jurors to serve in the courts of the United States are controlled by the laws of the state in which such courts are held, the laws and usages of the state relating to designating and impaneling jurors are not controlling in the courts of the United States, save as the same may be adopted in said courts by standing rule, or by special order in a particular case. United States v. Shackelford, 18 How. 588, 15 L. Ed. 495; Pointer v. United States, 151 U. S. 407, 14 Sup. Ct. 410, 38 L. Ed. 208, supra; United States v. Richardson (C. C.) 28 Fed. 61, 69.

(B) That the United States District Courts may by standing rule, or

special order in a particular case, designate and prescribe the method of impaneling juries for the trial of criminal cases in such courts.

(C) Where the District Courts have neither by standing rule, adopted the state practice regarding the impaneling of jurors, or prescribed a method of their own, or made a special order in a particular case, the manner and method of impaneling a jury is within the discretion of such courts. But this authority must be exercised subject to the restrictions of Congress as prescribed, and also to such limitations as are recognized by the settled principles of criminal law, to be essential in securing impartial juries for the trial of offenses, and, as differently stated in Lewis v. United States, 146 U. S. 379, 13 Sup. Ct. 139, 36 L. Ed. 1011, supra, subject to the condition "that such rules should be adapted to secure all the rights of the accused."

In this case there was no standing rule adopting the state practice as to impaneling juries. There was no standing rule prescribing the practice in the federal court, nor was there any special order entered prescribing what such practice in this instance should be. The court at the trial proceeded in the absence of such rules and regulations to impanel the jury. This case turns upon whether or not, in the exercise of its discretion under such circumstances, error was committed prejudicial to the accused, or which hindered or embarrassed him in the exercise of his constitutional and statutory rights respecting the jury.

A careful consideration of the above-named cases in the Supreme Court will greatly clarify this subject, and they will be referred to in their proper order. In Lewis v. United States, supra, 146 U. S. 370, 375, 13 Sup. Ct. 136, 36 L. Ed. 1011, the court, at the trial, directed two copies of the list of 37 qualified jurors to be made out by the clerk, one to be given to the district attorney, and the other to the defendant, with the direction that either side proceed to make their challenges, without knowledge on the part of the other as to what challenges were made by each. The record failed to show that, at the time the challenges were made, the jury had been called to the box, or that the prisoner was present; nor did it appear that the clerk called the entire panel of the petit jury, or that they answered to their names, so that they could be inspected by the prisoner. The court set aside the verdict after conviction, and awarded a new trial, because the record did not sufficiently show that what occurred was in the presence of the accused.

In Pointer v. United States, supra, 151 U. S. 396, 408, 409, 411, 14 Sup. Ct. 410, 38 L. Ed. 208, a capital case, a panel of 37 jurors was furnished the prisoner; the said jurors having, in open court, in his presence been found to be qualified to serve, and from this number the government and the defendant respectively were allowed to make their peremptory challenges. The defendant objected to this method, and insisted that he had the right, under the law of Arkansas, to have the government first make its peremptory challenge, before the defense was required to make any. This right was denied; the court holding that the jury was legally and properly selected. In this case, as in the Lewis Case, there was no standing rule or order of court prescribing the manner in which the impaneling of juries should be made.

The third case, St. Clair v. United States, supra, 154 U. S. 146, 147,

148, 14 Sup. Ct. 1002, 38 L. Ed. 936, also a capital case was one where the method pursued of selecting a jury was more in accord with that pursued in the present case in this: That the right of peremptory challenge was made pending the selection of the jurors on voir dire, instead of after the whole panel was completed; but the circumstances of that case are wholly unlike the one here, and while, in a way, it gives color to it, it does not sustain the action of the trial court in this case. There, the Circuit Court of the United States for the Northern District of California, had a standing rule of court on the subject, which in terms required that jurors should be sworn as soon as the examination was completed, and before the examination of another juror. It is as follows:

"In all criminal trials the designation, impaneling, and challenging of jurors shall conform to the laws of this state existing at the time, except as otherwise provided by acts of Congress or the rules of this court; but a juror shall be challenged, or accepted and sworn, in the case as soon as his examination is completed, and before the examination of another juror."

This rule was, in effect, in accordance with the statute of California on the subject. Deering's Penal Code Cal. 1915, §§ 1055, 1057, 1066, 1067, 1068, 1069, 1088. Not only was the method pursued in that case in harmony with the state law, and with the stated rule of court, but the jury was not selected until the first panel of 50 jurors had been examined in the presence of the accused, in open court, and from which number only 8 had been accepted. Whereupon the court ordered 25 additional talesmen to be summoned, returnable to a later day, and from that number likewise in the presence of the accused, in open court, 4 additional jurors were secured. In other words, out of 75 jurors, in pursuance of the fixed rule of court, with full opportunity for the defendant to examine and test their qualifications, these 12 were selected for his trial, with all of whom he was brought face to face in open court.

The first-named cases of Lewis v. United States and Pointer v. United States are more in accord with the general practice, where there is no state authority in vogue, and no rule of court on the subject. They make it quite clear that, before an accused is required to exercise his right of peremptory challenge, he is furnished with the names of the jurors found qualified to try him, from which he may do so, and, it should be said in passing, that the statute of West Virginia expressly provides for the peremptory challenge after the full panel has qualified to serve as jurors.

The real test in whatever method there may be of exercising the peremptory challenge is whether the defendant, when he was required to make the same, was brought face to face with the persons whom he desired to challenge, knew who they were, and how he could intelligently exercise his right of challenge, and at the same time know by whom he was to be tried. This would seem to be clear from the general discussion of the subject in the Pointer Case last cited. The court, at page 408 of 151 U. S., at page 414 of 14 Sup. Ct. (38 L. Ed. 208), says:

"Nor is it contended that the jurors who were examined as to their qualifications before the list of 37 qualified jurors was furnished were not properly selected for general service during the term."

In further reference to the selection of the jury, the court said at page 409 of 151 U. S., at page 415 of 14 Sup. Ct. (38 L. Ed. 208):

"Were his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. The jurors legally summoned for service on the petit jury were, as we have seen, examined in his presence as to their qualifications, and 37 were ascertained, upon such examination, to be qualified to sit in the case. Both the accused and the government had ample opportunity, as this examination progressed, to have any juror who was disqualified rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first 12 unchallenged would constitute the jury for the trial of the case. It is apparent, from the record, that the persons named in the list so furnished were all brought face to face with the prisoner before he was directed to make, and while he was making, his peremptory challenges."

In a further discussion, at page 411 of 151 U. S., at page 416 of 14 Sup. Ct. (38 L. Ed. 208), the court said:

"We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory challenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging 20 jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit on the case. Such a list was furnished to him, and he was at liberty to strike from it the whole number allowed by the statute, with knowledge that the first 12 on the list, not challenged by either side, would constitute the jury."

At page 408 of 151 U. S., at page 414 of 14 Sup. Ct. (38 L. Ed. 208), the court said that—

"Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice."

Can it be seriously claimed that what was done in the present case was in accord with the simple and manifest common-sense requirements set forth in the Pointer Case? To ask this question is to answer it in the negative. Does not that case clearly show, as does the Lewis Case, supra, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011, that before the accused can properly be called upon to exercise his right of peremptory challenge, the names of 28 persons who have been examined in his presence, in open court, had been found qualified to serve as jurors in his case? The necessity for this previous examination is manifest in several parts of the opinion, and the Lewis Case was reversed because the previous examination was apparently made out of the presence of the accused. The denial of the right of peremptory challenge in impaneling the jury is a matter of the greatest moment, and of vital importance to the accused. Mr. Justice Harlan, in the Pointer Case, su-

pra, refers to it as one of the most important of the rights secured to an accused. Coke says the end of challenge is—

"to have an indifferent trial, and which is required by law; and to bar a party indicted of his lawful challenge is to bar him of the principal matter concerning his trial." 3 Inst. 27, c. 2.

It cannot be claimed that the accused was not seriously embarrassed in the exercise of his right of peremptory challenge, by the course pursued in this case. He had, it is true, the names of 12 persons before him for challenge, and he was required to object to them if he intended to or so desired. Had he challenged peremptorily 10 out of the 12 jurors, the government having stricken the names of 3 from the 15 called, only 2 jurors would have been secured, and in the selection of the other 10, he would have been forced to rely only upon the challenge for cause, wholly within the discretion of the court, and by the mere challenging for cause, he might and most probably would have offended some of the persons chosen to try him, with the result that he would thereby have lost the real benefit of his right of peremptory challenge, and been deprived of securing a fair and impartial jury to try him. The course pursued here not only largely impaired the right of peremptory challenge, but it deprived the accused of a comparison and choice between jurors, with little or no opportunity for observation of each juror, essential to the intelligent exercise of the right of challenge. Lamb v. State, 36 Wis. 424.

If the requirement to exercise the right of peremptory challenge, in advance of the choice of the duly qualified panel from which to strike, is ever to be made, it will be seen that there is a great difference in cases where a large number of jurors are called and examined, as in the St. Clair Case, supra, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936, or where, as in the Burr Case, referred to in the majority opinion, 96 persons were called and examined and a case like this, where only 15 were called and sworn. It would seem that the exercise of a wise discretion would, in this case, have forbidden the enforcement of the peremptory challenge, in advance of the accused knowing who the triers were to be, especially over his objection. To have granted his request would have been only to apply the axiomatic doctrine in a criminal case of giving the accused the benefit of the doubt.

HARRIS AUTOMATIC PRESS CO. v. HALL PRINTING PRESS CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1922.)

No. 187.

Patents ⇔328—1,112,609, for press-feeding mechanism, held valid, but not infringed.

The Harris patent, No. 1,112,609, for a sheet feed or separator, *held* valid, but not infringed.

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

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

Suit in equity by the Harris Automatic Press Company against the Hall Printing Press Company. Decree for complainant, and defendant appeals. Reversed.

For the purposes of this opinion, it is sufficient to set forth claims 6 and 11, which are as follows:

"6. In a sheet feed or separator, in combination, means for buckling one or a plurality of sheets at the top of a pile of stock, means for engaging and firmly holding the stock at a point near the engagement of the buckling means with the stock, such holding means preventing any portion of the stock from moving save the buckled portion, a separator located intermediate the buckling means and the holding means and designed to be lowered into contact with the buckled portion of the stock while the buckling and holding means are in engagement therewith, and means for raising such buckling means, holding means and separator from engagement with the stock, the buckling means being disengaged therefrom before the suction separator or holding means is raised to allow any buckled portion of the stock other than the topmost sheet to resume its previous position on the pile."

"11. In a sheet feed or separator, in combination, rotary combing bucklers for buckling one or a plurality of sheets at the top of a pile of stock, such bucklers being designed to engage the pile in proximity to two edges thereof and operable in a fixed plane when in engagement with the pile, presser feet for bearing on and holding the stock at points near the points of engagement of the bucklers, such presser feet preventing any portion of the stock from moving save the buckled portion, separators located intermediate the bucklers and the presser feet and designed to be lowered into contact with the buckled portion of the stock while the bucklers and presser feet are in engagement therewith, such separators being constructed and arranged to engage the buckled portion of the stock and crowd it laterally to increase the separation, at the crest of the buckled portion, between the pile and the topmost sheet, and means for raising such bucklers, feet and separators from engagement with the stock, the bucklers being disengaged therefrom before the separators or feet are raised to allow any buckled portion of the stock other than the topmost sheet to resume its previous position on the pile."

Gifford & Bull, of New York City (George F. Scull, of New York City, of counsel), for appellant.

Philip C. Peck, of New York City, for appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). The patent is in the printing press art and the particular subject-matter relates to automatic paper-feeding mechanism used principally in lithographic presses. "The primary object of this invention," Harris stated in the specification, "is to provide a sheet feed or separator which will be capable of being operated at a high rate of speed, and which will, with equal facility, handle stock of varying degrees of thickness." Prior to Harris, there were automatic feeders in operation at speeds high as compared with hand feeding, and the automatic feeder was, of course, only a part of the lithograph printing press. It is therefore important to ascertain, at the outset, what the art was at the Harris date.

Paper sheet feeding to printing presses or folders from a pile of cut sheets has been and still is done by hand. Where, however, very large numbers of sheets were to be printed, it was appreciated that some automatic method of feeding the sheets would be commercially more economical and effective, because, obviously, in a given time more sheets

could be fed automatically than by hand. The art developed along two general lines; i. e., front edge and rear edge feeders. These were so called because in the front edge feeder the separating and feeding units were arranged along the entire front margin or at the front edge corners, while in the rear edge feeder the sheet separating units were situated at the rear of the pile.

With the alleged defects of front edge feeders we are not concerned, because rear edge feeders were well known, and in addition commercially utilized, prior to Harris, and it is the rear edge feeder to which the Harris patent is addressed; but, under elementary principles, reference may be made to any developments of the prior art. Upon resorting to the prior art, it is found that all of the units referred to in claim 6 and more specifically mentioned in the other claims were old. This fact is not in dispute, and its significance was appreciated by the District Judge in his careful and thorough opinion; for, recognizing that the buckler, presser foot, and the rest were old, he stated the point of the case when he said, "The sequence of the operation is everything." It is because we are satisfied that the sequence in defendant's machine is genuinely and not colorably different from that of the patent that we are unable to agree with the decision below in respect of infringement.

The patent in suit is for a sheet-feeding machine which is designed to pick up a sheet from the top of a pile and feed it into the printing press. The first operation of sheet-feeding machines is to raise some part of the top sheet from the pile and then "wind" it; i. e., separate it from the underlying sheet by a film of air. This initial raising of a part of the sheet is accomplished by "buckling." The general method of buckling may be thus described:

A finger or buckle stop is pressed against the top of the pile, and a portion of the sheet near this presser is then engaged frictionally by a rotating roller or a finger, which moves toward the buckle stop. This engagement is produced by pressure between the roller or the finger (as the case may be) and the pile, and moves the part of the sheet beneath it toward the buckle stop. By reason of the presence of the buckle stop, the sheet as a whole does not move; hence the intervening part is arched up to produce the so-called buckle. In forming the buckle, a part of the sheet below is exposed, both beneath the arch itself and also between the edge of the top sheet and the outer edge of the pile. Both of these spaces have been availed of to insert a pile clamp or presser foot, which presses down on the subjacent sheet and the remaining part of the pile, so that, when the buckling mechanisms (i. e., the buckler and the buckle stop) are removed from the top sheet, the latter is free to be removed from the pile. Such a clamp acts to hold the subjacent sheet against any drag from the top sheet as the latter is being slid off the pile, and particularly holds it against push fingers used in such removal. Before such removal, however, an air blast is usually blown beneath the arched portion to "wind" the sheet and to provide the air film to complete the separation of the top sheet.

Prior to Harris, each one of these parts had been varied greatly in construction and location. Harris worked out a new cycle of operation,

the outstanding features of which were: (1) A separator designed to be lowered in contact with the buckled portion of the stock while the buckling and holding means are in contact therewith; and (2) the disengagement of the buckling means from the stock before the suction separator or holding means is raised, to allow any buckled portion of the stock other than the topmost sheet to resume its previous position on the pile. The result, in a patent sense, of what Harris did, was not new, because he took up the sheet and fed it to the press; but he did this in a new way and obtained a new practical result, namely, increased speed.

It is principally because of the features noted supra, working in a new way in combination with the other elements, that what Harris did rose to the dignity of invention, and the new practical result he attained by increasing the ability of such machines for rapid printing was a patentable contribution to the art. Such a result is a worthy achievement, particularly in a crowded art, and we have no hesitation in holding that the respective cycles of operation in plaintiff's patent and defendant's the patent is valid, and so much is conceded by defendant. But, when machines are contrasted, the difference in these cycles of operation will be at once appreciated:

Downward Movement.

Harris.	Hall.
1. Presser foot.	1. Presser foot.
2. Buckler.	2. Sucker.
3. Sucker.	2. Buckler.

Upward Movement.

Harris.	Hall.
1. Buckler.	1. Presser foot.
2. Sucker.	2. Buckler.
3. Presser foot.	2. Sucker.

Owing to the gearing of the Hall machine, we are satisfied that the buckler and the sucker move simultaneously, although mere visual observation might indicate that the buckler in the upward movement moved slightly ahead of the sucker, and that there was a slight difference in the downward movement. Whether they move simultaneously or not, however, is not important for the purposes of the question here considered.

It is entirely plain that the cycle or sequence of operation in one machine differs from that in the other. What Harris did, inter alia, and what Hall did not do, was to arrange his separators to engage the buckled portion of the stock and crowd it laterally to increase the separation at the crest of the buckled portion. See claim 11. It is this difference which explains the difference in practical results. The Hall machines can accomplish no greater result than was attainable before Harris.

Before 1908, and thus in the prior art, the Dexter, the Fuller, and the Cross, automatic paper-feeding machines were in commercial use. These feeders fed at least 2,500 sheets an hour. It was testified that the Harris feeder would feed the largest size sheets (i. e., 44 in. x 64 in.) at 3,500 per hour, and smaller sizes up to 6,000 per hour, while the

Hall machine can feed only 2,400 to 2,600 of the largest size per hour. In other words, the Harris feeder can feed about 1,000 sheets per hour more than the Hall feeder, and thus can meet the business requirements of those engaged in large production, while Hall cannot.

The truth is that there is no real competition from the patent standpoint. Before the Harris invention, the Dexter could feed 2,500 an hour in round numbers, and now the Hall can do no better. Hence the field above 2,500, which Harris has rightly captured, remains uninvaded so far as Hall is concerned.

We fail to find any convincing evidence that the Dexter, Cross, or Fuller machines worked so as to smear or worked inaccurately, and many of the prior patents taught the art how to do the feeding accurately and without smearing. The real objective was greater speed, and the sequence of the Hall operation shows a cycle of operation different in principle from Harris, and that is why Hall is inferior in respect of speed.

The case is quite different from those where some slight or shrewd change is made, so that the operative result is not as good nor efficient as the result of the practiced invention. A disingenuous effort of that kind is sometimes characterized as an impairment of function; but here, where the difference in operation is real, the result is because of that difference, and not because of an appropriation of plaintiff's inventive thought, as defined in the claims.

A long list of patents has been cited to us to show the mechanical ancestry of defendant's feeder. We think that it is unnecessary to set forth an analysis of these, but we mention Kneeland, No. 326,124, Sedgwick, No. 469,366, and Dexter, No. 754,204, as worthy of consideration.

Finally, we think the case is not one where commercial utility is of service. We have found the patent valid, and we have indicated that defendant's feeder is not in the true sense a competitive article for the highest speed work; but, if commercial utility were of consequence, on this evidence, it is not a safe guide.

Plaintiff's feeder is attached to certain of its printing presses, which sell for a considerable price. Manifestly, the Harris press is a superior machine, and how much of commercial success is due to the merit of the press, with or without the feeder, we are unable to determine.

In concluding, we desire to reiterate that we think the invention meritorious, and that we go no further than to dispose of this case on the substantial question of sequence of operation. For that reason we make no comment as to the "rotary combing buckler," referred to in some of the claims.

The decree is reversed, with costs, solely on the ground of noninfringement, and the District Court is instructed to dismiss the bill, with costs, on that ground.

SOCIETA COMMERCIALE ITALIANA DI NAVIGAZIONE v. MARU NAV. CO.

THE ST. CHARLES.

(Circuit Court of Appeals, Fourth Circuit. February 23, 1922.)

No. 1904.

1. International law ⟸10—Suggestion attached vessel is immune, as in service of foreign government, must come through State Department.
   Suggestions that a vessel attached was immune from seizure, because at the time it was under requisition to and in possession of a foreign government, do not defeat the jurisdiction of the admiralty court, where they did not come through our own Department of State, but came from the consul and ambassador of the foreign government.
2. Salvage ⟸23—Owner of vessel aided is liable in personam.
   Libel in personam to recover salvage may be maintained against the owner of a vessel to which the services are rendered.
3. Salvage ⟸18—Vessel not required to assist another under whose convoy she was required to travel.
   Where an unarmed vessel was required by naval authorities to travel under the convoy of an armed vessel, she was under no legal obligation to render aid to the convoying vessel when the latter stranded, so that such services as she did render were voluntary, entitling her to salvage.
4. Salvage ⟸36—Salvaging vessel is not bound by settlement of master for past services.
   The owner of the vessel which rendered salvage services is not bound by a settlement made by the master after the services were rendered, though the owner will ordinarily be bound by an agreement made in good faith by the master for future services of salvage character.
5. Salvage ⟸30—$34,000 for assisting stranded vessel by her convoy reduced to $20,000.
   Where a vessel was required by naval authorities to travel under convoy of an armed vessel, and, while so traveling, assisted her convoy, which had become stranded, but the services involved no particular danger or difficulty, and were rendered only during the daytime, an award of $34,000 for salvage, with interest, will be reduced to $20,000, without interest, against which award will be credited a payment made to the master of the vessel rendering the assistance, to be distributed among his crew.
6. Salvage ⟸30—Vessel under convoy owes moral duty to assist convoying vessel.
   A vessel which was required by the naval authorities to travel under convoy of another owed a moral duty to assist to float the other after she stranded, though not a legal duty, and the existence of the moral obligation and the fact that the services resulted in the benefit to the salvaging vessel, as well as the other, will be considered in determining the amount of the salvage.
7. Salvage ⟸26—Attempted settlement with master of salvaged vessel does not affect amount of award.
   The amount allowed as salvage is not affected one way or the other by payments to the master of the assisting vessel, even if the owner of the assisted vessel attempted by a collusive settlement with that master to evade liability for a larger sum.

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

Libel in admiralty in personam by the Maru Navigation Company, as owner of the steamship St. Charles, and by the master, officers, and

crew of the steamship, against the Societa Commerciale Italiana Di Navigazione, to recover salvage. From a decree awarding to libelant $34,000, with interest (271 Fed. 97), respondent appeals. Decree modified, to allow $20,000, without interest.

John C. Prizer, of New York City (Barry, Wainwright, Thacher & Symmers, of New York City, and Keech, Deming, Kemp & Carman, of Baltimore, Md., on the brief), for appellant.

Homer L. Loomis, of Baltimore, Md. (Loomis, Barrett & Jones, John Henry Skeen, and Bartlett, Poe & Claggett, all of Baltimore, Md., Isidore Rabinow, of New York City, and J. Kemp Bartlett, Jr., of Baltimore, Md., on the brief), for appellees.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

KNAPP, Circuit Judge. The case in outline is this: On June 8, 1917, the American steamship St. Charles and the Italian steamship Tea were at Gibraltar, both bound for Genoa. The St. Charles was much the smaller and unarmed; the Tea carried a gun. At that time the naval authorities would not permit an unarmed vessel to traverse the Mediterranean without an armed convoy, and accordingly the two vessels were directed to proceed in company. The Tea took the lead, following the windings of the Spanish coast; the St. Charles half a mile or so behind. Early in the morning of June 10th the Tea ran aground, about a mile off shore, and the St. Charles went to her assistance. By their united efforts the Tea was floated the next evening, some 39 hours after the accident happened, and the voyage thereupon continued. On the 16th Genoa was safely reached.

Some two days after arrival at that port the agents of the Tea gave the master of the St. Charles the sum of $5,000 for distribution among his officers and crew, for their services in aiding the former vessel, and also, besides a gold watch, the further sum of $8,000, which he retained, giving $1,000 of it to the master of the Tea and sending the balance home to his wife. In addition to these gifts, the agents of the Tea paid the cost of repairing the minor damages sustained by the St. Charles in assisting the stranded steamship. All this was unknown to the owners of the St. Charles until her return to New York, when certain members of the crew complained because they had received no part of the $5,000. Investigation followed, but it was several months before the facts were ascertained. In the meantime the Tea, after a couple of trips to the United States, had been sunk by a submarine.

[1] These proceedings were instituted in August, 1918, by libel against respondent, in personam, with a clause of foreign attachment, under which the steamship Armando was arrested. Suggestions were made by the Italian consul and by the ambassador of Italy that the Armando was immune from seizure because at the time under requisition to and in possession of the Italian government; but, as neither of these suggestions came from or through our own Department of State, the learned trial judge "declined to consider them as evidence upon the question of fact involved," and proceeded to hear the case on the merits. That this ruling was correct is not open to doubt under the decision of the Supreme Court in Ex parte Muir, 254 U. S. 522, 531, 532, 41 Sup.

Ct. 185, 65 L. Ed. 383. See also The Pesaro, 255 U. S. 216, 41 Sup. Ct. 308, 65 L. Ed. 592, and The Attualita (decided by this court) 238 Fed. 909, 152 C. C. A. 43. It is enough to say without discussion that the court below had full jurisdiction.

The trial resulted in a decree in favor of libelant for $34,000, with interest from November 1, 1917, less certain deductions on account of the $5,000 paid as above mentioned, and respondent appeals.

[2] It was apparently contended at the trial, though not urged here, that the owner of the Tea was not liable in personam, but the contention is without merit. United States v. Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987.

[3] It is argued with some insistence that the relations between the two vessels put upon the St. Charles the duty of assisting the Tea if occasion required, and therefore the former is not entitled to compensation. But those relations were not entered into by mutual consent; they were forced on the St. Charles; there was no agreement, express or implied, that she would aid the Tea in case of need; and no proof of any intent on her part to assume such an obligation. This being so, the service rendered by the St. Charles must be deemed a voluntary service—that is to say, a salvage service, as that term is commonly understood—for which she was entitled to be properly rewarded.

[4] It is further argued that the owner of the St. Charles is bound by the settlement alleged to have been made with her master when the $13,000 was paid him as above mentioned; but the argument must be rejected. For future services of a salvage character the owner will ordinarily be bound by an agreement of the master made in good faith, because of the necessities of the case; but for past services the settled rule is otherwise. The Inchmaree, [1899] L. R. Probate, 111; Bergher v. General Petroleum Co. (D. C.) 242 Fed. 967. How much the payment in this instance should now be taken into account is another question.

[5] In short, we agree with the conclusions of the trial court, except as to the compensation awarded the St. Charles, which seems to us excessive. The reasons for this view will be briefly indicated. It is to be noted in the first place that witnesses from the Tea were not available to respondent, certainly were not produced, because that vessel had been destroyed, and its officers and crew scattered, some time before the trial. The case, therefore, rests on the interested testimony of those on board the St. Charles. Without going into details, it is enough to say that the salvage services in dispute were not of exceptional merit. The Tea was aground for only a portion of her length and wholly uninjured. It was the pleasantest season of the year, the weather clear, and the sea calm. The assistance rendered by the St. Charles involved little, if any, risk to that ship, and no great exertion on the part of her crew. As one witness says, it was "no more dangerous than any other ordinary ship work." In fact, most of the crew had practically nothing to do. The St. Charles, it is true, went aground at the stern soon after starting to assist the Tea, but got herself off in a short time without damage. The efforts put forth the first day were suspended at

nightfall, and not resumed until the next morning. The total detention was less than 40 hours.

Moreover, it can hardly be said that the St. Charles was the only source of relief, since other vessels were passing at no great distance, from one or more of which the needful aid might have been procured. Nor does it seem to us that the danger of submarine attack was sufficient to be taken into serious account in estimating the value of the salvage services. The requirement to go under convoy did not of itself imply the presence of known and actual danger, but was rather a precaution against its possible existence. In the meager and indefinite testimony on this point, little support is found for belief that ships in the territorial waters of Spain were at that time in any real fear of molestation by German submarines; and apparently those in charge of the St. Charles had no apprehension on this score, as the only lookout kept was a man on the bridge.

[6] Whilst we hold, as above stated, that the relations between the two vessels were not such as to deprive the St. Charles of the right to compensation, we are nevertheless of opinion that those relations imposed upon each of them a degree of moral obligation to assist the other in case of need. Besides, it was to the obvious advantage of the St. Charles to render prompt aid when the accident happened. It was against orders for her to proceed without an armed convoy, and her officers were unfamiliar with the coast along which lay her course. This, then, is not the case of assistance which is at once voluntary and against self-interest, but distinctly the case of assistance which, although voluntary in a legal sense, is at the same time of direct and important benefit to the one by whom it is rendered. And this essential difference should be reflected in a materially less award than otherwise would be allowable.

[7] We are unable to see that the value of the services in controversy was affected one way or the other by the payments to the master of the St. Charles, even if it be true that by a collusive settlement with him the owner of the Tea attempted to evade liability for a much larger sum. The compensation which the St. Charles should receive is to be measured by what was done on the Spanish coast, and not by what afterwards took place in the harbor of Genoa.

Each case must, of course, be judged by its own facts, and comparisons are not controlling. But the conclusion reached by us, as to the proper award to the St. Charles, appears to be supported by the awards made in a number of recent cases of a more or less similarity. The St. Charles (D. C.) 254 Fed. 509; The Teresa Accama (D. C.) 254 Fed. 637; The Tordenskjold, 255 Fed. 672, 167 C. C. A. 48; The Jason (D. C.) 257 Fed. 438; The Professor Koch (D. C.) 260 Fed. 969; The Bretanier (C. C. A.) 267 Fed. 178.

Taking all the circumstances into account, we are of opinion that $20,000 would be adequate compensation to the St. Charles, and the decree below will be modified accordingly. We decline to allow interest on the amount awarded. The $5,000 paid to the master and distributed among the officers and crew will be deducted, and the remain-

ing $15,000 paid to libelant. But from this sum libelant shall pay to each member of the crew who got no part of the $5,000 the same amount as was paid therefrom to others receiving the same wages. Costs in this court to be equally divided between the parties.

Modified.

ARNOLD et al. v. UNITED STATES, for Use of W. B. GUIMARIN & CO.

(Circuit Court of Appeals, Fourth Circuit. February 9, 1922.)

No. 1926.

1. **Trial ⟹3—Trying jurisdiction at same time as merits held not abuse of discretion.**

Where the defendants questioned the jurisdiction of the court in an action on a government contractor's bond, on the ground that six months had not elapsed between the final settlement by the government and the beginning of the suit, as required by Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), it was not an abuse of the trial court's discretion to refuse to try the jurisdictional question before the trial on the merits, but instead to submit to the same jury the question as to the date of settlement, which determined the jurisdictional question and the issues as to defendants' liability.

2. **United States ⟹67(3)—Time for suit on contractor's bond begins to run when government has determined amount due; "final settlement."**

The time within which a subcontractor can bring suit on a government contractor's bond begins to run at the date of the "final settlement" by the government, which means the date when the contract has been performed, and the government, in its final adjustment, according to administrative methods, has determined what, if any, amount is due thereunder.

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

3. **United States ⟹67(3)—Correspondence relating to small items of contract held not to postpone final settlement, as regards time for suing on bond.**

Correspondence between the government and the contractor, after the government had ascertained the amount due, which related to two small items of the account, and had no material bearing on the final settlement, did not postpone the date of final settlement from which the subcontractor's time to sue on the bond began to run, especially where the government issued the subcontractor a copy of the contract and bond, to which he would not have been entitled unless six months had expired from the final settlement.

4. **United States ⟹67(3)—Approval by contractor of government's adjustment of amount due is not essential to final settlement as regards action on bond.**

The failure of the general contractor to approve the government's determination of the amount due under the contract does not postpone the date of final settlement, from which the six months which must elapse before the subcontractor can sue on the bond, begins to run.

5. **United States ⟹67(3)—Statutes authorizing suits on contractor's bonds should be liberally construed.**

Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), permitting subcontractors to bring suit on the bond given by the contractor, is highly remedial, and should be interpreted liberally in favor of the subcontractors.

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6. Appeal and error ⟸1051(3)—Exception to admission in evidence of contract admitted by pleadings is without merit.
An exception to the admission in evidence of the contract between plaintiff subcontractor and defendant contractor is without merit, where the due execution of that contract was admitted by the pleadings.

7. Appeal and error ⟸1051(2)—Admission of correspondence without proof of signatures held not prejudicial.
In an action on a government contractor's bond by a subcontractor, the admission in evidence of some correspondence between the parties without proof of the signatures thereto, or of the authority of the persons signing, was not prejudicial to defendants, where the amount claimed under the contract was undisputed and has been unpaid for two years.

8. Jury ⟸14(1)—Action on contractor's bond is at law, entitling parties to jury.
An action by a subcontractor on the bond given by a government contractor is an action at law, in which the parties are entitled to a trial by jury, under Const. Amend. 7, where more than $20 is involved.

9. United States ⟸67(3)—All claims against contractor's bond should be tried before one jury.
In an action by a subcontractor on a government contractor's bond, where other subcontractors and materialmen intervened and sought to recover claims against the contractor, all of the claims of plaintiff and interveners should be submitted at the same time to the same jury, and the trial should be postponed until after the expiration of the time in which claims in intervention can be filed.

10. Appeal and error ⟸1046(1)—Properly directed verdict for recovery on contractor's bond not set aside because other claims were not submitted to same jury.
Where a verdict for plaintiff was properly directed in an action by a subcontractor on a government contractor's bond, it will not be set aside merely because the court failed to submit to the same jury claims of interveners against the same bond.

11. United States ⟸67(3)—Form of judgment on contractor's bond held proper.
In an action by a subcontractor on a government contractor's bond, where the amount of the bond was sufficient to pay the claims of plaintiff and all interveners, a judgment for plaintiff for the full penalty of the bond, in conformity with the state practice making such judgment a forfeiture of the bond, with a provision that judgment should be discharged on the payment to plaintiff of the amount of its claim, was in proper form.

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

Action by the United States, for the use of W. B. Guimarin & Co., against R. H. Arnold, doing business as the R. H. Arnold Company, and the Globe Indemnity Company, to recover on the bond of a government contractor, in which other subcontractors and materialmen duly filed their petitions of intervention. Judgment for the plaintiff, after trial of his claim alone, and defendants bring error. Judgment modified, in so far as it directed a reference to pass on the claims of the interveners, and, as modified, affirmed.

John I. Cosgrove, of Charleston, S. C., and William Henry White, of Washington, D. C. (Logan & Grace, of Charleston, S. C., and Ellwood P. Morey, of Washington, D. C., on the brief), for plaintiffs in error.

Frank G. Tompkins and M. G. McDonald, both of Columbia, S. C., for defendant in error.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WADDILL, Circuit Judge. On the 3d of October, 1917, the plaintiff in error R. H. Arnold entered into a contract with the United States to erect and furnish materials for the erection of a certain storehouse in the United States navy yard at Charleston, S. C. At the time of entering into said contract, the Globe Indemnity Company, also plaintiff in error, as surety, obligated itself, in the penalty of $65,190, for the faithful performance of the contract by the Arnold Company; said contract and bond being severally entered into and executed in pursuance of the act of Congress of the 13th of August, 1894 (28 Stat. c. 280, p. 278), as amended by act of February 24, 1905 (33 Stat. c. 778, p. 811 [Comp. St. § 6923]). On the 4th of October, 1917, the defendant in error, W. B. Guimarin & Co., composed of W. B. Guimarin and E. R. Hayward, copartners trading as W. B. Guimarin & Co., contracted with the Arnold Company as subcontractor to furnish the labor, materials, tools, appliances, and other things required for all plumbing, heating, roofing, drains and fire surface in connection with such building. The work under said contracts was completely performed and final settlement made, determining the amount due by the government.

This suit, in the name of the United States, suing for the benefit of the subcontractors, was instituted to recover the balance due the subcontractor (the general contractor having failed to pay the same) more than six months and within one year after the making of the final settlement as aforesaid, to wit on the 16th day of April, 1920; the United States having instituted no suit during the first period of six months after such settlement. After bringing the suit, sundry other subcontractors and materialmen duly filed their petitions of intervention, as authorized by the act of Congress in question. The defendant filed its answer to the plaintiff's petition, and raised the question of jurisdiction, alleging the suit was prematurely brought—that is to say, within the first six months of the period after settlement of the accounts; the defendant's contention being that the 20th day of September, 1920, and not the 16th of April, 1920, was the true date of the settlement, assuming any final settlement had ever been made under said contract within the meaning of the act.

Plaintiff in error insisted that this question should be determined in advance of the hearing on the merits, either by the court itself, or by submitting the same to the jury. This motion the court overruled, believing it best to hear the testimony thereon, and try the whole case on its merits. The case accordingly went to the jury; the defendant insisting that the jury should be sworn, not only to try the claim as presented by the plaintiffs, but also those of the intervening petitioners, which motion was also overruled. Upon testimony being adduced on the issues thus presented, namely, the question of jurisdiction raised as aforesaid, and upon the merits as to the plaintiff's claim, the defendants moved to direct a verdict, as well upon the merits as upon the question of jurisdiction, which motions the court overruled, and in-

structed the jury to render a verdict in favor of the plaintiffs for the amount due them under their contract, to wit, $7,693.31, with interest from the 19th day of December, 1918. Judgment was duly entered thereon, and the defendants excepted to all action taken, and the case is before this court on writ of error.

The assignments of error, 26 in all, are made to the rulings of the court below. These need not be considered in detail, but grouped according to their subject-matter. They relate chiefly to the question of jurisdiction, which turns upon (1) whether or not a final settlement of the account had been made, when made, and whether the suit was prematurely instituted; (2) whether the court should have impaneled a jury to try the plaintiff's claim alone, or together with the other intervening petitioners; (3) to the ruling of the court in admitting in evidence the contracts in suit, and sundry correspondence had in connection therewith, as well between the parties to the contracts as with government officials; (4) whether there was error upon rendering its judgment upon the verdict in the name of the United States for the full penalty of the bond, and in directing the petitioners' claims to be referred to a master for determination; and (5) whether the court erred in the form of its judgment entered upon the verdict. These will be disposed of in the order named.

[1] First. Was there error in the action of the court in declining preliminarily to dispose of the question of jurisdiction? We think not, certainly upon the pleadings. The defendants appeared generally, filed their answers, and raised the jurisdictional question along with other defenses in the case. The court acted entirely within its discretion, and wisely, in this matter, after hearing all the testimony, and upon the disposition of the case on its merits. The issue as to jurisdiction depended on whether the suit was prematurely instituted or not. From the plaintiff's standpoint, the final settlement had been ascertained and made as of the 16th day of April, 1920. The government having declined to bring suit within the first 6 months period after that date, the plaintiffs procured properly authenticated copies of the contract, bond, and settlement of accounts from the government, and instituted this suit on the 20th of November, 1920, 7 months after the final settlement, and some 30 days after the right to sue had become effective, upon the expiration of the period in which the government had the sole right to sue.

[2] The date at which the statute begins to run—that is, the 12 months period within which suit must be instituted—depends upon when there is, or what constitutes, final settlement under a contract between the government and a general contractor. Mr. Justice Hughes, in Illinois Surety Co. v. United States, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, has made this clear, and to that case, and the authorities therein cited, reference is especially made. Final settlement means when the contract has been performed, and the government in its final adjustment and settlement, according to administrative methods, has determined what, if any, amount, is due thereunder.

[3] The issue is sharply drawn in this case as to when this action was taken by the government, whether on the 16th of April, or the 20th

of September, 1920. The District Court held that the former, and not the latter, was the date of final settlement, in which we concur. It is true that a letter was written on the subject as late as the 20th of September; but this had relation to the two small items of the account, and had no material bearing on the final settlement, which had been determined upon as of April, 1920. Not only do the facts fully sustain this finding by the trial court as to the date of settlement, but we think that it is significant that the government, on proper application being made to it, furnished the plaintiff with a copy of the contract and bond in question, in order that suit might be brought, if so desired, the government having taken no action. If the 20th of September, and not April, 1920, was the correct date of settlement, the plaintiff would not have been entitled to receive these copies.

[4] Defendants seek to avoid the effect of the settlement on the date in question, claiming that, although the work had been completed, the defendants had not acquiesced in the settlement. This position cannot be maintained. It is the ascertainment and determination by the proper governmental authorities of the amount due under the contract, that enables the government on the one hand, and subcontractors on the other, to assert their rights under the bond of the general contractor, and these rights cannot be held in abeyance by the mere failure of the general contractor to approve of what the government has done, or concur in the result thereof. Authorities are quite conclusive on this subject. Illinois Surety Co. v. United States, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, supra; United States v. Winkler (C. C.) 162 Fed. 401; United States v. Bailey (D. C.) 207 Fed. 783; United States v. Robinson, 214 Fed. 38, 130 C. C. A. 434: Robinson v. United States, 251 Fed. 461, 163 C. C. A. 637; United States v. Title Guaranty Co., 254 Fed. 958, 166 C. C. A. 320.

[5] This position is untenable for another reason. It is contrary to the very spirit and purpose of the acts in question, which are highly remedial in character, and intended to afford a prompt remedy to materialmen and laborers under the bond of the general contractor, and should be interpreted liberally in favor of the subcontractors. U. S. F. & G. Co. v. Golden, etc., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; U. S. to Use of Hill v. American Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437; Mankin v. United States, 215 U. S. 533, 30 Sup. Ct. 174, 54 L. Ed. 315; Alexander Bryant & Co. v. N. Y. Steamfitting Co., 235 U. S. 327, 35 Sup. Ct. 108, 59 L. Ed. 253; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 Sup. Ct. 614, 61 L. Ed. 1206. To maintain the position of the general contractor in this respect would be entirely subversive of the interests alike of the government and of the subcontractors, and largely destroy the benefits sought to be attained by the act.

[6, 7] Second. A careful examination of the several documents offered in evidence, and the correspondence in connection therewith, as well between the contractor and subcontractor and government officials, convinces us that these exceptions, one and all, are without merit. To illustrate: One relates to the signing of the contract with the subcontractor, when its due execution is admitted in the pleadings; and while in some instances the introduction of letters and papers of the charac-

ter mentioned might be subject to exception, or, in proper cases, call for proof as to the execution of the same, or for the authority to sign such letters still, in this case, where they consist mainly of correspondence between the parties, of and concerning the very subject-matter of this suit, with the amount claimed undisputed and unpaid 2 years, it does not appear at least that any possible prejudice could have arisen from the admission in evidence and a full consideration of all the papers objected to.

[8] Third. Was there error in the action of the court in according to the plaintiffs singly a jury trial, excluding the cases of the several petitioners, and in entering judgment directing that the latter claims be ascertained by a master? Whatever may have been the belief originally, on the part of some, as to whether action on a contractor's bond of the character under consideration here was a proceeding at law or in equity, it is now and has long since been definitely held to be an action at law. Illinois Surety Co. v. The United States, 240 U. S. 214, 223, 36 Sup. Ct. 321, 60 L. Ed. 609, supra. In actions at law, the right to trial by jury follows, it being a right granted by the Constitution of the United States, where more than $20 is involved. Const. Amend. 7.

[9] The sole question, therefore, on this exception, is whether there should have been a single jury trial of the claims of the plaintiffs and the several petitioners jointly, instead of that of the plaintiffs alone. We think it clear that a jury should have been impaneled to try and dispose on a single trial of all of the petitioners' claims, as well as that of the plaintiffs; the statutory period in which petitions could be filed having expired. It may be said, in passing, that except in most unusual cases a jury trial should not be had, in a case like the present, until the expiration of the period in which petitions may be filed, when a single trial, covering all the claims, should be had. The recent case of Miller v. American Bonding Co., a decision of the Supreme Court, decided December 12, 1921, not yet [officially] reported, 256 U. S. —, 42 Sup. Ct. 98, 66 L. Ed. —, makes clear what should be done here, and the course of procedure in like cases.

[10] Fourth. Considering the action to be taken upon the judgment in this case, it seems to us, the same having been fully tried so far as the plaintiffs are concerned, without request from the petitioners to be heard, or objection on their part as to the course pursued, that the action of the lower court should not be disturbed in its ascertainment of the amount due plaintiffs. The court instructed the jury to find for the plaintiffs, and properly so, as there was no testimony questioning the validity and correctness of their claim, and the judgment should be treated as that of a judgment on the bond, along with other petitioners, when judgments are rendered in their favor.

The judgment of the District Court, directing the reference to a master to pass upon the claims of the several petitioners, should be modified, and a jury trial awarded, to determine in a single trial the amounts due the several petitioners.

[11] Fifth. Was there error in the form of the judgment by the lower court, in that the same was entered in favor of the United States, and for the full amount of the penal sum of the bond sued on? The

court's idea, manifestly, in entering this judgment for the full penalty, was that, under South Carolina practice, such action constituted a forfeiture of the bond, and enabled persons in the position of the plaintiffs and the petitioners to come in and assert their claims, the aggregate not to exceed the amount of the bond, so far as the surety was concerned. The record in this case is a little confusing, in that the judgment entered on July 7, 1921, is not in the exact terms of the order of the judgment of 18th of June, 1921.

It is evident, upon consideration of the order of judgment and judgment thereon, that the court held, and meant to hold, that the contract between R. H. Arnold & Co. and the United States, dated the 3d of October, 1917, referred to in the proceedings, had been fully performed, and final settlement made on the 16th day of April, 1920, and that there was due to the plaintiffs from the general contractor the sum of $7,693.31, with interest from December 19, 1918, amounting in all to $9,035.59, and that, suit having been instituted upon the bond in the name of the United States, suing for the use of W. B. Guimarin & Co., judgment should be entered in favor of the United States for the sum of $65,190, the penal sum of the bond referred to, to be discharged by the payment to the said Guimarin & Co. of $7,693.31, with interest from the 19th of December, 1918, until paid, together with costs, $54.11; it appearing that the plaintiffs' and petitioners' claims combined do not exceed the penal sum of said bond.

We think the judgment as thus understood is correct and should be so modified, and that the several petitioners, upon ascertainment of the amounts respectively due them, should be entitled to like judgments; the total judgments, including that of the plaintiffs herein, not to exceed the penalty of the bond. The decision of the lower court, as herein modified, will be approved and affirmed.

Modified and affirmed.

SOUTHERN RY. CO. v. COLUMBIA COMPRESS CO.

(Circuit Court of Appeals, Fourth Circuit. February 8, 1922.)

No. 1891.

Indemnity ⇐9(1)—Provisions of lease construed; "other property."

A railway company leased ground on its right of way for a cotton compress, with warehouse, platform, sheds, and appurtenances, the lease providing that the compress company should indemnify the railway company "against all claims * * * accruing to the compress company or to any other party against the railway company for loss or injury to said compress or warehouse or other building, or the contents thereof, or other property, which may be caused by fire or otherwise, however resulting, * * * and arising by reason of the presence of said plant or the operation or maintenance thereof upon the premises of the railway company." *Held*, that the claims referred to were claims which might be asserted by the compress company, or its sublessees or customers, for damage by fire caused by locomotives of the railway company, and for which it was liable under the state statute, and that the words "other property" were limited in meaning to property which, like that specifically enumerated, was located or kept on the demised premises, and that

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

the provision did not render the compress company liable for the loss of cars of other railroad companies, for which lessor was responsible, which were destroyed by a fire originating on the leased premises while standing on an adjacent track.

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

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

Action at law by the Southern Railway Company against the Columbia Compress Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Frank G. Tompkins, of Columbia, S. C., for plaintiff in error.

J. B. S. Lyles, of Columbia, S. C., for defendant in error.

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

WATKINS, District Judge. Several years prior to 1906, Southern Railway Company, plaintiff in error, leased to Columbia Compress Company, defendant in error, a lot of land comprising practically an entire city block in the industrial section of Columbia, S. C. The compress company proceeded to construct a plant, consisting of a cotton compress, warehouses, platforms, etc., for the purpose of conducting a general cotton compressing and storage business. On one side of the leased premises were the tracks of the Atlantic Coast Line Railroad Company; on the other, an industrial track of the Southern Railway Company, leading into and for the use of the leased premises, another side track of the said railway company, used in its own business, and also one of its main line tracks. The original lease was renewed under date of July 31, 1906. On December 2, 1916, a fire originated on the leased premises, and was communicated therefrom to certain railroad cars standing on the side track of the Southern Railway Company adjacent to the leased premises.

This action was brought by the railway company for the purpose of recovering the amount of damage caused by said fire to certain railroad cars standing on the last-mentioned side track and their contents. Some of these cars were the property of the Southern Railway Company; others the property of other railroads, and which were in its custody in course of transportation, and for which last-mentioned cars and their contents, which consisted of cotton only, the Southern Railway Company was responsible. The buildings of the Compress Company, as they stood at the date of the fire, had been in existence for more than six years. The claim of the railway company was based upon the assertion that the fire was caused by the negligence of the compress company, and also upon the ground that under the terms of the aforementioned lease the compress company was made liable for any damage caused by fire originating on the leased premises and therefrom communicated to the property of the railway company, or property for which it was liable, irrespective of the cause of such fire. The

issue of negligence was submitted to the jury under instructions of the court, to which no exceptions are taken, and a special verdict was rendered, absolving the compress company of this charge. With the elimination of this issue, it is agreed that the claim of the railway company could not embrace damage to its own cars, but, if allowed at all, should embrace only that portion of the damaged property which belonged to others and for which it was primarily responsible. There seems to have been no dispute as to the amount of this damage.

Counsel for both sides requested the court peremptorily to instruct verdicts in behalf of their respective clients. Pending the consideration and construction of the terms of the lease, the court directed the jury to find a verdict for the plaintiff for the amount of the damage proved, stating that the judgment would be arrested and the verdict set aside if, after examination of the contract, the construction claimed by plaintiff was found to be incorrect. Accordingly, upon further consideration of the contract or lease, the verdict was set aside and the defendant was adjudged the right to enter up judgment as if the verdict of the jury had been in its favor.

The liability of the compress company depends upon the construction to be placed upon the eighth clause of the lease, in which certain of its obligations are set forth as follows:

"(8) That it will indemnify and save harmless the railway company against any and all loss or damage to the property of the railway company which may be caused by or originate from the negligence of the compress company, its agents, servants, or sublessees in or about the use of said demised premises and against all claims, demands, suits, judgments, and sums of money accruing to the compress company, or to any other party, against the railway company, for loss of or injury to said compress or warehouse or other building, or the contents thereof, or other property, which may be caused by fire or otherwise, however, resulting, either to person or estate, and arising by reason of the presence of said plant or the operation or maintenance thereof upon the premises of the railway company."

This provision was inserted in the contract for the benefit of the railway company and whatever ambiguity arises out of the language employed by the parties must, under the well-settled rules of construction adopted by the courts, be construed most strongly against the party for whose benefit the clause was inserted. Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757; Texas & Pacific Railway Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 252, 46 L. Ed. 358; Capital City Bank v. Hilson, 59 Fla. 215, 51 South. 853; 6 R. C. L. 855. The entire contract must be taken into consideration, together with the circumstances and laws surrounding and governing the parties, in order to arrive at their intention. At the time of the execution of the contract, and at the time of the fire, railroad corporations were made liable by the laws of South Carolina for damages to buildings or other property caused by fire communicated by the locomotive engines of such railroads or originating upon their rights of way, except in cases of property placed upon such rights of way without the railroads' consent. In agreeing, therefore, by contract, to the establishment of the compress company's plant upon such right of way, the railway company's officials must have had in mind, among other things, the necessity of protecting it against the extraordinary

risks under the statute which would result from the establishment and maintenance of a business where so much inflammable material would be handled and stored in close proximity to its moving engines, and to which fire might so easily be communicated both by said engines and from other causes.

An analysis of the section under construction will show that its first object was to indemnify the railway company against all loss or damage to its own property caused by or originating from the negligence of the compress company, and its representatives or sublessees in or about the use of the premises. Under this clause no claim could be asserted, unless founded upon negligence, and then only for injury resulting to the property of the railway company, and, even if this were true, the negligence creating the liability was limited to some act growing out of the use of the demised premises. It will be observed that this clause does not undertake to protect the railway company against its statutory liability to adjacent property owners for fires communicated from its right of way, even though originating on the demised premises through the negligence of the lessees. The indemnity covered the property of the railroad alone. The second clause or subdivision of this section was intended to indemnify the railway company against certain claims that might be asserted against it, either in the absence of contract or primarily asserted against it notwithstanding the contract. While the first clause related to all claims that might be occasioned by negligence within the limits set out, the claims mentioned in the second clause must be based on damages occurring by fire or otherwise, and negligence of the defendant was not required to give them validity. There being no issue in this case as to damages other than that caused by fire, it is unnecessary to consider the effect of the expression "or otherwise."

The instant issue is whether the expression "or other property" is to be construed as sufficiently comprehensive to embrace property injured or destroyed by fire communicated from the compress company's plant, although not located thereon, or is to be restricted to property upon the demised premises. The comprehensive phrase thus employed is used in connection with certain particular recitals and its construction is subject to the rule of ejusdem generis. This rule is succinctly stated in the case of Treasurers v. Thomas Lang et al., 2 Bailey (S. C.) 430, as follows:

"There is no question that general and unlimited terms are restrained and limited by particular recitals, when used in connection with them, whether they are found in the recital of a bond or covenant, or any other writing, or used in ordinary conversation, for the obvious reason that they convey a more definite idea, and are therefore less liable to misconception."

In Ex parte Leland, 1 Nott & McC. (S. C.) 460, the rule is thus stated:

"When an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term however general and comprehensive in its possible import, yet, when thus used, embraces only things 'ejusdem generis'—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms."

In 36 Cyc. 1120, it is said:

"The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like, and to include only others of like kind or character."

See, also, 25 Am. & Eng. Ency. of Law, 1012.

In the case of Alabama v. Montague, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. Ed. 1000, the court says:

"While the company is thus specific in its description of the subjects of the mortgage, enumerating with great particularity its land grant from Congress, its telegraph lines and offices, its machine shops, and its coal mines, it is quite unreasonable to suppose that the company would have been thus needlessly minute in its description of the property conveyed, enumerating with great particularity the four or five classes of property, mostly real estate, which were intended to pass, if it had also intended that the three words, 'all other property,' should stand for everything in the four states, which the company owned, and especially all its lands."

In Words and Phrases, vol. 3, page 2328, vol. 8, page 7647, and vol. 2, Second Series, 225, will be found citations of numerous cases upon the rule and its application. To these may be added State v. Williams, 2 Strob. (S. C.) 474; Commissioners of Public Accounts v. Greenwood et al., 1 Desaus. (S. C.) 450; United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304; United States v. Baumgartner (D. C.) 259 Fed. 722; United States v. Florida East Coast Ry. Co., 222 Fed. 33, 137 C. C. A. 571; Hills v. Joseph, 229 Fed. 865, 144 C. C. A. 147; Lewis' Sutherland Statutory Construction, vol. 2, p. 814, § 422.

It will be observed that the claims indemnified against are specified as those accruing to the compress company or to any other party—evidently such party as may be interested by virtue of relationship to the compress company as lessee, agent, customer, or otherwise, for loss of or injury to "said compress or warehouse or other building or the contents thereof." The words "or other property" immediately follow an enumeration of a particular class of property, not only as to kind and location, but also as to ownership. The word "said" evidently refers to property mentioned in a preceding section of the contract, wherein the compress company was obligated, during the life of the lease, to maintain and operate upon the demised premises a cotton compress, "together with a warehouse or warehouses and cotton platforms, sheds, and appurtenances to the same belonging." In the conduct of its business it was to be expected that these various structures should be used for the storage of cotton belonging to the compress company, or its customers, as well as of other property used by it in connection with its business. The contract contemplated a possibility of a subleasing of the plant or parts thereof, and provided the conditions under which this might be effected. For these reasons the railway company was to be indemnified against claims accruing, not only to the compress company, but to its sublessees and customers for injury to said property. "Any other party," therefore, as here used, would, upon the principle of noscitur a sociis, naturally be taken as meaning one bearing some definite relationship to the compress company, whether as customer, agent, sublessee, or otherwise.

If the above-quoted language should be construed to leave any doubt

as to the proper construction of its meaning, such doubt is effectively removed by the concluding words of section 8, wherein the claims accruing to the aforesaid party are limited to those "arising by reason of the presence of said plant or the operation or maintenance thereof upon the premises of the railway company." If the words, "other property" are to be used in the comprehensive sense urged by counsel for plaintiff in error, it is difficult to understand the particularity with which the contract sets out property located upon the premises only, including buildings and their contents, and why the compress company and any other party interested in said property should be singled out of all others, and why the claims accruing against the railway company should arise by reason of the presence of the plant of the compress company and its operation and maintenance upon the premises of the railway company. Taken as a whole, the eighth section of the contract, outside of the indemnity provision against the compress company's negligence, seems to have been intended as an indemnity to the railway company against any claim for damage by fire or otherwise to such property as might be upon the leased premises pursuant to the lease, including buildings, contents, or other property, either of the compress company or of those with whom it deals in the maintenance and operation of its plant.

The judgment of the District Court must therefore be affirmed.

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

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1921.

1. **Courts ⟸426—Jury ⟸19(1)—In District Court suit under Lever Act, all controversies as to seized property may be litigated and tried by jury.**

Under Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), giving the owner of requisitioned property the right to sue in the District Courts for just compensation, the District Court has complete jurisdiction to hear and determine all controversies arising from taking property of the kind in question, where the amount fixed by the President is deemed by the owner insufficient, and the parties are entitled to a jury trial to ascertain the just compensation.

2. **United States ⟸110—Not chargeable with interest on claims against it, in absence of statutory authority.**

Under the rules established by the courts and the invariable practice of the executive departments, interest on a claim will not be allowed against the government, except where payment thereof is expressly stipulated for by contract or is given in terms by Act of Congress, even though the claim is one which the District Court can adjudicate, under Judicial Code, § 24, par. 20 (Comp. St. § 991), and the inhibition of allowance of interest applies only to the Court of Claims.

3. **Courts ⟸363—War ⟸14—Proceedings under Lever Act to recover compensation for property seized are not "condemnation proceedings," so as to authorize interest.**

Proceedings instituted in the District Court by the owners of property seized under Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), by the exercise of war powers of the United

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

States, to recover just compensation for the property so taken, are not condemnation proceedings, which are proceedings by which the government, in the exercise of its power of eminent domain, institutes its suit against the citizen to acquire title to property, so that a rule allowing interest in condemnation proceedings in conformity to state statutes would not require the allowance of interest proceedings under the act.

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

4. War ⇐14—Courts have no discretion to allow interest on claims under the Lever Act.

Since Congress has not provided for the payment of interest on claims for property requisitioned under Lever Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), the court has no discretion in allowing or withholding interest, nor can it be influenced in that regard by what it considers just and equitable.

Woods, Circuit Judge, dissenting.

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

Action by the Seaboard Air Line Railway Company and others against the United States to recover for property seized by the government for war purposes. Judgment for plaintiffs, and the United States brings error. Reversed, and new trial awarded, unless the interest allowed on the value of the property be abated.

See, also, 275 Fed. 77.

Francis H. Weston, U. S. Atty., of Columbia, S. C. (G. L. B. Rivers, Asst. U. S. Atty., of Charleston, S. C., and Howard W. Ameli, of Washington, D. C., on the brief), for the United States.

George L. Buist, of Charleston, S. C. (Buist & Buist, of Charleston, S. C., on the brief), for defendants in error.

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge.

WADDILL, Circuit Judge. This is a writ of error to a judgment of the United States District Court for the Eastern District of South Carolina, in an action at law, wherein the plaintiff in error was defendant, and the defendant in error was plaintiff. The facts of the case are briefly these:

On the 23d day of May, 1919, the President of the United States, pursuant to the provisions of the act of Congress of the 10th of August, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛*l*–3115⅛r), familiarly known as the Lever "National Defense Act," requisitioned and possessed himself of certain lands mentioned and described in the proceedings, for governmental purposes, in order to provide storage facilities for supplies necessary to the support of the army, and other public uses connected with the public defense; and the President, pursuant to section 10 of said act (section 3115⅛ii), caused to be appropriately ascertained what was just compensation to be paid by the government for the property taken, with which valuation the plaintiff was dissatisfied, and instituted this suit for the purpose of recovering such reasonable and fair valuation

as he alleged would constitute just compensation for the lands taken. The government duly appeared, admitted the facts as to the taking of the property, and its possession thereof, but denied the valuation placed on the land by the plaintiffs, and insisted that the government valuation was the fair and full value therefor, and constituted just and ample compensation, which amount the government was ready to pay.

Issue being joined, on plaintiff's motion, a jury was impaneled to ascertain what would constitute just compensation for the property taken, and on the 5th of May, 1920, a verdict was returned, awarding to the plaintiff $6,000, the value as of the date of the taking of the property. On the 9th of May, 1920, judgment was entered upon the verdict against the United States, for the amount thereof, with interest from the 23d day of May, 1919, the date on which the property was taken, at the rate of 7 per cent., the court stating that to be the statutory rate of interest in South Carolina. To the entry of this judgment, the United States, by its attorney, excepted, and the case is here upon writ of error to test the validity of the same.

Several assignments of error are presented, but the one pressed and relied upon by the government, all other questions being in effect waived, is as to the allowance of interest on the judgment from any time and at any rate. Did the District Court err in awarding interest at the rate of 7 per cent. upon the verdict, from the date of the taking of the property, some two years antedating the rendition of the same? This is the sole question at issue in this case.

[1] Section 10 of the Lever Act provides that the President may requisition foods, feeds, fuels, and other war supplies, and necessary storage facilities, and that he shall ascertain and pay just compensation therefor, and, if any person is not satisfied with the President's award, he is to receive 75 per cent. of the award, and for the balance of the claim "shall be entitled to sue the United States * * * and jurisdiction is hereby conferred on the United States District Court to hear and determine all such controversies." Under this section, the District Court is given full and complete jurisdiction to hear and determine all controversies arising from taking property of the kind in question, where the amount fixed by the President is deemed by the property owner insufficient, and he may sue, and the parties are entitled to a trial by jury to ascertain the just compensation for the property taken. United States v. Pfitsch (decided June 1, 1921) 256 U. S. 547, 41 Sup. Ct. 569, 65 L. Ed. 1084.

[2] It has long been recognized, by an almost unbroken line of federal decisions, as well as by the invariable practice of the executive departments, that interest will not be allowed against the government, save where payment thereof is expressly stipulated for by contract, or is given in terms by the act of Congress under consideration. Citations from the Supreme and inferior courts to sustain this view, might be given almost without number, but only a few need be mentioned. In Pacific Coast Steamship Co. v. United States, 33 Ct. Cl. 36, Judge Howry, at page 49, aptly states the doctrine as follows:

"Interest, therefore, as a rule, is the creature of the statute. The courts have announced this proposition so often, and text-writers have so generally

accepted the same as correct, it may now be said to be axiomatic that unless the warrant for the payment of interest be found in the statute interest cannot be collected. The principle is well settled that the United States are not liable to pay interest on claims against them in the absence of statutory direction. This is so whether such claims originate in contract or in tort, or whether they arise in the ordinary course of business with the government, or under legislation making appropriations for specific relief. The only recognized exceptions are where the government stipulates to pay interest, and where it is expressly given by an act of Congress, either by the name of interest or by that of damages. The practice has long prevailed in the departments of not allowing interest on claims presented, liquidated or unliquidated, except in some way specially provided for. The Supreme Court adopted this rule from a succession of the opinions of the Attorneys General of the United States in a well-considered case on the subject, from which we know of no settled departure. Angarica v. Bayard, 127 U. S. 251. See, also, Gordon v. United States, 7 Wall. 188, and Harvey v. United States, 113 U. S. 243, 249; United States v. New York, 160 U. S. 619."

In one of the very latest cases, United States v. Rogers, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, relied on by the lower court, in which interest was allowed in condemnation proceedings instituted by the government, Mr. Justice Day, speaking for the court, said:

"It is unquestionably true that the United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. Angarica v. Bayard, 127 U. S. 251, 260; United States v. North Carolina, 136 U. S. 211, 216, cited and approved in National Volunteer Home v. Parrish, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the government, as was the fact in United States v. North American Transportation & Trading Co., 253 U. S. 330."

In the Rogers Case, Mr. Justice Day cited United States v. North American Transportation Co., 253 U. S. 333, 334, 335, 336, and 337, 40 Sup. Ct. 518, 64 L. Ed. 935, a suit in its essential features like the one here, save that the latter came from the Court of Claims, and nearly 20 years had elapsed between the taking of the property and the rendition of the judgment. In the last-named case, Mr. Justice Brandeis most comprehensively reviews the authorities bearing on the entire subject, from which it will readily be seen that irrespective of what may be done in condemnation proceedings, brought by the government against a citizen, interest will not be allowed where the government is being sued. This case would seem to remove all doubt on this generally accepted well settled question, and shows that the government, entirely regardless of what may be said of the injustice of its position, has hitherto consistently held to its right as at common law, not to be charged with the consequences of loss arising from delays, even if hardships ensue. The result in this respect is similar to the refusal to allow costs to be taxed against the government, or to be held responsible for the tortious acts of its agents. These conditions necessarily arise in dealing with the sovereign, and for which there is no redress.

The case of Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543, will be found of special application here. There, Congress referred to the Court of Claims to "investigate * * * and 'ascertain * * * the amount equitably due'" as damages for alleged breach of contract, and the question arose as to whether, by the use of the

word "equitable," it was not intended by the act that interest should be allowed on the award. The Supreme Court, speaking through Chief Justice Waite, said, at page 46 of 100 U. S. (25 L. Ed. 543):

"But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and, because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."

Cases arising under section 1 of the Act of March 3, 1887 (now section 24, par. 20, of the Judicial Code [Comp. St. § 991]), conferring on District and Circuit Courts jurisdiction to hear certain claims against the government, though the inhibition against the allowance of interest applies only to the Court of Claims, and not specially to those courts, they invariably, as far as is known, disallow interest, unless the same is either stipulated for, or given by act of Congress. Marvin v. United States (C. C.) 44 Fed. 405; United States v. Barber, 74 Fed. 483, 20 C. C. A. 616; United States v. Sargent, 162 Fed. 81, 89 C. C. A. 81; Scully v. United States (D. C.) 197 Fed. 327. In other cases before District Courts, arising under special acts of Congress, generally in admiralty cases (Watts v. United States [D. C.] 129 Fed. 222, 226; Pennell v. United States (D. C.) 162 Fed. 75), those tribunals likewise, and for like reasons, invariably refuse to allow interest in that class of litigation. The executive branches of the government have been no less positive in their refusal to allow interest on claims against the government than have the courts to make any ruling on the same subject, the former going to the extent of insisting upon interest on amounts due it, in the adjustment of claims, and at the same time denying to the creditors the like right. United States v. Verdier, 164 U. S. 213, 218, 219, 17 Sup. Ct. 42, 41 L. Ed. 407.

[3] The court based its ruling in this case upon the decision of United States v. Rogers, supra, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, a condemnation proceeding, and it is earnestly insisted, as it is necessary to do, in order to bring this case within the ruling in that case, that this is virtually a condemnation proceeding. Nothing could be further from the fact, as viewed by the court. What is, and what is not, a condemnation proceeding, can hardly be the subject of serious discussion from a legal standpoint. It is one in which the government in the exercise of its power of eminent domain, one of its most important requisites of sovereignty, institutes its suit against the citizen to acquire title to property, upon the awarding of just compensation for what is proposed to be taken. The government is the actor, the mover. The citizen is the defendant, brought in involuntarily, for the purpose of having taken from him property belonging to him, upon compensation being made therefor. Upon the lawful conclusion of such proceeding, and payment of the amount awarded for the property taken, title thereto vests in the government.

In such proceedings, especially where conducted under the conformity act in states in which interest is allowed on condemnation awards, interest may, in some instances, have been awarded against the government; but the decision in the case of United States v. Rogers, supra, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, is believed to be

the first and only case in which it has been suggested that interest could be awarded independent of such statute, if the court meant to so state, which is doubtful, it merely saying, on the contrary, that it was not so bound because of the existence of the state statute, but nevertheless thought it a convenient and fair method of ascertaining the sum to which the owner of the land was entitled. The vital point in that case was that there was a state statute allowing interest. The District Court and the Circuit Court of Appeals followed the same in making the allowance of interest, which action the Supreme Court affirmed. As before shown in that case the Supreme Court expressly recognized the doctrine of the disallowance of interest against the government, and it was careful to distinguish between that case and that of United States v. North American Transportation Co., 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935, supra, which we think is conclusive of this case.

The present case is in no sense a condemnation proceeding. Here the Congress, in the exercise of its war powers, in express terms authorized the President, Commander-in-Chief of the army, to requisition the property taken for national defense purposes, and to pay a just compensation for the same, and in case of dissatisfaction by the person whose property was taken, he was to receive at once 75 per cent. of the award, and was given permission to sue in the United States District Court for the residue.

Such action is but a plain and simple suit at law, to recover from the government upon an implied contract to pay for property lawfully taken, but not paid for. Mr. Justice Brandeis, in the case of United States v. Pfitsch, supra (not yet reported), speaking for the Supreme Court, considering especially the effect of section 10 as conferring this jurisdiction upon the District Courts, aptly refers to the same as "the usual procedure of a District Court in actions at law for money compensation," and it was held that the right of trial by jury existed in such case. See, also, Langford v. United States, 101 U. S. 341, 25 L. Ed. 1010; Schillinger v. United States, 155 U. S. 163, 166, 15 Sup. Ct. 85, 39 L. Ed. 108; Tempel v. United States, 248 U. S. 121, 129, 39 Sup. Ct. 56, 63 L. Ed. 162; United States v. North American Transportation Co., 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935, supra. It will not be found that interest has ever been awarded against the government in such a case, or class of cases. The fact that the District Court hears the case, not as a Court of Claims, but solely under clause 10 of the Lever Act, with the right of trial by jury, makes no difference, since interest can be allowed only when the act of Congress plainly makes provision therefor.

A review of other sections of the Lever Act, authorizing the requisition of property, will give added strength to views herein expressed. Section 12 (section 3115⅛jj) relates to factories, mines, and pipe lines; section 16 (section 3115⅛*ll*) to distilled spirits; and section 25 (section 3115⅛q) to coal or coke mines or businesses. Each of these three sections provides in identical terms that a person, dissatisfied with the President's award, shall be entitled to sue the United States; but each section makes provision for suit against the United States to recover

just compensation, in terms materially different from those of section 10—that is to say, these three sections provide for suits (section 145 Judicial Code [Comp. St. § 1136]) in the Court of Claims where the amount in controversy exceeds the sum of $10,000, and in the District Courts (section 24, par. 20, Judicial Code [Comp. St. § 991]), concurrent with the Court of Claims, where the amount involved is less than $10,000. The Court of Claims is inhibited from awarding interest prior to the time of the rendition of the judgment, unless the same be expressly stipulated for (section 177, Judicial Code [Comp. St. § 1168]), and a District Court sitting as a Court of Claims, at least by analogy, has no greater or other power. It can hardly be conceived that Congress in making provision for payment of property requisitioned by the government, under the same act, meant to deny interest to claimants under some sections of the law, and to leave it open to courts to allow the same on awards under other provisions thereof.

[4] In reaching its conclusion, the court has no discretion in allowing or withholding interest, nor can it be influenced by mere equitable consideration of what may appear in a particular case to be just and right. The fact that Congress has or has not seen fit to make provision for the payment of interest, must be its guide. It may not substitute its judgment for that of Congress, and it should be slow to assume that Congress did not act advisedly and wisely in foreseeing that during a great war, and the period following its conclusion, all sorts and kinds of claims would have to be met and adjusted, necessarily consuming much time, and almost inevitably involving heavy loss to the government. Under these conditions, Congress rightfully refused to impose upon the government the further burden of paying interest on claims, pending delays incident to such contests. Indeed, all claim of injustice on the part of the government is silenced, when it undertook voluntarily the payment in advance of 75 per cent. of its award, on account of such claims. Assuming the present case to be fairly typical of those likely to arise, it will readily be seen how far-reaching and important the question is. Here the President's appraisers have fixed the value of the property to be taken at $235.80, one-fourth of which is $58.95. Suit was instituted to recover $100,000, and the jury rendered a verdict in favor of the plaintiff for $6,000, upon which 7 per cent. interest per annum was allowed by the court, antedating the judgment some two years. Thus the annual interest allowed on the debt was almost twice the amount of the government's original valuation.

The judgment of the lower court will be reversed, and a new trial awarded, unless the defendant in error shall, within 60 days from the date of the judgment hereon, file with the clerk of the lower court, and a copy thereof with the clerk of this court, a remittitur abating all interest upon the judgment.

Reversed.

WOODS, Circuit Judge (dissenting). Section 10 of the Act of August 10, 1917, 40 Stat. 276, 279 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), provides:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Under this act the President, on May 23, 1919, requisitioned and took possession of a parcel of land, the property of the Seaboard Air Line Railway Company, and ascertained its value to be $235.80, but paid no part of the estimated value. Being dissatisfied with this valuation, the railway company on August 9, 1920, sued the United States to recover $99,823.15—the difference between $100,000, the alleged value of the property, and 75 per centum of the value fixed by the President, and interest thereon from the date of the taking. On trial the following issue was submitted to the jury without objection:

"What, on May 23, 1919, was the fair and reasonable value which would constitute a just compensation to be paid for the taking for public purposes of the lands mentioned and described in the petition herein?"

On May 5, 1921, the jury found the fair and reasonable value of the land on May 29, 1919, to be $6,000. Thereupon the court entered judgment in favor of the railway company for $6,000, with interest from May 23, 1919. The United States brings the case here, assigning error in the allowance of interest from the date of the taking of the land on its value at that date as fixed by the jury.

Section 177 of the Judicial Code (Comp. St. § 1168) forbids the Court of Claims to allow interest on claims against the government until after judgment. The general proposition, that interest cannot be allowed on claims against the government, unless it is so provided by statute, is too well settled for discussion. Authorities on this general proposition are cited in United States v. North American T. & T. Co., 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935. That suit being in the Court of Claims, although brought by the owner for the value of land taken, interest was denied, because the statute forbade it. But the court says:

"It may be that interest could be collected as part of the just compensation in condemnation proceedings brought by the government."

In United States v. Rogers, 255 U. S. 163, at page 169, 41 Sup. Ct. 281, at page 282 (65 L. Ed. 566), the court thus states the rule:

"It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. Angarica v. Bayard, 127 U. S. 251, 260; United States v. North Carolina, 136 U. S. 211, 216, cited and approved in National Volunteer Home v. Parrish, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the government, as was the fact in United States v. North American Transportation & Trading Co., 253 U. S. 330. The government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial

use thereof from the date from which the allowance of interest ran. * * * In fixing the compensation, the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the Circuit Court of Appeals applying the statutes of Minnesota to lands appropriated in that state. United States v. Sargeant, 162 Fed. 81. The government urges that the Conformity Act of August 1, 1888, does not require the United States government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."

There is no denial in the majority opinion in the case before us that just compensation required by the Constitution is not complete without the payment of the value at the date of the taking with interest to the date of payment. But interest is denied on the ground (1) that this proceeding under section 10 is not a condemnation proceeding; and (2) that, even if it is a condemnation proceeding, it is not one instituted by the United States, but an independent suit instituted by the owner of the land.

Any proceeding prescribed or authorized by a state or the federal Legislature to acquire land for public purposes and to ascertain just compensation for it is a condemnation proceeding, and every step taken in it from the beginning to the end is a part of the condemnation. It may be a suit by the government before taking without other proceeding, as Kohl v. United States, 91 U. S. 367, 376, 23 L. Ed. 449. In Garrison v. New York, 21 Wall. 196, at page 204 (22 L. Ed. 612), the court says:

"The proceeding to ascertain the benefits or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be made to him, is in the nature of an inquest on the part of the state, and is necessarily under her control. It is her duty to see that the estimates made are just, not merely to the individual whose property is taken, but to the public which is to pay for it."

In Kennebec Water Dist. v. Waterville, 96 Me. 234, 236, 52 Atl. 774–789, condemnation is defined to be:

"A special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact. The proceedings are in the nature of an inquisition on the part of the state."

See, also, Filbin Corporation v. United States (D. C.) 265 Fed. 354.

The title does not vest in the government until the just compensation has been ascertained on a fair hearing and actually paid. Garrison v. United States, supra. It seems to me perfectly clear that the taking and method of ascertainment of value and payment prescribed by section 10 is a condemnation proceeding instituted by the government. The Congress has in one section prescribed an exclusive and complete scheme of condemnation to be instituted by the government. Each successive step prescribed by the statute—the taking, the tentative ascertainment of value, the payment of 75 per centum of such valuation, the suit by a dissatisfied landowner—is a part of one condemnation proceeding instituted by the United States. This being so, it seems to follow the landowner is entitled to interest on the value at the date of

the taking until payment, on the authority of United States v. North American T. & T. Co., 253 U. S. 330, 40 Sup. Ct. 518, 64 L. Ed. 935, and United States v. Rogers, 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566.

The distinction that a landowner is entitled to interest when the government institutes the proceeding, but not entitled to it when the government forces him to institute it, is admittedly mounted on a technicality having no foundation in justice. It seems to me, to deny interest justly due in this case is to further displace the just compensation required by the Constitution by the additional technical holding that the suit brought by the landowner is not a part of the condemnation proceeding instituted by the United States.

COLLETON MERCANTILE & MFG. CO. et al. v. SAVANNAH RIVER LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1925.

1. **Removal of causes ⊜48—Separable controversy.**
   In a suit in a state court between citizens of the same state to enforce specific performance of a contract for the sale of standing timber, plaintiff joined as defendant a corporation of another state, alleging that it claimed some interest in the timber which constituted a cloud on the title of its codefendant, and asking that such claim be adjudicated. *Held*, that such allegation created a separate controversy, in which the interests of both the other parties were adverse to those of the nonresident defendant, and which entitled it to remove the cause.
2. **Removal of causes ⊜95, 111—Federal court may protect its acquired jurisdiction by injunction.**
   Where a cause is removable and has been properly removed, the state court loses jurisdiction, and the federal court may protect its jurisdiction by enjoining further proceeding by the parties in the state court.
3. **Specific performance ⊜106(1)—Persons interested in subject-matter of suit properly made parties.**
   A complainant, which had contracted for the purchase of standing timber, in a suit for specific performance of the contract, *held* entitled to join as a defendant a third party, which claimed an interest in the timber, to the end that the rights of all parties therein might be adjudicated in a single suit.
4. **Courts ⊜352—Jury may be called to try legal issue.**
   Under equity rule 23 (33 Sup. Ct. xxiv), providing that if, in a suit in equity, a matter ordinarily determinable at law arises, such matters shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court, where an issue triable by jury arises, a jury is called to try such issue, and when it has been settled the court adjudicates the equitable issues in the light of the verdict.

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

Suit in equity by the Colleton Mercantile & Manufacturing Company against W. B. Gruber and the Savannah River Lumber Com-

pany. From an order granting an injunction, complainant and defendant Gruber appeal. Affirmed.

M. P. Howell, of Walterboro, S. C. (J. C. Lemacks and Howell & Fishburne, all of Walterboro, S. C., on the brief), for appellants.

G. L. B. Rivers and A. B. Lovett, both of Savannah, Ga. (Hitch, Denmark & Lovett, of Savannah, Ga., Padgett & Moorer, of Walterboro, S. C., and Hagood, Rivers & Young, of Charleston, S. C., on the brief), for appellee.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. On March 21, 1921, Colleton Mercantile & Manufacturing Company, a South Carolina corporation, filed its complaint in the court of common pleas for Colleton county against W. B. Gruber, a citizen of South Carolina, and Savannah River Lumber Company, a Georgia corporation.

The complaint alleged in substance these facts as to W. B. Gruber: Ownership by Gruber of several tracts of timber lands described; the execution on January 7, 1921, by Gruber of an option to the plaintiff to purchase all the pine and cypress timber of certain dimensions on the land for $42,500, payable in installments, the first being $2,500, 60 days from the date of the option; acceptance by plaintiff of the option, and offer to comply with its terms, and demand on Gruber that he make a good marketable conveyance; the inability and refusal of Gruber to make such a conveyance.

The allegations as to the Savannah River Lumber Company are as follows:

"That this plaintiff is informed and believes, and so alleges, that the defendant Savannah River Lumber Company has or claims some interest in or title to the pine timber standing or being upon tract No. 4, * * * and that such claim of ownership and title by the defendant Savannah River Lumber Company constitutes a cloud upon the title and claim of the defendant W. B. Gruber, who claims to be the owner thereof, and renders it unsafe and hazardous for this plaintiff to pay the said purchase money, or any part thereof, until there has been an adjudication by this court of the said claim of title and ownership by the defendant Savannah River Lumber Company. That the defendant Savannah River Lumber Company is made a party defendant, to the end that its claim of ownership in and to the said timber may be set up in this action and examined into and adjudicated by this court."

The relief asked is:

First, examination into and adjudication of the claim of the Savannah River Lumber Company, "and, if it be found that the said defendant owns no title or interest in or to the said timber, that judgment of the court so declare, and the said defendant be forever barred from asserting or claiming any interest or estate therein and the cloud on the title of the defendant W. B. Gruber, thereto removed"; second, "if it be found that the defendant W. B. Gruber is the owner in fee of the said timber and rights contracted and agreed to be conveyed to this plaintiff, as hereinbefore set forth, that this court adjudge and decree that he specifically perform his said agreement and contract as herein set forth"; and, third, "such other and further relief as may be just and equitable and the nature of the case may require."

On the petition of the Savannah Company, based on diversity of citizenship, the state court on March 7, 1921, ordered the cause removed to the federal court, and the Savannah Company filed its an-

swer in the federal court on April 16, 1921, setting up title to the timber on tract No. 4 and recognizing the title of Gruber to the land. On April 28, 1921, the state court reconsidered and undertook to revoke its order of removal. On May 13, 1921, the Savannah Company filed its bill in the federal court, asking, on the pleadings and proceedings above recited, that the Colleton Company and Gruber be enjoined from prosecuting the cause against it in the state court. On June 29, 1921, the District Court made the order of injunction asked, but provided therein:

"That if the Colleton Mercantile & Manufacturing Company shall, within thirty (30) days from the date of this order, move in this court to dismiss the Savannah River Lumber Company as a defendant in the cause mentioned, removed from the state court to this court, so as to leave the same as a cause existing only between the Colleton Mercantile & Manufacturing Company, plaintiff, and W. B. Gruber, defendant, and thereupon move also that the cause in such condition be remanded to the state court, and such order be granted, and that then and in that case the said Colleton Mercantile & Manufacturing Company and W. B. Gruber, or either of them, may move to dissolve the injunction hereby granted."

[1] The appeal is from this order. We think the Savannah Company was entitled to the removal, and that the original order of the state court was right; that on the filing of the transcript in pursuance thereof the state court lost and the federal court acquired jurisdiction; and that the order of the federal court protecting its jurisdiction was properly granted.

Considering the necessary implications of the fourth and fifth paragraphs of the complaint of the Colleton Company, above set out, we cannot doubt the meaning to be that Gruber's inability and refusal to carry out his contract with plaintiff and plaintiff's unwillingness to accept his title were due to the claim of the Savannah Company. Looking from the form to the substance, therefore, the real controversy was between the Colleton Company and Gruber on one side and Savannah Company on the other, as to the validity of the latter's claim to the timber on tract No. 4. The claim of Gruber and the Colleton Company being a common one against the Savannah Company, neither of them could, by joining the other and the Savannah Company as defendants, defeat the right of the latter company to remove the real controversy to the federal court. In such case the court will rearrange the parties according to their interests to preserve the right of removal. Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Harter Twp. v. Kernochan, 103 U. S. 562, 566, 26 L. Ed. 411; Evers v. Watson, 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520.

But let it be assumed that the Colleton Company's complaint states a cause of action against Gruber, and shows a controversy with him as well as with the Savannah Company. Nevertheless it is evident that the real interest and assertion of right of the Colleton Company and Gruber is a common one as against the Savannah Company; and it is equally evident that the Savannah Company has no interest whatever in any controversy between Colleton Company and Gruber. In such a condition the plaintiff cannot, by joining a nonresident as defendant with a resident, defeat the nonresident's right to a trial of his separate

and independent controversy in the federal court. The case is capable of separation into parts, so that in one of the parts a controversy is presented between Colleton Company and Gruber, citizens of South Carolina, on one side, and Savannah River Lumber Company, a citizen of Georgia, on the other. This separate part of the case, involving the separate controversy of a defendant, a citizen of Georgia, with citizens of South Carolina, makes the whole case removable. The rule is thus stated in Geer v. Mathieson Alkali Works, 190 U. S. 428, at page 432, 23 Sup. Ct. 807, at page 809 (47 L. Ed. 1122):

"A suit may, consistently with the rules of pleading, embrace several distinct controversies. Barney v. Latham, 103 U. S. 205, 212. It was said in Hyde v. Ruble, 104 U. S. 409: 'To entitle a party to a removal under this clause (second clause of section 2 of the act of 1875; same as second clause in the act of 1887), there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those on the other.' In other words, as expressed in Fraser v. Jennison, 106 U. S. 191, 194, 'the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.' And when two or more causes of action are united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants * * * interested in the controversy. * * * Hyde v. Ruble, supra. See also Ayres v. Wiswall, 112 U. S. 187."

[2] It follows that, the cause having been properly removed to the federal court by order of the state court, the state court lost jurisdiction, and the federal court was right in enjoining the plaintiff and W. B. Gruber from proceeding with the cause in the state court. Madisonville Traction Co. v. Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; C. & O. R. Co. v. McCabe, 213 U. S. 207, 217, 219, 29 Sup. Ct. 430, 53 L. Ed. 765.

[3] We think, however, the Colleton Company could properly join Gruber and the Savannah Company as parties, and thus have all claims to the land adjudicated in one action. The general rule is that the holder of the legal title cannot sue to have a cloud removed from the title unless he is in possession. Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 30 L. Ed. 1010. His remedy is an action at law to recover possession. But by the great weight of authority this rule does not apply to the holder of the equitable title, because he had no remedy at law. Pomeroy's Eq. (3d Ed.) § 1399, note 1. This is the rule in South Carolina. Pollitzer v. Beinkempen, 76 S. C. 517, 520, 57 S. E. 475. On this point the federal court will be controlled by the state practice. Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 30 L. Ed. 1010. It would be a hardship to require the Colleton Company either to pay Gruber and take his title, with the claim of the Savannah Company outstanding, or lose its bargain. It has no power to require Gruber to sue the Savannah Company for possession. Hence it seems to us it could get no adequate relief, except by bringing both adverse claimants in and having their rights adjudicated.

It is true the Supreme Court held in Willard v. Tayloe, 8 Wall. 557, 571, 19 L. Ed. 501, in an action for specific performance, that one who

had acquired a partial interest from plaintiff after the suit was begun was not a necessary party, and that the general rule was that only parties to the contract were proper parties to the suit. But the court intimated that special circumstances might authorize a departure from the rule. As we have tried to show, here the special circumstances are such that the complainant can get no adequate relief without having the Savannah Company before the court. The rule in nearly all the other courts of this country is that all parties interested in the subject-matter should be brought in. Midland Timber Co. v. Prettyman, 95 S. C. 13, 75 S. E. 1012; 1 Pomeroy's Eq. (3d Ed.) 14; 36 Cyc. 768, and cases cited. In Heckman v. United States, 224 U. S. 413, 448, 32 Sup. Ct. 424, 56 L. Ed. 820, a number of holders of independent titles were made parties to one suit to set aside their conveyances; all the titles depending on a single statute. In Gaines v. Chew, 2 How. 619, 642 (11 L. Ed. 402) the court says:

"It is well remarked by Lord Cottenham, in Campbell v. Mackay, 7 Sim. 564, and in 1 Myl. & C. 603, 'to lay down any rule, applicable universally, or to say, what constitutes multifariousness, as an abstract proposition, is, upon the authorities, utterly impossible.' Every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided, by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts. In a course of reasoning in the above-cited case, Lord Cottenham observes: 'If, for instance, a father executed three deeds, all vesting property in the same trustees, and upon similar trusts, for the benefit of his children, although the instruments and the parties beneficially interested under all of them were the same, it would be necessary to have as many suits as there were instruments. That is a proposition,' he says, 'to which I do not assent. It would, indeed, be extremely mischievous, if such a rule were established in point of law. No possible advantage could be gained by it; and it would lead to a multiplication of suits, in cases where it could answer no purpose to have the subject-matter of contest split up into a variety of separate bills.' The same doctrine is found in Story's Equity Pleading, § 534; Attorney General v. Cradock, 3 Myl. & C. 85, 7 Sim. 241, 254. In the above case against Cradock, the chancellor says: 'The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule, if it were to impose upon the plaintiffs, and all the other defendants, two suits instead of one.'"

See, also, Caldwell v. Taggart, 4 Pet. 190, 7 L. Ed. 828.

[4] The Savannah Company has, of course, a right of trial by jury on the issue of its title to the property. Under the old practice, if in a suit in equity the defendant set up an adverse legal title to the subject of the action, as in a suit for partition where one of the defendants set up title by adverse possession, the practice was to suspend the equity suit until the plaintiff could bring his action at law. Clark v. Roller, 199 U. S. 541, 546, 26 Sup. Ct. 141, 50 L. Ed. 300; Gilbert v. Hopkins (C. C.) 171 Fed. 704. But that would give the plaintiff here no relief, since it could not recover in a law action, nor require Gruber to test his title in a law action.

The real dividing line between law and equity under the Constitution is the line between controversies triable by jury under the common

law of England and those not so triable as a matter of right. Root v. Railway Co., 105 U. S. 189, 206, 26 L. Ed. 975. The District Court is a court of law and equity. The judge performs his functions as a judge of both courts concurrently. The only mechanical difference is separate dockets and records. Juries are impaneled and used in both courts, heretofore in the court of equity to enlighten the conscience of the judge as to an issue of fact. Equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv) now provides:

"If in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

We think this rule means that, where in an equity case a matter triable by jury arises, the court shall not refuse to try it, and shall not go through the form of sending it to the law side of the court, but shall determine it according to all the principles applicable—one of which is the right of trial by jury. Under rule 22, if the case is essentially a law case improperly brought in equity, it must be transferred to the law side. Under rule 23, if the case, looked at as a whole, is an equity case, but a question arises in it triable by jury, a jury trial is held to settle the legal issue without transfer. When the legal issue has been settled by the verdict of the jury, the court adjudicates the equitable issues in the light of the verdict.

Affirmed.

DAVIS, Director General and Agent, v. REYNOLDS.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1915.

1. **Evidence ⟸474(11)—Injured brakeman competent to give opinion that smoothness of step was cause of injury.**
   It was competent for an injured experienced brakeman to testify that a jerk of the engine would not have been sufficient to throw him from a sill step, but for the slickness of the step.

2. **Master and servant ⟸111(1)—"Secure sill steps," within federal act, defined.**
   Act Cong. 1910, § 2 (Comp. St. § 8618), requiring that all cars must be equipped with "secure sill steps," means steps that furnish secure footing for employees having to use them, in view of Act Cong. 1911, § 2, as amended by Act 1915, § 2 (Comp. St. § 8639b).

3. **Master and servant ⟸286(12)—Negligence in failing to provide secure step held for jury.**
   Whether slickness of sill step on engine rendered the step not a "secure" one, within Act Cong. 1910, § 2 (Comp. St. § 8618) and Act 1911, § 2, as amended by Act 1915, § 2 (Comp. St. § 8639b), *held* for the jury.

4. **Master and servant ⟸204(2)—Risk of unsafe step not assumed under federal statute.**
   Brakeman on an interstate railroad did not have the duty imposed on him to inspect steps on an engine, and could not, under the federal statute, be charged with assumption of risk of an insecure or unsafe step, notwithstanding rules of the railroad admonishing him to take no risks.

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5. **Evidence ⟨⟩194—Exclusion of car step not error, in absence of positive identification.**

In action by brakeman for personal injuries, court did not err in refusing to allow defendant railroad to introduce in evidence a sill step tendered, where there was no positive identification of it as the step from which the plaintiff fell; its exclusion being within the discretion of the court.

6. **Appeal and error ⟨⟩1056(1)—Exclusion of evidence held harmless.**

Complaint cannot be made of refusal of court to allow defendant to introduce in evidence a sill step from which plaintiff servant fell, and which he claimed was defective, where the step was before the jury, and the witnesses referred to it frequently, and it had just as much influence on the verdict as if it had been formally received in evidence.

7. **Master and servant ⟨⟩296(16)—Instruction on contributory negligence held not misleading.**

In action by brakeman for injuries from a defective sill step, an instruction that, if the jury believe from a preponderance of the evidence that the injury suffered by the plaintiff was due entirely to his negligence, "and was not due in whole or in part to the condition of the tread of the sill step, as shown by the preponderance of the evidence," then they must find for the defendant, could not have misled the jury, though it would have been better to have left out the quoted clause.

Knapp, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by John Wiley Reynolds against James C. Davis, Director General and Agent under the Transportation Act of 1920 (41 Stat. 456), operating the Atlantic Coast Line Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 257 U. S. ——, 42 Sup. Ct. 383, 66 L. Ed. ——.

Edwin P. Cox, of Richmond, Va., and Bernard Mann, of Petersburg, Va. (Wm. B. McIlwaine, of Petersburg, Va., on the brief), for plaintiff in error.

S. Heth Tyler, of Norfolk, Va. (James Mann and Mann & Tyler, all of Norfolk, Va., on the brief), for defendant in error.

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

WOODS, Circuit Judge. In the afternoon of January 8, 1920, the plaintiff, John W. Reynolds, a brakeman, fell from the step in front of a freight engine and lost his arm. He recovered judgment on the allegation that the accident was due to the negligence of the Director General of Railroads in not furnishing a "secure sill step" on the buffer beam of the engine as required by the safety appliance statute as amended in 1910 (Comp. St. §§ 8617–8619, 8621–8623). Error is assigned in the admission of testimony, in refusal to direct a verdict for the defendant, and in instructions to the jury.

There is no dispute as to the general facts. Plaintiff, who is an experienced brakeman, gives this account of the accident:

"At Ahoskie, N. C., after we got in there that afternoon, we were making to switch out on the warehouse track. I went in there with the engine headed down the warehouse track, coupled the cars, and the brakeman, Parker,

cut off several cars back and signed me out. I stepped on the sill step of the engine and continued riding until I got down on the main line switch. Then coming out of the warehouse track, or just approaching the Main street crossing at Ahoskie, and when he started back pulling the slack out, of course, on the cars, it caused a jerk, and both feet slipped off the sill step, and I had hold of the lift lever across the pilot of the engine, which is used for a grab-iron, and both hands holding on to it, and when I slipped I lost my hand, and it threw me in the same direction the engine was going, and I fell parallel with the rail, and my arm flew out to catch myself, and this arm [left] went across the rail, and it was cut off at the elbow, all except a little."

The sole breach of duty imputed to the defendant was allowing the sill step on the engine to become slick from use, and therefore unsafe and insecure. There was evidence to the effect that the defendant roughened such steps in front of the engine by nicks on the surface, so that they would afford more secure foothold against sudden movement and jerks of the train; that in this instance defendant had allowed the nicks to be worn down by use without renewing them, so that the step had become slick. The evidence also tended to prove that the jerk was not unusual. In answer to the question. "What caused you to fall?" plaintiff was allowed to testify over objection:

"The only thing I know was a jerk; the jerk I got was not sufficient to jerk my feet off the sill step, if it had been rough, or had not been slick. The jerk that he gave was not sufficient to have thrown me off, if the step had been rough, and not so slick."

[1] It is often difficult to draw the line between evidence which is really expressive of opinion on the issue before the jury and evidence which, though in form opinion, is really a statement of the impression of fact produced on the sense of sight or hearing or feeling. The evidence here is near that dividing line. It seems to mean, however, that the plaintiff had the physical feeling at the time that the jerk did not break the hold of his hands but made his feet slip from a step which was not rough enough to prevent slipping. The plaintiff was evidently in a much better position to tell the cause of the fall than the jury. But, even regarded as opinion evidence, it was competent for the plaintiff, an experienced brakeman, to testify that the jerk of the engine would not have been sufficient to throw him, but for the slickness of the step.

[2] The case is very close the border line, also, on the question whether the evidence of the defendant's breach of duty was adequate to make an issue for the jury. Section 2, Act of 1910, Barnes' Federal Code, § 8036 (Comp. St. § 8618), provides:

"All cars must be equipped with secure sill steps and efficient hand brakes."

The contention of defendant is that "secure," as used in the statute is not the equivalent of safe, but means securely fixed or fastened, so that it will not fall or break in use—that is, safe as to strength, stability, firmness—and that the defendant had met its duty under the statute when it securely fastened a step of the material and dimensions required by the Interstate Commerce Commission.

Under this restricted definition, placing a step unsafe because inclined downward, or lower on one side than the other, would not be

a violation of the statute. "Secure steps" means steps which furnish secure footing for employees having to use them. This is made the more evident by the broad language of section 2, Act of 1911, 36 Stat. 913 (Barnes' Code, § 8047), as amended by section 2, Act of 1915, 38 Stat. 1192 (Barnes Code, § 8056 [Comp. St. § 8639b]), which prohibits carriers from using a locomotive unless it and all its parts are in "proper condition and safe to operate" in the service to which they are put.

[3] Evidently there is greater danger of slipping from a step in front of the engine than one on the side of the car, because a sudden jerk in that situation backwards tends more strongly to throw the feet and whole body directly away from the car. It was probably in recognition of this danger that the defendant had the engine steps made rough by nicking. It was for the jury to say whether the slickness of the step described by the witnesses made it an insecure and unsafe footing, in view of the sudden jerks to be expected. The court was therefore right in submitting to the jury as the vital issue whether the step furnished a safe and secure footing.

[4] The plaintiff testified he did not examine the step and did not know its condition. The duty to inspect the step was not imposed on him, and he cannot under the statute be charged with assumption of risk of an insecure or unsafe step. Hence the rules of the defendant admonishing him to take no risks were not relevant to any issue in the case, and there was no error in excluding them.

[5, 6] The assignment of error in refusing to allow the defendant to introduce in evidence the sill step tendered cannot be sustained for two reasons: First, there was no positive identification of it as the step from which the plaintiff fell, and it was therefore within the discretion of the court to exclude it; and, second, the step was before the jury, the witnesses referred to it frequently, and it doubtless had just as much influence on the verdict as if it had been formally received in evidence.

[7] We think the criticism of the following instruction is too refined:

"2. The court further instructs the jury that, if they believe from a preponderance of the evidence that the injury suffered by the plaintiff was due entirely to his negligence, *and was not due in whole or in part to the condition of the tread of the sill step, as shown by the preponderance of the evidence,* then they must find for the defendant."

It might have been better to leave out the last clause, which we have italicized; but it was only stating the converse of the first clause, and we think could not have misled the jury.

The requests of the defendant, not charged in substance, are disposed of by the discussion of request for a directed verdict.

Affirmed.

KNAPP, Circuit Judge (dissenting). I am unable to concur in affirming the judgment in this case, because it seems plain to me that negligence cannot be predicated upon the proven condition of the sill step in question. Admittedly, all that can be said against it is that the

tread, originally made rougher than any law or regulation requires by punching a few "nicks" on its surface, had become by wear a little smoother than it was at first. The tread proper showed no appreciable wear; but the tips of the nicks, or some of them, had partially worn off, the necessary result of use, even for a short time, as undisputed testimony shows. In every other respect it was the same as new. It had been inspected daily by defendant's agents, and at least quarterly by the government's agents, the last time within three months, and apparently no one who saw it before the accident ever had a thought that it was not in proper condition. It was continued in use without change till just before the trial, more than 15 months, and then produced in court to show for itself. The legal proof of its identity may not have been sufficient to make it admissible in evidence, but there is no moral doubt that it was the same step. Certainly no witnesses for plaintiff undertook to say that it was not the same, or that it was in any better condition than the step he saw when the accident happened. To hold that such a slight departure from perfection as here appears, necessarily caused by a brief period of use, permits an inference of negligence is to hold, as seems to me, that defendant was bound to keep this step continually new, which would be practically impossible, and in effect to hold that in the matter of safety appliances the railroad company is an insurer, which, of course, is not the law.

I am of opinion that a verdict should have been directed for the defendant.

CHARLES F. MURPHEY CO. v. FULTON BAG & COTTON MILLS.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1922. Rehearing Denied April 5, 1922.)

No. 2979.

Sales ⇐182(4)—Whether taking by purchaser of part of shipment constituted acceptance held jury question.

Whether the taking by defendant of a few bags from a carload of 50,000, shipped by plaintiff under a contract of sale, constituted an acceptance which bound defendant to take all, may depend on the intent with which they were taken, and where the shipment was made to a point remote from where defendant, a corporation, was located, and the bags were taken from the car by its agent for samples, as was claimed, and sent to defendant during negotiations as to acceptance, an instruction that such taking was an acceptance as matter of law *held* erroneous.

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

Action at law by the Fulton Bag & Cotton Mills against the Charles F. Murphey Company. Judgment for plaintiff, and defendant brings error. Reversed.

Earl J. Smith and John I. Evans, both of Chicago, Ill., for plaintiff in error.

Roland D. Whitman, of Chicago, Ill., for defendant in error.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. Defendant prosecutes this writ of error to review a judgment arising out of a contract for the purchase and sale of 50,000 cotton bags of a certain kind and description. Plaintiff made tender under its contract, and defendant rejected the bags thus tendered because of their alleged failure to meet the contract requirements. Plaintiff also relied upon the acceptance of a portion of the shipment as binding defendant to accept all of it. It is in reference to this theory that error is assigned, which requires our consideration of the judge's charge to the jury. To better understand the criticism of this charge we state the pertinent evidence:

Plaintiff shipped a car containing 50,000 bags from St. Louis to defendant at Cameron, Wis.; shipment reaching its destination November 12, 1918. Immediately representatives of the defendant made a rather cursory examination of the sacks, opened a bale or two, and reported by wire to defendant at Chicago "the car was below grade and very poor." Thereupon defendant notified plaintiff by wire that it refused to accept the bags, and that the car was "at Cameron, Wis., refused, subject to your order." Plaintiff thereupon notified defendant that its representative would go to Cameron, but efforts to adjust the matter failed, and plaintiff notified defendant that the bags would be sold to pay the freight, demurrage, and storage, and the balance applied on the purchase price, which was done. Shortly before and after delivery the market for these bags dropped sharply. The verdict was for the contract price of the bags, less the amount realized from the sale.

Defendant's agent, when he examined the car, November 12th, took 7 bags as samples, which he sent to defendant's main office in Chicago. Defendant sent them to plaintiff at St. Louis. Shortly before plaintiff's agent reached Cameron to inspect the car, defendant's agent again went to the car, accompanied by numerous witnesses. The station agent unsealed the car, and all of the parties examined the bags and thus qualified themselves to testify later upon the trial. Their going and their examination was unknown to plaintiff. Five bags were taken from the car at this time. A few days later plaintiff's agent arrived, and he, together with the defendant's representative, visited the car, examined a large number of sacks, and made certain tests of some of them. After he left, defendant's representative returned to the car and took 18 more sacks, which he claimed were representative, or, to use his own language:

"Perhaps a little on the poorest order. They were taken after Miller left. I did not tell him I was going to make any selection."

The judge charged the jury:

"There was some evidence of dealing with those bags there as though they belonged to the defendant. If the defendant wanted any of those bags, he seemed to have gone and taken them as though they were his. For instance, they took out a bunch of bags, 6 or 7 or 8 of them, and sent them to Chicago. Another time they took out 5; does not appear what became of them. You have 18 bags upon the rail that were taken out. It is for you to determine what effect that has upon the question of acceptance or rejection of this carload of bags. If they were going to take the bags at all, if they were not up to the contract, they had to do one of two things: It was their duty to take all of the bags that were good, if they took any of the bags at all. They had

no right to take a part, such part as might please them, for evidentiary purposes, or for any other purpose, and reject perfectly good bags. They were either their bags or they were not, by their acceptance."

Exceptions were saved. Undoubtedly a purchaser may obligate himself to pay for merchandise not up to representation by acceptance. And equally well settled is the law that acceptance of a part of a shipment may bind the purchaser to accept all. Likewise an acceptance of the goods after rejection may obligate the purchaser to pay for all (Cream City Glass Co. v. Friedlander, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895), leaving him his remedy to recoup or set off his damages arising out of the breach of warranty. But we are dealing with the question of acceptance as such, not with its effect upon the rights of the parties. The issue of acceptance may of itself be one for the jury (35 Cyc. 262), fully as much as the issue of warranty or compliance with a warranty. Acceptance involves more than mere physical possession. Intent may become the determinative factor.

The present case is illustrative. Both parties were corporations that acted through agents, the vendor residing in St. Louis, the purchaser in Chicago, and the shipment was made to an agent with limited power in northern Wisconsin. When such agent advised his principal that the sacks were inferior in grade, he sent 7 samples to support his opinion. This was not in acceptance of any part of the shipment, for the defendant did not retain the sacks, but, in support of its claim based upon the wire of its agent, forwarded them to the plaintiff. It was the only practical way of settling a dispute between the parties.

It is true at this point the defendant rejected the shipment, but the plaintiff did not accept this rejection as final. It called upon defendant to reconsider its action, and sent an agent to northern Wisconsin, who invited defendant to make another and more thorough examination. Before plaintiff's representative arrived, defendant's agent, accompanied by outside parties, went to examine the sacks, opened more bales than previously, and, after plaintiff's agent left, but on the same day, took 18 sample sacks, as he called them, that the defendant at Chicago might the more intelligently act in respect to plaintiff's proposal to reconsider its rejection and accept the carload lot. If the jury, from all the evidence, did not find that this was the purpose of their taking, it might well have found that the defendant's agent at Cameron acted entirely outside his authority in taking these 18 bags and that his acts were not ratified. It is true plaintiff asserts that defendant never acted in good faith, that it had already purchased other sacks, that the price had fallen greatly, and that defendant had decided to repudiate its contract before the shipment was ever made, and there is evidence to support this charge.

These facts, if established to the satisfaction of the jury, may have had important bearing upon certain other issues; but we fail to see how they control the issue of acceptance. At best, their probative value was for the jury to determine, and they do not constitute all the evidence on the issue of defendant's good or bad faith. It must be borne in mind that plaintiff was dealing with defendant in Chicago, who in turn was relying on its agent in northern Wisconsin. This representa-

tive first sent 7 sacks that satisfied his principal that the shipment should be rejected. Plaintiff insisted the 7 sacks were not fair samples, and demanded a more thorough examination of the carload lot. Defendant acquiesced, and the local agent again made an examination. He and plaintiff differed in their opinion. To support his position he took other samples, 18 in number. It was not for him to make the ultimate decision. That responsibility rested with the principal in Chicago. When he thus took the samples, the question was not closed. They were taken to assist the parties in determining whether the sacks were up to the requirements of the contract—to determine the question which defendant had reopened at plaintiff's request. At least this is what defendant urges, and there is some evidence to support such an inference. At least a jury question was presented.

The instructions made no distinction between the taking of the first 7 and the last 18 bags. The jury was not permitted to consider the purposes or the intention of defendant in taking the bags. The fact that the first 7 bags were submitted by defendant to plaintiff, and were in the latter's possession on the last examination, was ignored by these instructions. The jury was told that—

"They [defendant's servants] had no right to take a part, such part as might please them, for evidentiary purposes, or for any other purpose, and reject perfectly good bags. They either were their bags, or they were not, by their acceptance."

We think the record did not justify the court in taking the issue of acceptance from the jury. Springfield Engine Stop Co. v. Sharp, 184 Mass. 266, 68 N. E. 224; Bell v. Anderson, 74 Wis. 638, 43 N. W. 666; Philadelphia Whiting Co. v. Detroit White Lead Works, 58 Mich. 29, 24 N. W. 881; Okell v. Smith, 1 Stark. 86. This instruction was in substance equivalent to a directed verdict for the plaintiff, and, being erroneous, must result in a reversal.

The judgment is reversed, with costs, and the cause remanded for a new trial.

WENNAGEL v. CONSOLIDATED GAS, ELECTRIC LIGHT & POWER CO. OF BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. March 21, 1922.)

No. 1941.

Patents ⇐328—1,307,070, for device for dissipating heat in underground conduits, held void for lack of invention.

The Wennagel patent, No. 1,307,070, for a device for dissipating heat in underground conduits, consisting of the insertion in one compartment of the conduit of a small perforated water pipe, by means of which the surrounding earth may be moistened, *held* void for lack of invention, as merely applying a well-known device to a new use; other sprinkling devices being then in use.

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

Suit in equity by George F. Wennagel against the Consolidated Gas, Electric Light & Power Company of Baltimore. Decree for defendant, and complainant appeals. Affirmed.

Wallis Giffen and Lee S. Meyer, both of Baltimore, Md., for appellant.

E. M. Sturtevant, of Baltimore, Md., for appellee.

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

KNAPP, Circuit Judge. Wennagel brought this suit to obtain an injunction and damages for infringement of his patent, No. 1,307,070, issued June 17, 1919, "for an alleged new and useful improvement in dissipating heat from underground conduits." The court below held the patent invalid for want of invention, and he appeals.

The electric current passing through high-tension cables in underground conduits generates a considerable amount of heat, which radiates through the paper wrapped around the conductors of the cables, and through the lead sheathing which covers the cables, into the tile conduits, and thence into the earth. If the surrounding earth is moist, this heat is readily absorbed; but, if the earth is dry, it acts as an insulator and holds the heat in the conduit line. In such cases the heat continues to rise, until it gets so high that the cable carbonizes and breaks down.

Wennagel's device for meeting this condition, as described in his patent, consists of the insertion, in one of the ducts or compartments of a conduit line, of a small water pipe, with holes at spaced intervals, and the connection of this pipe with a water main, so that water can be turned on as needed, which will percolate through the joints of the conduit and thus supply the necessary moisture to the surrounding earth.

The electrical conduit system of the city of Baltimore is owned by the municipality and operated by a commission, known as the electrical commission. Defendant's cables are installed in this conduit system. Wennagel was an employé of the commission from 1912 to 1918. He names May, 1915, as the date of his invention. In August, 1916, he made application for a patent, which was rejected in February, 1917. An amended application, filed in June of that year, was also rejected, but upon reconsideration was finally allowed, in July, 1918, apparently upon the representation that water for cooling electrical conduits had not been in public use for more than two years prior to the application.

If this was the theory on which the patent was granted, it certainly was contrary to undisputed facts. As early as 1912, Wennagel himself had suggested the use of water in the Baltimore conduits, to avoid the troubles caused by heat, and was, of course, perfectly aware of its use for that purpose; and prior to 1913, the Niagara Falls Power Company had adopted the plan of dissipating heat from its cables by spraying them with a rubber hose introduced into the conduits and connected at the manholes with pipes from the water supply of the

city. In that year also its general superintendent, Mr. Imlay, devised a method of supplying water to the earth in which conduits are laid by placing on top of them a line of terra cotta pipe; the water let into this pipe from the city main percolates through the pores of the terra cotta and moistens the adjacent earth. The testimony shows that this method has proved satisfactory and come into extensive use. It is described in a paper read by Mr. Imlay at a convention of electrical engineers in New York in February, 1915, and published in November of that year, and this paper was brought to Wennagel's attention while he was at work on his invention.

It appears, in short, that for some four years before Wennagel applied for a patent the method of cooling cables by injecting water through a rubber hose, and thus moistening the surrounding material, had been in effective use by the defendant company at Baltimore, and that the same method had been employed by the Niagara Falls Company for even a longer time, until Imlay adopted the plan of conveying water through a terra cotta pipe laid on top of the conduit; and all that Wennagel has done, so far as we can see, is to substitute an iron pipe with holes in it for the terra cotta pipe and the rubber hose. That this involved no exercise of the inventive faculty seems to us beyond serious question. To put an old appliance to a new use is not invention. Sprinklers of various types have been long familiar, and none more simple than a piece of perforated pipe. The sprinkler in suit possesses no novelty of design or mode of operation; it is merely shown to be adaptable to a use to which it had not before been devoted. The proper adjustment of the old device, so that it will successfully perform the new service, may require a considerable degree of mechanical skill, but the surmounting of such difficulties is not evidence of that originality of conception which is necessary to sustain a patent.

As we understand the matter, the result desired in this case is attained, not by the direct application of water to the cables or conduit line, which would seem to be comparatively ineffectual, but by so moistening the adjacent earth that the excessive heat will be absorbed or conducted away as fast as it is generated. This may be accomplished, among various ways, by injecting water through a hose, by conveying it through some porous material, or by supplying it through the simplest kind of a sprinkler. But the latter method is not essentially different from the others, and like them calls for nothing more than the exercise of ordinary mechanical skill. It is only repeating to say that the discovery that an old device will meet a new need is not invention. The learned trial judge was therefore right in holding that the instant case is governed by Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, decided in 1882, and frequently quoted with approval. The sharp criticisms in the opinion in that case are doubtless not applicable to Wennagel, but the principle there laid down is controlling. Even more in point is Lovell Manufacturing Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307, in which the Supreme Court, citing numerous decisions, says (147 U. S. 637, 13 Sup. Ct. 477, 37 L. Ed. 307):

"The principle deducible from those cases is that it is not a patentable invention to apply old and well-known devices and processes to new uses, in other and analogous arts."

The decree appealed from will be affirmed.

WILLIAMS et al. v. KOZAK.

(Circuit Court of Appeals, Fourth Circuit. March 21, 1922.)

No. 1930.

1. Justices of the peace ⊜25—Liable for negligent issuance of illegal search warrant.

A justice of the peace, who, without the complaint under oath required by statute, issues a search warrant in a civil case, acts entirely outside of his jurisdiction, and is liable for actual compensatory damages resulting from invasion of defendant's premises or other wrongs done by the officer in attempted execution of the illegal warrant, but not for malicious or vindictive acts of such officer which he did not authorize or sanction.

2. Trial ⊜252(6)—Instruction held not warranted by evidence.

An instruction authorizing a verdict for damages against a justice of the peace on a finding of malice in the issuance of a search warrant *held* erroneous, where there was no evidence to support a finding of malice.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action at law by Max Kozak against William F. D. Williams and Robert H. Reynolds. Judgment for plaintiff, and defendants bring error. Reversed.

S. James Turlington, of Accomac, Va. (Thomas H. Nottingham, of Eastville, Va., on the brief), for plaintiffs in error.

James E. Heath, of Norfolk, Va. (Louis S. Sacks, of Cape Charles, Va., and Tazewell Taylor, of Norfolk, Va., on the brief), for defendant in error.

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

WOODS, Circuit Judge. Plaintiff, Max Kozak, is a maker and repairer of shoes at Cape Charles, Va. Janie Gunter, a negro woman, left with him two pairs of shoes to be repaired. Claiming that one pair returned was not hers, she made an effort with the assistance of Reynolds, the town sergeant, to get Kozak to correct the alleged mistake. The effort was unsuccessful, Kozak contending no mistake had been made. On the advice of Reynolds she then applied to Williams, the local justice of the peace, for his assistance. Williams issued a warrant of detinue and made it returnable the same day. The statute requires that, except by consent, the trial in a civil action shall not be held until the expiration of five days. Kozak and his wife are Russians, and he speaks broken English. In the course of the trial of this civil case the justice of the peace issued a search warrant for the shoes

without the sworn complaint, required by statute, that goods had been stolen, embezzled, or obtained by false pretenses. The justice thus explains the upsetting of his judicial equilibrium and consequent illegal action:

"I asked Mr. Reynolds to go and get Mr. Kozak to come, and Mrs. Kozak said he cannot speak good, and she could speak for him, and I said surely, and the colored woman started to explain herself, and Mrs. Kozak kept calling her a thief and a liar, and she was so excited I did not hear much that passed, and it was a one-sided affair, I could hardly hear myself think, and finally I could not get heads or tails of the thing, so I said to Mr. Reynolds, 'I do not know of anything better than for all the parties to go and look at the shoes in the shop, and see if the woman can identify them.' She said these were not hers, and Mr. Reynolds said, 'I have been there one time this afternoon and they ran me out,' and I said, 'I will give you a warrant,' and I made it out and gave it to him, and told him to look for the shoes."

The sergeant, Reynolds, in company with Janie Gunter, went to Kozak's shop and undertook to search for the shoes. While this was going on Kozak and his wife returned. A mêlée followed. Kozak in this action recovered judgment for $700 damages against the justice of the peace and the sergeant, on the allegations that they had forced him to walk through the streets of Cape Charles to the office of the justice and then imprisoned him; that they beat and bruised and ill-treated and imprisoned him; that they invaded his place of business without warrant and searched and ransacked it. The warrant of detinue was a mere summons to defendant to appear and answer the complaint of Janie Gunter. It did not command or authorize the arrest of Kozak, and if the sergeant did arrest plaintiff under it he alone was responsible.

[1] In issuing the search warrant in a civil case without complaint under oath, the justice acted entirely outside of his jurisdiction, and is responsible for actual compensatory damages which proximately resulted from his illegal action. Therefore actual damages for any invasion of plaintiff's premises, and for any other wrongs done by the sergeant growing out of the attempted enforcement of the illegal warrant, are chargeable to the justice as well as the sergeant. Flack v. Harrington, Breese (Ill.) 213, 12 Am. Dec. 170; Kelly v. Rembert, Harp. (S. C.) 65, 18 Am. Dec. 643; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Broom v. Douglass, 175 Ala. 268, 57 South. 860, 44 L. R. A. (N. S.) 164, Ann. Cas. 1914C, 1155; Landseidel v. Culeman (N. D.) 181 N. W. 593, 13 A. L. R. 1339, note, 1351, 1360.

The instruction that, if the justice acted without malice, plaintiff could recover nothing more than nominal damages—defined by the court to be damages substantially small—was too favorable to the defendant Williams. We think the evidence shows, beyond doubt, the absence of malice on the part of the justice of the peace. He was negligent in issuing a search warrant, void for lack of jurisdiction. But his action was taken in good faith, with the good motive of trying to adjust expeditiously a petty dispute over a pair of shoes. There is no evidence that he participated in, authorized, or sanctioned any malicious or vindictive motive or action attributable to the sergeant, and for that he is not liable. Foley v. Martin, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123, and note.

[2] The jury was nevertheless given this instruction:

"If you believe from the testimony that the said Williams, in issuing said search warrant, acted with malice—that is, with the purpose and intent, by reason of his official position, to do injury to the plaintiff's person or property, or to humiliate and degrade him—then, and in such case, the defendant Williams may be held liable in damages for the ordinary results which would likely follow such improper conduct."

In the "eleventh instruction" the same charge was made. These instructions, having no basis in the evidence against the justice of the peace, were erroneous as to him.

The instruction was given to the jury that, if the sergeant, Reynolds, during the search made an assault on both the plaintiff and his wife, they should assess damages that would compensate plaintiff for the physical and mental suffering by reason of such misconduct by the defendant. This instruction was erroneous and confusing. The jury might well have concluded that they should include in the verdict damages for assault on plaintiff's wife, which she alone could recover.

Reversed.

BRADLEE & McINTOSH CO. v. FREY & SON, Inc.

(Circuit Court of Appeals, Fourth Circuit. March 21, 1922.)

No. 1932.

Sales ⇐81(1)—Delivery held not in compliance with contract.

A contract by plaintiff for sale to defendant of sugar to be imported, which stated that the sugar was "expected to arrive in New York June and July," *held* not to bind defendant to accept sugar tendered in September, where it was not shipped in such vessel and by such route as warranted a reasonable expectation of its arrival in New York in July.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action at law by the Bradlee & McIntosh Company against Frey & Son, Incorporated. Judgment for defendant, and plaintiff brings error. Affirmed.

W. Irvine Cross, of Baltimore, Md., for plaintiff in error.

Horace T. Smith and Charles McHenry Howard, both of Baltimore, Md., for defendant in error.

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

WOODS, Circuit Judge. Plaintiff, Bradlee & McIntosh Company, of Boston, made this contract for the sale of Sugar with defendant, Frey & Son, Incorporated, of Baltimore:

"April 26, 1920.

"Sold to Frey & Son, Baltimore, Maryland, 1,000 (one thousand) bags (approximate weight 224 pounds net each) foreign refined granulated sugar, packed in double bags, @ 24c. (twenty-four cents) per pound, duty paid, ex ship New York. Landed weights.

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

"Shipment: From source during April and May, expected to arrive in New York June and July.

"Payment: Buyer to open immediately irrevocable bank credit for approximate value in favor of Bradlee & McIntosh Company, payable against shipping documents.

"Force majeure conditions to apply to this contract. No arrival, no sale."

A number of like contracts were made with other dealers at the same time. These contracts of sale were made by Bradlee & McIntosh Company on the faith of its own contract for 1,150 tons of sugar with Czarinkow-Rionda Company, of Hong Kong, dated April 22, 1920, containing these provisions:

"Shipment to be made during April, May, 1920, as follows from Hong Kong, with transshipment at Port Said, Gibraltar, or London, at sellers' option for New York.

"450 tons per S. S. Gleniffer, scheduled to load abt. mid April.

"200 tons per S. S. Professor, scheduled to load May.

"500 tons per S. S. Glenade, scheduled to load abt. end May."

The Gleniffer sailed from Hong Kong the latter part of April. At Gibraltar the sugar was transshipped by another vessel, and reached New York in July. All of this consignment was delivered to purchasers other than Frey & Son, for the reason that their letters of credit would expire earlier than that of Frey & Son. The Glenade sailed from Hong Kong for London, May 27, 1920. The sugar was transshipped in London, and reached New York September 2, 1920. The quantity of sugar contracted to Frey & Son was shipped to it from that vessel. Defendant refused to receive it, on the claim that the delivery was not in compliance with the contract. It was then sold by plaintiff. This action is for the difference between the price realized and the contract price.

The obligation of the parties was fixed by the contract at its date. The plaintiff did not guarantee delivery at any specific time, but it did give defendant these assurances against indefinite delay, namely: That the sugar should be shipped from the source between the 1st of April and the last of May, and by such vessels and route as would produce in the minds of the plaintiffs a reasonable expectation that it would reach New York in July. The shipment in the Glenade from Hong Kong was actually made within the time required by the contract. The only question is whether it was made in such vessel and by such route as warranted the reasonable expectation that it would reach New York in July. If it was, then the plaintiff complied with its contract, and the defendant was bound to take the sugar at the price specified, although the sugar did not arrive until September; if it was not, then the plaintiff breached one of the vital conditions and the defendant was relieved. On this issue the burden was on the plaintiff to prove compliance with its contract.

The sole reliance of the plaintiff for the alleged expectation that the sugar would reach New York in July was its own contract with Czarinkow-Rionda Company, of Hong Kong. Plaintiff's treasurer, Bradlee, testified that his corporation was new in the business, had never imported from China before, and knew little about trade conditions; that, according to the information he had, a cargo starting from Hong

Kong the end of May might have reached New York by July 31st, "if it came on fast boats, and the boat had come right along, and it did not make a lot of stops." This seems to be an admission that his corporation was not warranted in having a reasonable expectation at the date of the contract that sugar shipped "about end of May" in the Glenade, and transshipped at Port Said, Gibraltar, or London, would reach New York in July.

The testimony of witnesses engaged in the Far East trade was to the effect that all informed persons knew that delivery could have been made in New York within the time of expectation only by a vessel taking a direct route and without the delay of transshipment. There was also uncontradicted testimony to the effect that according to the custom and understanding of the trade the contract between plaintiff and defendant meant a direct voyage without transshipment.

We are unable to perceive how the plaintiff can claim that actual arrival in New York in July by another vessel of enough sugar to fill its sale to defendants was a fulfilment of its contract. Surely it would have been had this sugar been tendered defendant. But plaintiff's allocation of that sugar to other buyers, and of the sugar on the Glenade to the defendant, was an irrevocable binding declaration that the defendant's sugar was shipped on the Glenade on May 28th.

The District Judge submitted to the jury as the vital issues: (1) Did the plaintiff ship the sugar for the defendant in such a vessel and by such route that it had a reasonable expectation of arrival in New York in July? and (2) did the contract, according to the common understanding of the trade, mean that the shipment should be made by direct route without transshipment? These were the vital issues, upon which the testimony left little room for doubt. These issues were conclusively decided by the jury against the plaintiff.

Affirmed.

PATTERSON-SARGENT CO., Inc., v. RUMBLE et al.

In re W. P. WILKIN CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1916.

Bankruptcy ⟸140(3)—Merchandise held by bankrupt as agent held not reclaimable under Virginia statute.

Merchandise shipped by petitioner to bankrupt to be stored and delivered to petitioner's customers on orders, with the right to bankrupt to purchase such as desired, which was placed by bankrupt in its warehouses with other goods for sale, and from which it made sales, as to that remaining which came into possession of its trustees, *held* not reclaimable by petitioner under Code Va. 1919, § 5224, providing that, if any person transact business in his own name, without a required designation of agency, all property or stock acquired or used in such business shall as to his creditors be liable for his debts.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Jr., Judge.

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

In the matter of the W. P. Wilkin Company, Inc., bankrupt. From an order denying the petition of the Patterson-Sargent Company, Inc., against H. H. Rumble and others, trustees, to reclaim property, it appeals. Affirmed.

Certiorari denied 257 U. S. —, 42 Sup. Ct. 590, 66 L. Ed. —.

John S. Wise, Jr., of New York City (Hugh C. & Hugh W. Davis, of Norfolk, Va., on the brief), for appellant.

J. Winston Read, of Newport News, Va. (Harry K. Wolcott, of Norfolk, Va., on the brief), for appellees.

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

KNAPP, Circuit Judge. The W. P. Wilkin Company, Inc., filed a petition in bankruptcy, and on January 25, 1921, Flory and Rumble were appointed receivers. On February 10 they were also, together with one McMurran, appointed trustees. This appeal is brought by the Patterson-Sargent Company, Inc., petitioner below, from an order dismissing its petition, filed on February 24, by which it sought to reclaim certain property which the receivers had taken into possession. The right to retain is asserted under section 5224 of the Code of Virginia, which reads as follows:

"If any person transact business as a trader, with the addition of the words 'factor,' 'agent,' 'and company,' or 'and Co.,' 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 wherein such business is transacted, and also by a notice published for two weeks in a newspaper (if any) printed in the city, town or county wherein the same is transacted; or if any person transact such business in his own name, without any such addition; all the property, stock, and choses in action acquired or used in such business shall, as to the creditors, of any such person, be liable for the debts of such person. This section shall not apply to a person transacting such business under a license to him as an auctioneer or commission merchant."

The Wilkin Company carried on a ship chandlery business under a general merchandise license. It had no license as an auctioneer or commission merchant, and had made no publication in the newspapers of its agency, or of any other interest in the business than its own. The Patterson-Sargent Company, Inc., having offices in Cleveland, Ohio, and New York City, made a contract with the Wilkin Company, dated June 1, 1919, by which the latter agreed "to accept and store upon arrival all material consigned by the Patterson-Sargent Company," and to deliver on behalf of that company, for a service charge, material from this stock to named parties at Norfolk, Newport News, and Hampton Roads, Va., sending daily memoranda of such deliveries to the New York office for billing to the purchasers. It was also permitted to "purchase from stock stored * * * so much thereof as it may from time to time require, * * * such sales being subject to proper settlement the 10th of the month following." This contract reserved title to the property in the consignor, subject to the right of the Wilkin Company to "purchase from stock stored," and provided for its termination by either party on written notice of 60 days. The contract was canceled by the Patterson-Sargent Company on or about

January 15, but without the required notice; such action having been taken, as stated by Mr. Wilkin, president of the Wilkin Company, "owing to the condition of our company," and he admitted having advised the petitioner of its financial embarrassment 2 or 3 days before.

About the same time, Wilkin attempted to sublet to one Westheimer, a clerk in his employ, a warehouse fronting on the Roanoke dock side of Campbell's wharf, Norfolk, then under lease to the Wilkin Company, as was also the adjoining warehouse facing on the Commercial Place side of Campbell's wharf, and on the 19th of January he transferred the larger part of the goods now claimed by the petitioner from the Commercial Place warehouse to the one on the Roanoke dock side of the wharf. A small portion of the goods claimed was brought from Newport News. Upon learning of this removal, the receivers, on January 29, finding Mr. Wilkin on the premises, advised him that they considered it their duty to take possession of the property, which they accordingly did; Wilkin consenting thereto and remaining in charge for them.

Inasmuch as the lease of these premises to the Wilkin Company prohibited assignment or subletting without the consent of the owner, which was refused, the trustees assert that the lease to Westheimer was wholly invalid. But in the view we take of the case the question of the validity of that lease is quite immaterial. Even if it be conceded that Wilkin for a short time had possession for the petitioner as its agent of the property in dispute, he voluntarily relinquished it to the receivers at their request, and they have ever since been in peaceable possession thereof. Indeed, the fact that petitioner seeks to reclaim the property in this proceeding implies acknowledgment that it is held in peaceable possession by the trustees.

As we see the matter, the sole question here is whether the property claimd by petitioner was "acquired or used" in the business of the bankrupt, within the meaning of the Virginia statute, and that it was so acquired and used seems to us not doubtful. The goods consigned to the Wilkin Company were shipped and waybilled the same as to a purchaser; they were placed in its warehouses alongside goods obtained from other sources and exposed for sale in like manner; and from the stock on hand from time to time sales were made to customers procured by the Wilkin Company, presumably at prices and on terms fixed by it, as well as sales for a service charge to the parties named in the contract with petitioner. In short, in their legal aspect, the facts of record are practically identical with those considered by us in Virginia Book Co. v. Sites, 254 Fed. 46, 165 C. C. A. 456, and the views expressed therein, and in the authorities there cited, are decisive of this case. "To hold otherwise," as we then said, "would be to defeat in large degree the declared purpose of the statute and open the door to its easy evasion."

Affirmed.

REED v. DUNLAP.

In re SCOTT & BLACKMER

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5913.

1. Bankruptcy ⟸340—Proof of claim against bankrupt partnership some evidence that debt was a firm debt.

Proof of claim filed against bankrupt partnership firm was some evidence that the debt for which claim filed was a debt of the firm, notwithstanding objection to the claim.

2. Bankruptcy ⟸340—Evidence held to show debt evidenced by notes signed by partners individually was partnership debt.

In bankruptcy proceedings involving issue as to whether claim based on notes signed by the partners individually were the individual notes of the partners or the notes of the bankrupt firm, evidence *held* to overcome the presumption that the notes were the individual debt of the partners and to prove the debt a partnership obligation.

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

In the matter of the bankruptcy of Scott & Blackmer, bankrupt. Claim by Ida A. Dunlap, opposed by L. S. Reed, as trustee in bankruptcy. Claim disallowed by referee, but allowed by the District Court on petition for review of referee's action, and the trustee appeals. Affirmed.

W. F. Wilson, of Oklahoma City, Okl. (Wilson, Tomerlin & Threlkeld and Howard & Beets, all of Oklahoma, Okl., Tolbert & Tolbert, of Hobart, Okl., and E. E. Brown and John N. Ott, both of Chicago Ill., on the brief), for appellant.

J. A. Duff, of Cordell, Okl. (Massingale & Duff, of Cordell, Okl., on the brief), for appellee.

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

CARLAND, Circuit Judge. [1, 2] Appellee filed a claim against the estate of the firm of Scott & Blackmer, bankrupt, amounting to $11,473. In her oath to said claim as amended, the consideration of the same was stated to be stock of the First National Bank of Hobart, Okl. The claim was based on four promissory notes signed D. A. Scott and R. C. Blackmer. The trustee objected to the allowance of the claim against the copartnership as it appeared on the face of the notes that they were signed by Scott & Blackmer individually. The referee disallowed the claim, but the District Court on petition to review reversed his action and allowed the claim against the copartnership. The question before us is as to whether the presumption that the notes were the individual notes of the persons who signed them, arising from their individual signatures, was overcome by the evidence. The proof of claim notwithstanding the objection to the same was some evidence

that the debt for which the claim was filed was a debt of the copartnership. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; Frederick v. Citizens' National Bank, 231 Fed. 667, 145 C. C. A. 553.

The testimony of four witnesses was offered before the referee upon the question as to whether the claim of appellee was a copartnership obligation or not. These witnesses were R. C. Blackmer, a member of the copartnership, L. S. Reed, trustee, and E. F. Dunlap and E. A. Livermore, who testified by deposition. Blackmer testified that he was a member of the firm of Scott & Blackmer, Hobart, Okl.; that in March, 1913, said firm had a transaction with Ida A. Dunlap, through her agent and husband E. F. Dunlap, who was president of the First National Bank of Hobart; that the firm bought 165 shares of the stock of said bank which constituted all the Dunlap interest; that the stock was purchased by the partnership. All but $10,000 of the purchase price was in money which was paid by Scott & Blackmer out of partnership assets. The balance of the consideration was evidenced by the notes constituting the present claim. That it was the intention of Mr. Scott and himself to pledge the partnership to pay the notes. Scott & Blackmer paid the interest on the notes out of partnership funds. We sold some of the stock to different friends of ours at the same price that we bought and at the time we bought it. Blackmer on cross-examination testified that the stock certificates were issued to him individually and to Scott individually, as a matter of convenience to enable them to serve as officers. Dunlap testified:

> That the claim in controversy was based upon purchase of bank stock; that the notes were given in partial payment for the purchase of bank stock; that the notes were given by Scott & Blackmer to Ida A. Dunlap; that the consideration for the notes was bank stock in the First National Bank of Hobart, Okl., bought by Scott & Blackmer, of the value of $24,825. $15,000 was paid in cash and the notes covered the balance. "The stock, before it was purchased by Scott & Blackmer, belonged to Ida A. Dunlap and myself. I dealt with Scott & Blackmer as a firm. The check for $15,000 cash was signed by Scott & Blackmer. The stock was sold to Scott & Blackmer as a partnership. Scott & Blackmer paid interest on the notes as a partnership. The interest was paid by check signed by Scott & Blackmer. Some payments were made on the notes by checks, which were signed by Scott & Blackmer. Scott & Blackmer stated, when buying the stock, that they wanted it as an aid to their farm loan business, and in their conversation relative to this negotiation they always used the word 'we.' I understood that the notes in controversy had to do with the partnership transaction of Scott & Blackmer. Scott & Blackmer told me that they were buying it as an aid to their farm loan business; that they were keeping a very small part of it themselves, but were selling it to their different connections—people to whom they sold their farm loan paper. I had no business with D. A. Scott and R. C. Blackmer as individuals."

Livermore, bookkeeper for Scott & Blackmer, testified to having issued firm checks in payment of the interest on the Ida A. Dunlap notes. The referee also found that the $15,000 payment and the various other interest payments were made by the firm and charged against the firm assets. The testimony of this witness in regard to the other book entries concerning which he was asked is confusing and difficult to understand.

Blackmer testified that Scott never looked at the books much; that he (Blackmer) was blind, and could not see the books if he had looked. Scott did not care what you did last week, but what you were going to do next week. Mr. Livermore took directions from both of us. The testimony of Reed, the trustee, simply shows a very confused and unreliable condition of the books of the copartnership, and from all the testimony we conclude that they are of no value in determining the question at issue. There would seem to be no necessity for discussing the propositions of law raised in the briefs of counsel, as there can be no dispute at the present time that the difference between firm debts and individual debts is a matter of substance, and the distinction must be kept clearly in mind in proving claims against a copartnership which is bankrupt.

The question in this case is one of fact, and we think the evidence preponderates in favor of the proposition that the amount due on the notes in question is a partnership obligation. The referee found differently, but when the real testimony which must be considered in determining the matter, is read, we agree with the District Court in its conclusion, and its order in the premises is therefore affirmed.

ONE PIECE BIFOCAL LENS CO. v. STEAD.

(Circuit Court of Appeals, Second Circuit. April 3, 1922.)

No. 201.

Patents ⊂=328—932,965, for a solid bifocal lens, held not infringed.

The Conner patent, No. 932,965, for a solid bifocal lens having a uniform thickness through both fields at the curved line of joinder, whereby the division is practically free from prismatic effects, *held* not infringed by a lens made under a prior disclosure, which, as made, had a shoulder at the line joining the two fields, which shoulder was subsequently ground off in polishing, so as to present to the eye an appearance of uniform thickness similar to plaintiff's lens, but not having its quality of avoiding prismatic effect.

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

Suit in equity for infringement of patent by the One Piece Bifocal Lens Company against Harold J. Stead, doing business as the H. J. Stead Optical Company. Decree for plaintiff (274 Fed. 667), and defendant appeals. Reversed and remanded, with directions to dismiss the bill.

Suit is upon Conner patent, 932,965, for a "solid bifocal lens." The single claim is as follows: "A bifocal lens, comprising one piece of glass having an upper distance field, a lower and smaller near field, and an arched division separating the two fields, but the lens at the curved line of joinder of the upper and lower fields having a uniform thickness through both fields, whereby the said division is practically free from prismatic effects."

The trial court found the patent valid and infringed; defendant appealed.

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

Howard P. Denison and E. A. Thompson, both of Syracuse, N. Y., for appellant.

Edward Rector, of Chicago, Ill., and V. H. Lockwood, of Indianapolis, Ind., for appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

HOUGH, Circuit Judge. With the court below we assume the validity of the claim in suit. As to the history of the art and the nature of Conner's patented improvement, nothing need be added to the discussion of these matters by Rose, District Judge, in One Piece, etc., Co. v. Bisight Co., 246 Fed. 450, affirmed (C. C. A.) 259 Fed. 275. Upon the same authority we assume the invalidity of the first and third claims of Alexander's patent, 954,772; therefore it was open to this defendant or any one else to manufacture bifocal lenses of the style displayed by Alexander in his invalidated claims.

The sole question in this case is whether the defendant by making some or all of the alleged infringements offered in evidence has violated Conner's admitted right. It is a necessary preliminary to this inquiry to state exactly what we conceive to be the resulting form of a lens covered by the Conner claim in suit.

The language of the patent is that "the lens at the curved line of joinder of the upper and lower fields [has] a uniform thickness through both fields." It is obvious that the word "line" is not used in the mathematical sense of exhibiting length without other dimensions. What Conner invented was a form of juncture between reading and distance lenses, which produced equal thicknesses of glass on each side of the exact junction line, but at small (indeed, almost miscroscopic) distances from said line. Thus, a vertical section of Conner's construction would look like a similar section of a hill with sides of exactly equal curvature near the apex. Conner declares, and the testimony bears out, that this construction produces a "division practically free from prismatic effects."

Conner's patented result may be obtained by means other than those disclosed in his method patent, 925,802; but, no matter what means or method be employed in the making of this patented article, fine work is required, skilled labor is necessary, and even then the percentage of failures rejected by rigid inspection is quite large.

The Alexander lens, which any one can make so far as patent rights are concerned, necessarily exhibits, even when completed according to Alexander's disclosure, a shoulder or substantially vertical line delimiting and separating the reading and distance portions of the lens. A vertical section of that lens does not look like a hill, but like a pair of steps—the level of one step being the lens for distance, and the level of the other the lens for reading—and the separation between them is perpendicular.

We consider it proven beyond all doubt, and especially by the witness Zircher, called for the plaintiff, that defendant makes all its lenses in the Alexander manner, and not in that of Conner. It is, however, also proven that, when defendant has by machines produced what may be called an Alexander lens, it is subjected to a polishing process which

wholly or partially removes the Alexander shoulder. Result is what defendant calls a "zone of aberration." It is obvious that defendant's resulting commercial product is a ruder, cheaper, and less accurately formed set of bifocal lenses than plaintiff's carefully worked product.

But the only inquiry in this suit is whether the polishing of an Alexander lens in the manner amply testified to does or can produce the Conner lens. The differences between the comparatively cheap product of defendant and the carefully finished one of plaintiff are matters of millimeters; the difference cannot be determined by visual inspection, and we think that the court below fell into error in deciding this case, not upon the oral evidence, but by considering the appearance to a layman in such matters of plaintiff's and defendant's commercial products.

To us there are some of the alleged infringements that do not in the least resemble Conner's disclosure, and there are others which we cannot distinguish from some of the plaintiff's glasses. But causes cannot be decided in that manner; the evidence is that defendant starts his polishing process with an Alexander lens, and there is no evidence to show how, as matter of mechanics or mathematics, the polishing of what in vertical section looks like a pair of steps can be made into something which on vertical section resembles a hill, with equally curving sides.

We do not assert that the thing is impossible; but there is no evidence to show its possibility, and in our opinion all the probabilities justifiably based on the evidence indicate that this defendant has done no more than produce a cheap machine-made lens, possessing, and acknowledging the possession of that very "zone of aberration" which is sure to produce the "prismatic effects" that have been avoided by Conner's scientifically accurate patented product.

Holding, therefore, that the evidence of infringement is quite insufficient, it is ordered that the decree below be reversed, with costs, and the matter remanded, with directions to dismiss the bill.

ATWOOD-LARSON CO. v. HASVOLD et al.

In re RICHMOND EQUITY EXCH.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1922.)

No. 217.

Bankruptcy ⇐339—Referee must hear objections to claim on the ground that creditor has received preferences.

Where objections are made to the claim of a creditor on the ground that he has received voidable preferences, it is the duty of the referee to hear evidence in support of such objections, and, if sustained, to disallow the claim as required by Bankruptcy Act, § 57g (Comp. St. § 9641), unless the preferences are surrendered.

Petition to Revise Order of the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of the Richmond Equity Exchange, bankrupt. Petition by the Atwood-Larson Company to revise order of District Court as to objections of H. R. Hasvold and others, creditors. Affirmed.

Hugh J. McClearn and Leslie C. Gilbertson, both of Duluth, Minn., and R. A. Dunham, of Clark, S. D., for petitioner.

G. N. Williamson and Williamson, Williamson & Smith, all of Aberdeen, S. D., for respondents.

Before SANBORN, STONE, and LEWIS, Circuit Judges.

LEWIS, Circuit Judge. This petition to revise the action of the Bankruptcy Court recites that Richmond Equity Exchange, a corporation, was adjudged a bankrupt January 25, 1921, that the first meeting of creditors was held February 7, 1921, at which Hasvold and other creditors filed written objections to the allowance of the claim made by petitioner, on the ground that claimant had received from bankrupt within the four months' period $3,000 in money and wheat valued at $10,000, as payments on the indebtedness to petitioner, and which sums it was alleged by objecting creditors constituted voidable preferences. The referee denied the objecting creditors the right and opportunity to present proof to sustain their objections, overruled them without hearing any testimony and allowed petitioner's claim. On review the Bankruptcy Court vacated the action of the referee and ordered—

"That the said order of the Referee, dated February 7th, 1921, refusing the request of the objectors to furnish evidence in support of the objections and overruling the objections and allowing the claim of Atwood-Larson Company, be and the same hereby is reversed and said matter is hereby returned to the Referee with instructions to set a date for hearing said objections, give due notice thereof to the parties interested, or their attorneys, and hear evidence in support of the objections filed to the claim of Atwood-Larson Company, and if it is found that the objections are established, that an order be made disallowing the claim of Atwood-Larson Company until they have surrendered any preference that it is found they had received as set forth in the objections to their claim when filed."

This is the action complained of and which we are asked to revise as being erroneous in matter of law. Errors specified and argued here are all to the effect that the objections to the allowance of the claim presented a controversy that should be determined only in a plenary suit, and cannot be disposed of in this summary way without petitioner's consent. This is a mistaken view of what the referee was called on to determine. It was not a proceeding to recover the alleged preference, but to determine whether the referee would decline to allow the claim on account of petitioner's having received a voidable preference. It was clearly the duty of the referee to hear evidence on the objections interposed by Hasvold and other creditors. Bankruptcy Act, § 57 (Comp. St. § 9641) d, f, g. If those objections had been sustained the petitioner would not have been bound by that ruling to surrender the preference. It would have been at its option to do so and have its claim allowed in full, or to retain the preference and forego the immediate allowance of its claim. Stevens v. Nave-McCord Merc. Co., 150 Fed. 71, 75, 80 C. C. A. 25; In re Quinn, 165 Fed. 144, 91 C. C. A. 178; Evans v. Claridge, 176 Fed. 907, 909, 100 C. C. A. 377; Union Central Life Ins. Co. v. Drake, 214 Fed. 536, 550, 131 C. C. A. 82; Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332. A similar condition was dealt with by this court in W. S. Peck & Co. v. Whitmer, 231 Fed. 893, 146 C. C. A. 89, brought up on appeal after the evidence on objections had been heard. There can be no doubt that the referee was in error, and that the order of the Bankruptcy Court directing him to correct that error was rightly made.

Petition dismissed at petitioner's costs.

AMERICAN TELEPHONE & TELEGRAPH CO. v. SPRING.

(Circuit Court of Appeals, Fourth Circuit. February 23, 1922.)

No. 1936.

Telegraphs and telephones ⟸26¾, New, vol. 7A Key-No. Series—Company not liable for torts during federal control.

A telegraph company is not liable for acts of its former employees while engaged under government control in the operation of its property.

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; William E. Baker, Judge.

Action at law by Mary L. Spring against the American Telephone & Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. H. Frapwell, of New York City, and Martin & Seibert, of Martinsburg, W. Va., for plaintiff in error.

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

PER CURIAM. The injury sued for in this case was inflicted 18 days after the President took over the telegraph and telephone system of the country, in pursuance of the authority conferred upon him by the Joint Resolution of Congress of July 16, 1918, 40 Stat. 904. Months subsequent to the disposal of this case below, the Supreme Court decided that telegraph and telephone companies were not liable for the acts of their former employees while engaged under government control in the operation of their property. Western Union Telegraph Co. v. Poston, 256 U. S. 662, 41 Sup. Ct. 598, 65 L. Ed. 1157.

It follows that the judgment in favor of the defendant in error, plaintiff below, must be reversed.

CHICAGO & N. W. RY. CO. v. RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA et al.

(District Court, D. Minnesota, Third Division. May 15, 1922.)

1. Injunction ⟸103—Destruction of property rights by criminal proceedings may be enjoined.

Though equity has generally no power to enjoin criminal proceedings or to prohibit the enforcement of an unconstitutional criminal law, it may afford relief by injunction where property rights are involved, and are threatened by destruction by criminal proceedings under an alleged unconstitutional law.

2. Courts ⟸262(2)—Remedy at law by appeal from commission's order held not to preclude injunction; "adequate remedy at law."

The remedy at law against the enforcement of an alleged unconstitutional statute by appeal from an order of the state commission, which was prerequisite to criminal proceedings under the statute, to the state courts, and thereafter to the United States Supreme Court, does not preclude equitable relief by the United States District Court since the "adequate remedy" at law, contemplated by Judicial Code, § 267 (Rev. St. § 723 [Comp. St. § 1244]), must be one which is as prompt and efficient as the equitable remedy, one to which plaintiff may resort of his own volition, and one in the federal court, and not merely in the state court.

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

3. Constitutional law ⟸241—Classification of points where buildings are required for repairs of railroad cars held not invalid.

Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring companies engaged in the construction or repair of railroad cars to erect and maintain a building or buildings at every point where there are as many as six men employed at one time for a period of not less than 30 days on such work, is not invalid because of the method of classification, which, while not logically perfect, is practicable, and manifests the purpose to include the more important repair points and exclude the others.

4. Master and servant ⟸12—State regulation of railroad shops within "police power."

Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring companies engaged in the repair or construction of railroad cars to erect and maintain buildings in which the work shall be done, is not invalid as arbitrary interference with the management of the railroad company of its own property, but is an exercise of the state's police power, which is not

capable of exact definition, but embraces regulations to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or public health.

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

5. Master and servant ⟸12—Sate regulation of railroad shops held not invalid in making specifications.

The numerous minute specifications in Laws Minn. 1919, c. 514, § 3, as amended by Laws 1921, c. 481, for shops in which railroad cars shall be constructed or repaired, is not an arbitrary interference with the management of railroad property, in view of the provision giving the state Railroad and Warehouse Commission power to allow deviations from the specifications, since it will not be assumed that the state commission will exercise the power given it arbitrarily, and, if it does, the railroad has the right to appeal to the courts.

6. Commerce ⟸58—Regulation of railroad repair shops does not directly burden interstate commerce.

Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring buildings to be erected for the construction and repair of railroad cars, is not invalid because it interferes with interstate commerce, since the interference with such commerce is indirect and incidental only.

7. Constitutional law ⟸42—Railroad cannot complain of regulation requiring buildings to protect car repairers because it disregards other employés.

The objection that Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, is invalid because it protects only railroad employés who are repairing or constructing cars, and not other employés working on other structures, cannot be raised by the railroad company, where the other employés are not complaining, and especially in view of the element of practicability of including such other employés.

8. Constitutional law ⟸241—Objection to act requiring buildings for car repairers that business of different kind was not also regulated does not invalidate the act.

Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring buildings for the construction or repair of railroad cars, is not invalid because it is not based on the relation of employer and employé, nor on the dangerous or unhealthful character of the work, but solely in the character of the articles made or repaired, since regulations for one kind of business necessary for the protection of the public are not objectionable, because like restrictions are not imposed on other business of a different kind.

9. Master and servant ⟸11—Regulation within police power not invalidated by cost.

The cost and inconvenience to a railroad company necessary to comply with a statute enacted under the police power for the protection of employés is not an objection to the validity of the act, unless such cost and inconvenience are very great.

10. Constitutional law ⟸303—Penalty provisions of act under police power not effective until order by state railroad commission, which is subject to judicial review, do not invalidate act.

The penalty provisions of Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, do not render the statute unconstitutional, in view of its provision that, before they come into effect, an order of the state Railroad and Warehouse Commission is necessary, which order is subject to judicial review, under Gen. St. Minn. 1913, § 4191, as amended by Laws 1917, c. 291 (Gen. St. Supp. 1917, § 4191), and sections 4192, 4200.

11. Master and servant ⟸12—State regulation of railroad shops not invalidated by federal regulation as to jurisdiction of Labor Board.

The jurisdiction of the Railroad Labor Board, under Transportation Act 1920, §§ 300–316, is confined to disputes arising between carriers and

their employés, and does not invalidate Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, giving the state Railroad and Warehouse Commission jurisdiction over railroad repair shops.

12. **Commerce ⊜8(1)—State statute regulating car repair shops held to conflict with federal Safety Appliance Act, requiring repairs to defective cars at place where defect discovered.**

Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring companies engaged in the construction or repair of railroad cars to maintain buildings for such work, is in conflict with the federal Safety Appliance Act April 14, 1910, § 4 (Comp. St. § 8621), requiring defective cars on the lines of interstate carriers to be repaired at the place where they are first discovered to be defective, if feasible, otherwise at the nearest available repair point, and the federal statute is paramount, and controls the state statute in so far as they conflict.

13. **Commerce ⊜10—State statute conflicting with federal act held not invalid as to field not covered by the latter.**

The conflict between Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, requiring buildings for the construction and repair of railroad cars, and the federal Safety Appliance Act (Comp. St. § 8605 et seq.), does not render the state statute wholly void, but merely limits its scope and leaves it still a field of operations.

14. **Health ⊜21—Prohibition of paint-spraying machines in railroad shops not within police power.**

The prohibition by Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, against the use of paint-spraying machines within buildings for the construction and repair of railroad cars, is not a valid exercise of the police power, in view of evidence that the paint used no longer contains the ingredients which were dangerous to health, and that the state itself makes use of paint-spraying machines inside of buildings.

15. **Constitutional law ⊜62—State statute as to buildings for repair of railroad cars held not invalid, as delegating legislative power to Railroad and Warehouse Commission.**

Laws Minn. 1919, c. 514, as amended by Laws 1921, c. 481, giving the Railroad and Warehouse Commission power to determine what portion of the car repair tracks shall be covered by shops, and to make an order specifying the buildings to be erected for that purpose, and authorizing it to permit deviations from the specifications for such shops, is not invalid, as an attempted delegation of legislative power to the commission.

16. **Criminal law ⊜13—Penal statute requiring protection of employés from heat, cold, and inclement weather is too indefinite.**

Laws Minn. 1919, c. 514, § 1, requiring buildings for the constructon or repair of railroad cars, so as to protect employés from heat, cold, snow, or other inclement weather, and section 4, making it unlawful to require employés engaged in such work to work outside of the buildings in rain, heat, cold, snow or other inclement weather, which is a criminal statute, the violation of which is a misdemeanor punishable by a fine of from $100 to $500, is too uncertain and indefinite to be valid, since the words "heat," "cold," and "inclement weather" are indefinite and uncertain, so that the authority to define a statutory crime, which is vested only in the Legislature, must be exercised by another.

17. **Statutes ⊜64(1)—Partial invalidity makes entire statute void, unless contrary intention manifested.**

A part of a statute may be enforced as constitutional, though another part is inoperative and void, only where the parts are so distinctly separable that each can stand alone, and where the court is able to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail.

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18. Statutes ⟸64(2)—Partial invalidity of statute for protection of railroad car employés held to invalidate entire act.

The invalidity of the provisions in Laws Minn. 1919, c. 514, prohibiting employment of car repairers in heat, rain, cold, snow, or other inclement weather, invalidates the entire act, which requires the construction of buildings in which the work may be carried on, since the invalid portions of the statute are vital, and embody the real ground and purpose of its passage.

In Equity. Suit by the Chicago & Northwestern Railway Company against the Railroad and Warehouse Commission of Minnesota and others to enjoin the enforcement of a state statute. On final hearing. Decree for permanent injunction directed.

This is a suit brought by plaintiff for an injunction to restrain the defendants and each of them from enforcing against the plaintiff certain state laws of the state of Minnesota, to wit, chapter 514, Session Laws 1919, as amended by chapter 481, Session Laws of 1921; the latter act amending section 3 only of the original act. Jurisdiction is based upon the ground of diversity of citizenship, and also upon the ground that the suit is one arising under the Constitution and laws of the United States; jurisdictional amount being sufficient. At the commencement of the suit, a temporary restraining order was issued. By written stipulation of the parties, duly filed, a hearing for an interlocutory injunction before three judges was expressly waived, the temporary restraining order continued in force, and the case has been brought on for final hearing, and heard upon the merits, upon bill, answer, and proof.

R. L. Kennedy, of St. Paul, Minn., Brown, Somsen & Sawyer, of Winona, Minn., and F. W. Sargent, of Des Moines, Iowa, for plaintiff.

Clifford L. Hilton, Atty. Gen., and Montreville J. Brown and Henry C. Flannery, Asst. Attys. Gen., for defendants.

BOOTH, District Judge (after stating the facts as above). The statute in question reads as follows:

"Chapter 514—H. F. No. 143.

"An act requiring railroads, car shops and other concerns manufacturing or repairing cars, car trucks, and other equipment used as conveyances by rail, for either freight or passengers, and other equipment used in repair work or otherwise, and operated by railroad companies, to provide buildings that will protect their employés from heat, rain, cold, snow, and other inclement weather.

"Be it enacted by the Legislature of the State of Minnesota:

"Section 1. *Buildings for Employés.*—That every person, firm, copartnership, corporation, or receiver thereof, engaged in the construction or repairing of railroad cars, car trucks, or other equipment used for conveyance by rail, shall erect and maintain a building or buildings at every station or point where there are as many as six (6) men employed at one time for a period of not less than thirty (30) days, on the work of construction or repairing of such cars, car trucks, or other such equipment; the building or buildings to cover a sufficient portion of the repairing or construction company's yards or tracks so that all employés engaged in such work shall be protected from heat, rain, cold, snow, or other inclement weather, while working at such work.

"Sec. 2. *Application.*—The provisions of this act shall not apply to the repairing of conveyances while the same are en route as part of a train, nor shall it apply to cars loaded with live stock or perishable freight, where trains are being held for the movement of said cars."

Section 3 of chapter 514, General Laws 1919, as amended by chapter 481, Session Laws 1921:

"Sec. 3. *Specifications.* All buildings to be erected hereunder shall substantially comply with the following specifications:

"In buildings that cover more than one track the distance between the inside rails of each track shall not be less than twelve lineal feet. Between the walls of the building and the outside rails there shall be a distance of ten lineal feet, except that where buildings have been constructed prior to January 1, 1921, the distance between the walls thereof and the outside rails shall not be less than seven and one-half feet. The building or buildings shall not be less than twenty feet high at the eaves. Each building shall be enclosed from roof to ground and shall have glass windows on each side with a space of not to exceed twelve feet apart. The side windows shall not be less than nine feet high, and not less than four feet wide. Windows shall be in three sections and sections shall be provided with pivoted or sliding sash. The buildings shall be equipped with side and end doors. The end track doors shall be not less than six feet wide and sixteen feet high, and there shall be two such doors for each repair track covered by the building. *Side doors shall be provided for each side of building. The size of said doors shall be great enough to allow the convenient handling of the larger materials required to be taken into said building.* The roof shall be provided with a cupola the entire length of the building, and be equipped with side windows of not less than three feet in width and six feet in height, having pivot and opening device that shall be at all times operative. One cupola or monitor shall be provided for each building that contains not to exceed four repair tracks. For buildings inclosing more than four tracks, skylights shall be provided to insure adequate light over each car, that men are required to work on. In lieu of above cupola, monitors and skylights, sawtooth roof construction may be used or monitors crosswise of the buildings to provide adequate light and ventilation. The buildings shall be equipped with necessary heating facilities, and shall at all times have drainage that will keep them in clean and sanitary condition. They shall be equipped with sanitary drinking fountains where clean wholesome drinking water can be obtained. A sufficient number of sanitary lavatories shall be provided for said employés and sanitary toilets shall be provided and kept properly clean, ventilated and free from odor, as required by chapter 491 of the General Laws of 1919, sections 9, 10, 11, and 12. All scaffolding used in such buildings shall be made of clear lumber free of all knots, and shall be kept in first-class condition at all times. The use of paint spraying machines shall not be permitted inside such buildings. It shall be the duty of the Railroad and Warehouse Commission to determine as soon as practicable what portion of the repair or construction tracks of each railroad in the state it shall be necessary to cover with such building or buildings in order to comply with section one hereof, and said commission shall thereupon make an order as to each railroad in the state specifying the size of the building or buildings necessary at each location where such repair or construction work is carried on, and it shall thereupon be the duty of each railroad company to forthwith erect such buildings and have all the same ready for occupancy not later than September 1, 1922. *The Railroad and Warehouse Commission may, upon application made, after a thorough investigation, permit any person, firm or corporation subject to the provisions of this act, to deviate from the specifications and requirements hereinbefore provided for, when, in the judgment of said commission, a strict compliance with the provisions herein would be impracticable or unnecessary.* Provided, that any employé who while engaged in the performance of his duty is required or permitted to ride on the top or side of a car in putting the car or cars into or taking them out of any such building, may be injured or killed by reason of any structure or obstruction or any part or portion of said building having been placed or built in closer proximity to the tracks upon which said cars are being moved, than eight feet from the center of said tracks or twenty-one feet from the tops of the rails thereof, shall not be deemed to have assumed the risk thereby occasioned or to have been

guilty of contributory negligence, although such employé continued in the employ of the person, firm or corporation using said tracks, after the location of such obstruction or portion of said building shall have been brought to his knowledge and the exercise of permission from the Railroad and Warehouse Commission as provided for herein, shall be at the sole risk of the employer and owner of said building.

"Sec. 4. *Employés Not Required to Work in Rain, Heat, Cold or Snow.*—Where any such buildings are maintained, it shall be unlawful for any employer to require men so employed to work outside of such buildings in rain, heat, cold, snow, or other inclement weather.

"Sec. 5. *Violation a Misdemeanor.*—Any person, firm, copartnership, corporation, or receiver thereof, violating any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be liable for a penalty of not less than one hundred dollars ($100.00), nor more than five hundred dollars ($500.00), for each offense, and the failure to provide a building or buildings as hereinbefore required, shall constitute a separate offense for every day or part of the day while such failure continues, and such penalty shall be recovered in a suit brought in the name of the state of Minnesota, in any court having jurisdiction thereof, by the attorney general of the state, or at his direction. All fines and penalties recovered by the state under this act shall be paid into the treasury of the state of Minnesota.

"Sec. 6. *Effective September 1, 1920.*—This act shall take effect and be in force on and after September 1, 1920.

"Approved April 25, 1919."

[1] At the outset it is contended by the defendants that the court has no jurisdiction of the suit, inasmuch as equity will not undertake to enjoin the enforcement of a criminal statute, and, further, that the plaintiff has an adequate remedy at law. These contentions cannot be sustained. Though a court of equity has in general no power to enjoin criminal proceedings or to prohibit the enforcement of an unconstitutional criminal law (In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Davis & Farnum Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778), yet where property rights are involved, and are threatened with destruction by criminal proceedings under an alleged unconstitutional law, a court of equity may afford relief by injunction. Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596; Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724; Mo. Pac. Ry. Co. v. Omaha, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157; Rast v. Van Deman, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Allen v. Omaha Co. (C. C. A.) 275 Fed. 1.

[2] In support of the contention that the plaintiff has a plain adequate remedy at law, the defendants point out that it was perfectly possible for the plaintiff to await an order made by the Commission pursuant to the statute in question, and then take an appeal, as provided by the statutes of the state, to the state district court, and, if necessary, to the Supreme Court of the state, and thereafter to the Supreme Court of the United States. Doubtless this course of procedure might be pur-

sued, but the remedy is not of such character as to preclude a suit in equity in the federal court. The adequate remedy at law contemplated by section 267, Judicial Code (R. S. § 723 [Comp. St. § 1244]), must be one which is as prompt and efficient as the equitable remedy. Walla Walla v. Walla Walla Co., 172 U. S. 1, 12, 19 Sup. Ct. 77, 43 L. Ed. 341; Magruder v. Belle Fourche Ass'n, 219 Fed. 72, 135 C. C. A. 524.

The remedy must be one that plaintiff may resort to of his own volition, and not at the will of the defendant. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Bank v. Stone (C. C.) 88 Fed. 398; Fredenberg v. Whitney (D. C.) 240 Fed. 819; Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22. It must be a legal remedy in the federal court, and not merely in the state court. Nat. Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Franklin v. Nevada Co. (C. C. A.) 264 Fed. 643; St. Louis, etc., Ry. Co. v. M'Elvain (D. C.) 253 Fed. 123. The legal remedy suggested in the case at bar does not fulfill these requisites, and therefore does not prevent the maintenance of a suit in equity.

Turning to the merits: The statute in question on its face purports to provide for the health, safety, and comfort of certain classes of employés. Its justification, therefore, must be found in the police power of the state. Violations of the statute are made misdemeanors, and penalties are provided for such violations. It is therefore a criminal statute, and must fulfill the usual requirements of such statutes.

Plaintiff contends that the statute is violative of the Fourteenth Amendment to the Constitution, and in conflict with the acts of Congress known as the Interstate Commerce Act (Comp. St. § 8563 et seq.), the Safety Appliance Acts (Comp. St. § 8605 et seq.), and the Transportation Act of 1920 (41 Stat. 456). Plaintiff further contends that the statute is not a legal exercise of the police power; that the statute is void, in that it attempts to delegate legislative powers to the Railroad and Warehouse Commission; and that the statute does not fulfill the requisites of a valid criminal statute.

1. *The Statute as a Police Measure.* The tests for determining whether a statute falls within or without the police power are perhaps not capable of exact and comprehensive statement. In the case of Sligh v. Kirkwood, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835, the court said (237 U. S. at page 58, 35 Sup. Ct. 502, 59 L. Ed. 835):

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chica-

go, etc., Railway v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. * * * And further, "It is the most essential of powers, at times the most insistent and always one of the least limitable of the powers of government."' Eubank v. Richmond, 226 U. S. 137, 142."

[3] Whether the statute under discussion is a valid exercise of the police power can perhaps be best determined by considering the objections urged against it. It is claimed that the statute in certain of its provisions is purely arbitrary, and therefore not a proper exercise of the police power. The statute, as will be noted, requires sheds to be built at all points where 6 or more men are employed at one time for a period of not less than 30 days on the work of constructing, repairing, etc., cars, car trucks, and other equipment.

It is contended that there is no relation between six men working for 30 days and the public health and welfare. This method of classification of points where sheds are required and points where they are not required may at first appear fanciful; but it is evident that some classification had to be made. It is suggested that only repair points used in the winter time should have been included. But the Legislature evidently concluded that inclement weather conditions for workmen were not confined to the winter season. The evidence shows that there are four repair points on plaintiff's railroad lines in Minnesota which come within the provisions of the statute, and several other points where repairs are made which do not come within the provisions. It was evidently the purpose of the Legislature to include the more important repair points and to exclude the others, and, while the method of classification employed may not be logically perfect, it is at least practicable, and one which has not infrequently been adopted. See McLean v. Arkansas, 211 U. S. 539, 551, 29 Sup. Ct. 206, 53 L. Ed. 315; St. Louis Consol. Coal Co. v. Illinois, 185 U. S. 203, 207, 22 Sup. Ct. 616, 46 L. Ed. 872.

[4] It is claimed by the plaintiff that the law is invalid, in that it arbitrarily interferes with the management by the railroad company of its own property. In support of this contention plaintiff cites Lake Shore Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; C., M. & St. P. Ry. Co. v. Wisconsin, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133. The former was "the family mileage book case," and the latter "the upper berth case." When these cases are compared, however, with the cases of Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, C., B. & Q. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, Erie R. R. v. Williams, 233 U. S. 685, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, Booth v. Indiana, 237 U. S. 391, 35 Sup. Ct. 617, 59 L. Ed. 1011, and the many cases therein reviewed, in which the police power was upheld, the cases being not dissimilar in principle to the case at bar, it becomes apparent that the latter class of cases is controlling here.

[5] It is further claimed that the law is void on account of the numerous and minute specifications in section 3 thereof, which arbitrarily interfere with the management by the company of its own property. The case of Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1051, is cited. This was the Wisconsin tenement house case. The provision in section 3 of the present statute as amended giving the commission power to allow deviations from the specifications largely takes away the force of this contention. But it is claimed that this provision is subject to the arbitrary whim of the Railroad and Warehouse Commission. In cases of this kind, however, it will be assumed that the public commission will act fairly and with reason, and not arbitrarily. Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Merrick v. Halsey & Co., 242 U. S. 568, 37 Sup. Ct. 227, 61 L. Ed. 498. In the latter case the court said (242 U. S. page 590, 37 Sup. Ct. 232, 61 L. Ed. 498):

"The contentions based on the exemption and provision are a part of that which accuses the law of conferring arbitrary discretion upon the commission. * * * The accusation is formidable in words but it is the same that has been made many times. It is answered by the comment and the cases cited in the opinion in the other cases. Besides, we repeat, there is a presumption against wanton action by the commission, and if there should be such disregard of duty a remedy in the courts is explicitly given, and if it were not given it would necessarily be implied."

[6] It is further contended by the plaintiff that the law is invalid, because it burdens and interferes with interstate commerce. Doubtless this is true to some extent, but the burden and interference are indirect and incidental only, and in this class of cases such results are not sufficient to invalidate the law. Sligh v. Kirkwood, 237 U. S. 52, 61, 35 Sup. Ct. 501, 59 L. Ed. 835; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; Hall v. Geiger-Jones Co., 242 U. S. 537, 538, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; Erie Railroad v. Williams, 233 U. S. 685, 704, 34 Sup. Ct. 761, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097; N. Y., New Haven & Hartford R. R. v. N. Y., 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; Atlantic Coast Line v. Georgia, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312; Lake Shore R. R. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; C., R. I. & P. Ry. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290.

[7] The law is further claimed to be arbitrary and invalid, because it includes only certain employés, viz. those who construct and repair cars, trucks, and other equipment, leaving other employés of the plaintiff, such as those who build tanks, shops, and other structures, to suffer inclemency of the weather. It is sufficient as to this contention to quote what was said in Erie R. R. Co. v. Williams, 233 U. S. 685, at page 705, 34 Sup. Ct. 761, 767 (58 L. Ed. 1155, 51 L. R. A. [N. S.] 1097):

"Considerable argument is made to support the contention, in which a comparison is made between the employés, mechanics, workmen and laborers, to whom the law applies, and the other employés of the company, and it is de-

clared that all, if any, suffer from monthly payments and all are entitled, therefore, to receive the benefit of semimonthly payments. But, as we have said, employés are not complaining, and whatever rights those excluded may have, plaintiff can not invoke."

Furthermore, in this connection, the element of practicability of including other classes of employés must not be overlooked. Louisville & Nashville R. R. Co. v. Molton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; St. Louis, Iron Mountain, etc., R. R. Co. v. State, 86 Ark. 518, 112 S. W. 150.

[8] The claim is also made that the statute is invalid because the classification of the employers to which it applies is purely arbitrary. It is pointed out that the law does not make the relation of employer and employé the basis, nor the fact that certain occupations are dangerous and unhealthy, but that the basis is found solely in the character of the articles made or repaired. The answer to this contention is found in such cases as Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, and Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. In the latter case the court said (113 U. S. 708, 5 Sup. Ct. 731, 28 L. Ed. 1145):

"The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

See Booth v. Indiana, 237 U. S. 391, 35 Sup. Ct. 617, 59 L. Ed. 1011; McLean v. Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315; Louisville & N. R. R. v. Melton, 218 U. S. 36, 55, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84. In the latter case the court said, quoting from Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 294, 18 Sup. Ct. 594, 42 L. Ed. 1037:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities, and necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

[9] Cost and inconvenience caused to the plaintiff by the statute are also strenuously urged against it. But in the case of Erie R. R. v. Williams, 233 U. S. 685, 700, 34 Sup. Ct. 761, 764 (58 L. Ed. 1155, 51 L. R. A. [N. S.] 1097), the court said:

"It is hardly necessary to say that cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."

See, also, Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721; G. N. Ry. v. Clara City, 246 U. S. 434, 38 Sup. Ct. 346, 62 L. Ed. 817.

[10] The penalty provisions of the statute are also urged as rendering it unconstitutional. But, before the penalty provisions can come into effect, an order of the commission is necessary, under the statute, and this order is subject to judicial review under Gen. St. 1913, § 4191, as amended by chapter 291, Session Laws Minn. 1917 (Gen. St. Supp. 1917, § 4191), and by sections 4192 and 4200, General Statutes Minn. 1913. One of the main tests to determine whether penalty provisions render a statute void, as being in contravention of due process, is the presence or absence of provisions for judicial review before the penalties can attach. Wadley v. Georgia, 235 U. S. 651, 35 Sup. Ct. 214, 59 L. Ed. 405, Oklahoma Operating Co. v. Love, 252 U. S. 331, 40 Sup. Ct. 338, 64 L. Ed. 596; Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908; St. L., etc., Ry. Co. v. Williams, 251 U. S. 63, 65, 40 Sup. Ct. 71, 64 L. Ed. 139; Allen v. Omaha Co. (C. C. A.) 275 Fed. 1. See, also, Western Union v. Richmond, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710.

[11] It is further contended by plaintiff that the statute is inoperative and void, as attempting to cover a field already occupied by federal statutes, viz.: First, the statute known as the Transportation Act of 1920 (41 Stat. 456, c. 91), and especially those provisions thereof establishing the "Labor Board" (sections 300–316); second, the federal statutes known as the "Safety Appliance Acts," and especially section 4 of the act of April 14, 1910 (36 Stat. 298, c. 160 [Comp. St. § 8621]). While the scope of the jurisdiction of the Labor Board is not yet definitely determined, yet in my judgment it is confined to disputes arising between carriers and their employés. See section 307a of the act. The instant case is not such a dispute.

[12, 13] The section of the Safety Appliance Act above cited requires that defective cars upon the lines of carriers subject to the act be repaired at the place where they are first discovered to be defective, if feasible; otherwise, at the nearest available repair point. The provisions of the statute involved in the case at bar are in my judgment in conflict with this requirement of the federal act. The federal statute is, of course, paramount, and the provisions of the state statute in so far as they conflict with the federal statute are inoperative and void. Penn. R. R. Co. v. Pub. Ser. Com., 250 U. S. 566, 40 Sup. Ct. 36, 63 L. Ed. 1142. But, though this may limit the scope of the state statute, it does not render it wholly void; the statute still has a field of operations.

[14] The prohibition of paint-spraying machines within the proposed sheds is claimed to be unreasonable, purely arbitrary, and not a valid exercise of the police power of the state. The evidence shows that at one time the use of such machines was thought to be deleterious to health, on account of certain ingredients contained in the paint. But the evidence further shows that these ingredients are not found in the paint used at present, and furthermore the evidence shows that the state itself makes use, upon its own work, of these same paint-spraying machines inside buildings. Under these circumstances I am of opinion that the prohibition of the use of such machines is not a valid exercise of the police power.

[15] 2. It is also claimed by plaintiff that the statute is void by reason of the attempted delegation of legislative power to the Railroad and Warehouse Commission contained in section 3 of the act. This contention is in my judgment fully met and disposed of by the cases of Red "C" Oil Co. v. North Carolina, 222 U. S. 380, 394, 32 Sup. Ct. 152, 56 L. Ed. 240; Merrick v. Halsey & Co., 242 U. S. 568, 37 Sup. Ct. 227, 61 L. Ed. 498; Brazee v. Michigan, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

[16] 3. It remains to consider the contention of the plaintiff that the statute is void for indefiniteness and uncertainty. The attack is upon sections 1 and 4. The portion of section 1 to which attention is challenged reads as follows:

"The building or buildings to cover a sufficient portion of the repairing or construction company's yards or tracks, so that all employés engaged in such work shall be protected from heat, rain, cold, snow, or other inclement weather, while working at such work."

Section 4 reads as follows:

"Where any such buildings are maintained, it shall be unlawful for any employer to require men so employed to work outside of such buildings in rain, heat, cold, snow, or other inclement weather."

The alleged uncertainty rests in the words "rain, heat, cold, snow or other inclement weather." It is to be borne in mind that we are dealing with a criminal statute, violation of which constitutes a misdemeanor, punishable by a fine of from $100 to $500. In U. S. v. Brewer, 139 U. S. 278, 11 Sup. Ct. 538, 35 L. Ed. 190, the court, in passing upon the construction to be given certain criminal statutes relating to elections, said (139 U. S. 288, 11 Sup. Ct. 541, 35 L. Ed. 190):

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In Tozer v. U. S. (C. C.) 52 Fed. 917, Circuit Justice Brewer, in passing upon a criminal statute, said:

"But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

This case was cited with approval in U. S. v. Cohen Grocery Co., 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045. The court, in passing upon section 4 of the Food Control Act of August 10, 1917, as amended October 22, 1919 (41 Stat. 298), said (255 U. S. page 89, 41 Sup. Ct. 300, 65 L. Ed. 516, 14 A. L. R. 1045):

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words 'that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the

subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can forshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. * * * That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question."

Applying these principles to the case at bar, the questions at once arise: What is the standard of guilt? When is it fixed, and by whom? The words "rain and snow" are hardly definite enough in a criminal statute. The words "heat and cold" are so elastic in their meaning as to cover the whole range of temperature. The words "inclement weather"? Will a fog or mist come within the language? Will wind be included? It is surely necessary that limitations shall be placed upon all of these terms. But who is to supply the limitations, the employer or the employé? or the court? or the jury? The Legislature is the only proper authority to define a statutory crime against the state. This power cannot be delegated to individuals, courts, or juries. The uncertainty and indefiniteness in the present statute is in my judgment as great as was found to exist in the statutes considered in the cases above cited. See, also, International Harvester Co. v. Kentucky, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284; Collins v. Kentucky, 234 U. S. 634, 34 Sup. Ct. 924, 58 L. Ed. 1510; U. S. v. Penna. R. R. Co., 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251. The cases of Nash v. U. S., 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232, Miller v. Strahl, 239 U. S. 426, 36 Sup. Ct. 147, 60 L. Ed. 364, and other similar cases which are cited as holding contrary views, were considered in the Cohen Grocery Co. Case, and the court in distinguishing these cases said:

"The cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."

No such standard can in my judgment be found in the statute now under consideration.

[17] It is contended by the defendants that, even if section 4 and the part of section 1 above referred to are so indefinite and uncertain as to be void, yet that this should not invalidate the whole statute. The tests to determine whether an invalid part of a statute may be separated from the remainder are stated in Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, where the court (114 U. S. at page 304, 5 Sup. Ct. 903, 962, 922, 29 L. Ed. 185) used the following language:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to

see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In El Paso, etc., Ry. Co. v. Gutierrez, 215 U. S. 87, 97 (30 Sup. Ct. 21, 25, 54 L. Ed. 106), the court in its decision used the following language:

"It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall."

See, also, Ill. Central R. R. Co. v. McKendree, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; Butts v. Merchants' Transportation Co., 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422.

[18] In the case at bar it is not possible, in my judgment, under the tests above given, to separate section 4 and that portion of section 1 above referred to from the remainder of the statute. These portions of the statute are vital. They embody the real ground and purpose of the passage of the statute. It is extremely improbable, in my judgment, that the Legislature would have passed the statute with these portions eliminated. Under these circumstances, the whole statute must fall.

A decree may be prepared by counsel for plaintiff in accordance with this decision, directing that a permanent injunction issue against the defendants, restraining and enjoining them from in any manner enforcing or attempting to enforce the statute in question. The decree should be submitted to counsel for defendants as to form before being presented for signature.

MISSOURI PAC. R. CO. v. CONWAY AND VILONIA ROAD DIST. OF FAULKNER COUNTY et al. SAME v. CONWAY AND DAMASCUS ROAD DIST. OF FAULKNER COUNTY et al. SAME v. CONWAY AND PALARM ROAD DIST. OF FAULKNER COUNTY et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

Nos. 5794–5796.

Highways ⇐142—Statutory proceedings for relief against Arkansas road district assessment is exclusive.

A provision of Road Laws Ark. 1919, vol. 1, p. 387, § 5, for an appeal by a landowner, deeming himself aggrieved by the assessment of his lands, to the chancery court, with right of appeal to the Supreme Court, provides an exclusive method for review of assessments for a highway, so that suits in equity attacking the assessment must be dismissed.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Three separate suits in equity by the Missouri Pacific Railroad Company against the Conway and Vilonia Road District of Faulkner County and others, against the Conway and Damascus Road District of Faulkner County and others, and against the Conway and Palarm Road District of Faulkner County and others. From a decree in each case, dismissing the complaint for want of equity, the complainant appeals. Affirmed.

Thomas B. Pryor and Vincent M. Miles, both of Ft. Smith, Ark., for appellant.

R. W. Robins, of Conway, Ark., for appellees.

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

CARLAND, Circuit Judge. These appeals have been submitted as one case. The complaint in each case was dismissed by the court below for want of equity. Counsel for appellees insist that the complaints were rightly dismissed for want of equity, and also for the reason that the state law providing for the levy of the tax in question, provides an exclusive remedy for any person deeming himself aggrieved by the assessment of his lands as shown in the assessment book prepared by the county clerk. As to the last contention, the following statute (Road Laws 1919, vol. 1, p. 387, § 5) providing an appeal in cases like those at bar is called to our attention:

"Any landowner deeming himself aggrieved by the assessment of his lands as shown in the said assessment book of said district prepared by the county clerk shall have the right to apply to the chancery court of Faulkner county for an order correcting any such assessment, which application shall be by written petition, duly sworn to, and upon which petition process shall issue against said district as upon any other complaint in equity, which application and petition must be filed in the office of the clerk of said chancery court not later than ten days after the filing of said assessment book by said county clerk. Upon the hearing of said petition, which may be heard on oral testimony or on depositions, as the court may order, the chancery court shall make such order as justice may require, and in event any assessment shall be corrected

by said court, a certified copy of the decree of said court shall be filed with the county clerk, and thereupon the said county clerk shall note in said assessment book the correction as ordered by said court. An appeal may be taken by said land owner, or the board of commissioners, from any such decree of the chancery court to the Supreme Court but said appeal shall be lodged in the Supreme Court not later than thirty days after the rendering of such decree by the chancery court. And for the purpose of hearing any such petition the chancery court of Faulkner county shall at all times be deemed to be open and said petition shall be heard at once and any appeal taken therefrom to the Supreme Court shall be advanced as a matter of public interest."

We are of the opinion that this contention of counsel must be sustained under the rulings of the Supreme Court of the United States and of this court. McDougal v. Mudge, 233 Fed. 235, 147 C. C. A. 241 (8th Circuit); McLaughlin v. St. Louis Southwestern Railway Co., 232 Fed. 579, 146 C. C. A. 537 (8th Circuit). In the last case certiorari was denied. 241 U. S. 679, 36 Sup. Ct. 727, 60 L. Ed. 1233. Counsel for appellant urge that the state statute provides for an administrative proceeding and not a judicial one, citing Missouri Pacific Railroad Co. v. Izard County Highway Improvement District, 143 Ark. 261, 220 S. W. 452. This view of the law was disapproved by the United States Supreme Court in Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark., Petitioners, v. St. Louis Southwestern Railway Co. (decided by the Supreme Court Feb. 27, 1922) 257 U. S. ——, 42 Sup. Ct. 250, 66 L. Ed. ——. The law involved in that case was for all practical purposes the same as the law in this case. In addition to the cases cited in McLaughlin v. St. Louis Southwestern Railway Co., supra, the principle that when a state provides a tribunal for the hearing of complaints against an assessment, such tribunal has exclusive jurisdiction, is sustained by the great weight of authority. Cooley on Taxation (3d Ed.) vol. 2, p. 1445; Laws of Special Assessments, Hamilton, § 758; Page & Jones on Taxation by Assessments, vol. 2, p. 2059; 27 Am. & Eng. Enc. of Law (2d Ed.) 726; Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Board of Public Works of West Virginia, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, and cases cited; Moore v. Yonkers, 235 Fed. 485, 149 C. C. A. 31, 9 A. L. R. 590; Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Baldwin Tool Works et al. v. Blue, State Tax Commissioner, et al. (D. C.) 240 Fed. 202.

Decrees affirmed.

THE SARANAC. THE LAMPASAS. Appeal of CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 217.

Collision ⊂⊃82(2)—Steamship held not at fault for not going ahead full speed in emergency.

Where the finding that the weather conditions required fog signals to be sounded was supported by the evidence, and neither tug nor steamship sounded such signals, so that both were at fault, and the tug was also at fault for failure to maintain a proper lookout, the steamship *held* not at fault for failing to go full speed ahead on sighting the tug, where the collision was imminent and probably inevitable at that time.

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

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

Petition in admiralty for limitation of liability by the Cornell Steamboat Company, as owner of the steam tug Saranac, with separate libels by Kate Dougherty and by Oliver Gildersleeve & Sons, Inc., against the steamship Lampasas, of which the Mallory Steamship Company was claimant, and in which the steam tug Saranac, the Cornell Steamboat Company, claimant, was impleaded. From decrees holding both vessels at fault, the Cornell Steamboat Company appeals. Affirmed.

Robert S. Erskine and Kirlin, Woolsey, Campbell, Hickox & Keating, all of New York City, for appellant Cornell Steamboat Co.

Burlingham, Veeder, Masten & Feary, of New York City (Chauncey I. Clark and Frederick Pennell, both of New York City, of counsel), for appellee Mallory S. S. Co.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. These causes grow out of a collision occurring in the North River, off Pier 25, Manhattan. The trial court found as facts: (1) That at and before collision the weather was such that fog signals should have been sounded by navigating vessels; (2) that such whistles were not sounded by either vessel; and (3) that the tug Saranac did not have a lookout properly stationed and attending to his duty. With these findings we agree, and they are assuredly sufficient to require affirmance of decrees holding both vessels at fault.

We express no opinion in respect of the alleged failure of the Saranac to keep her tow straight behind her, and we disapprove of the suggestion (it is hardly more) that it was a fault on the part of the steamship Lampasas not to go full speed ahead when she sighted the Saranac. When the tug and tow were seen through the fog, collision was probably inevitable; certainly a position of imminent and almost certain danger had been produced by mutual violation of the fog rules. Such a situation having been proven, it is not profitable to speculate as to whether collision might have been avoided by taking the "last chance" of full speed ahead under a hard over wheel.

Decrees affirmed, with one bill of costs.

ST. PAUL TRUST & SAVINGS BANK et al. v. WALKILL STOCK FARMS CO. et al.

(District Court, S. D. Florida. April 21, 1922.)

No. 222.

1. Receivers ⇐35(3)—Lienholder cannot complain that notice was not given debtor of application for receiver.

A lienholder cannot complain that appointment of a receiver in an ancillary proceeding was coram non judice, because the debtor was not given notice of the application for a receiver and no subpœna was served on it; such debtor having filed its answer and consented to the jurisdiction of the court, which it had a right to do.

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

2. Receivers ⊂=206, 208—Court in ancillary proceeding has right to protect rights and preserve liens of all creditors, and discharge one and appoint another receiver.

The court in which an ancillary receivership proceeding is filed has the power to protect the rights and preserve the liens of all creditors and may administer the funds and proceeds of the property of the debtor in its jurisdiction, and may, in the exigencies of the warrant, discharge receiver appointed in the ancillary proceeding and appoint another.

In Equity. Bill by the St. Paul Trust & Savings Bank, formerly the Van Sant Trust Company, as trustee, and Grant Van Sant, as individual trustee, against the Walkill Stock Farms Company and others. On motion by complainants to vacate order appointing a certain person receiver and to appoint another. Motion denied.

Giles J. Patterson, of Jacksonville, Fla., for complainants.
Cooper, Cooper & Osborne, of Jacksonville, Fla., for defendants.

CALL, District Judge. In the case 221, American Clearing Co. v. Walkill Stock Farms Co., the complainant filed a bill in which it sought and obtained the appointment of a receiver for all the property real and personal of the defendant ancillary to a suit commenced in Ohio, the domicile of the defendant, in which the relief sought was the preservation of the corpus of the property in order that it might be applied to the payment of its debts. Receivers were appointed by the Ohio court. Copy of the proceedings in the Ohio court, in which the defendant answered, admitting the allegations of the bill and consenting to such an appointment.

The complainant in this case, a trustee for bondholders, filed its bill seeking the foreclosure of the deed of trust, setting up facts which it claims makes the appointment of a receiver in the ancillary suit non judice and void, and moves this court to vacate the order appointing a receiver and appoint a receiver in its suit. It is upon this motion that a hearing was had.

[1] The contention of complainant, as I understand it, is that, because notice was not given the defendant of the application for a receiver and no subpœna served upon it, such appointment was coram non judice. The record from the Ohio court shows that the defendant filed its answer and consented to the jurisdiction of that court, and since the filing of the ancillary bill and before the motion was heard in this case, filed its answer in this court. If this court had jurisdiction, its order would not be coram non judice. That it did have jurisdiction of the subject-matter of the suit there can be no question. If the defendant did not have notice of the application, it would be heard to complain of this; but it is not here complaining. By its subsequent action it consents to jurisdiction over itself, and this it may do. The complainant in this case has a lien upon certain of the property of defendant, and it is the only one complaining of the order of the court, having taken the property of the defendant for the purpose of preserving it for the benefit of the creditors to be applied to the debts of the corporation.

[2] The powers of this court are ample, in the ancillary proceeding, to protect the rights and preserve the liens of all creditors. As I understand the law, this court may administer the funds, the proceeds of the property of the defendant in this jurisdiction and protect the rights and liens of creditors in and upon said property. It may in the exigencies of the warrant discharge the receiver in the ancillary proceeding and appoint another. Taking the allegations of the ancillary bill together with the allegations of the bill filed in Ohio and made a part of the ancillary bill filed in this court, I am of opinion that such appointment was proper under the circumstances to preserve the property and prevent its dissipation.

The bill of complaint filed in this case does not make a case for the appointment of a receiver at the instance of complainant, who under the laws of Florida is a lienor, with the right to make its debt out of the property.

The motion of the complainant will therefore be denied.

In re ADELBERGER.

(District Court, S. D. Florida. November, 1921.)

1. **Exemptions ⟸16—Exemption to head of family is for family's benefit.**
   Exemptions provided for the head of a family are for the benefit of the family, that they may not be left destitute.
2. **Exemptions ⟸4—Exemption laws not construed to impose on creditors.**
   The well-recognized rule that exemption laws should be liberally construed to accomplish their purpose does not permit them to be construed so as to impose upon creditors.
3. **Exemptions ⟸16—Divorced man, rooming with adult son, is not "head of a family."**
   A divorced man, whose adult son was rooming with him in a room paid for by the father, is not the "head of a family," where it appeared the son was a normal man, physically and mentally, and had supported himself before he came to take employment under his father.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of a Family.]

In Bankruptcy. In the matter of John Adelberger, doing business as the Havana Hat Company, bankrupt. On petition to review order of the referee, overruling exceptions of certain creditors to the report of the trustee, setting apart exemptions to the bankrupt. Petition and review granted, and case remanded to the referee, with instructions to sustain the exceptions.

Paradise & Lewis, of Jacksonville, Fla., for petitioner.
Noble & Sawyer, of Jacksonville, Fla., for bankrupt.

CALL, District Judge. This cause comes on for a hearing upon the petition to review the order of the referee made herein on July 25, 1921, overruling the exceptions of certain creditors to the report of the trustee setting apart the exemption of $1,000 to the bankrupt. The facts of the case may be stated as follows:

Some seven years ago the bankrupt, a divorced man, came to Florida. In October of last year a son, who had theretofore resided in Ohio, and who had reached his majority and supported himself, came to Jacksonville on funds supplied by the bankrupt and entered his father's employ at a stated salary. This son was a normal man, physically and mentally. Father and son occupied the same room in a rooming house, taking their meals in restaurants. The father paid the rent of the room. The question raised by the exceptions is, "Is the bankrupt the head of a family residing in this state?" as contemplated by the Constitution (article 10, § 1), in order that he be entitled to the exemption of $1.000 in personal property as provided by that instrument.

[1, 2] The cases referred to in the brief of counsel for the bankrupt and by the referee in his opinion are as to real property, and it seem to me that the rule of such cases is difficult to apply to the exemption provided for the head of a family in personal property. It is recognized that the exemptions provided to the head of the family are for the benefit of the family, that they may not be left destitute. It is also a well-recognized rule of construction that exemption laws should be liberally construed to accomplish this end, but not construed so as to impose upon creditors.

[3] From the facts found by the referee, it appears that the son was well able to, and did, care for himself up to and until October of last year, when, on account of lack of employment in Ohio, he came to Florida and entered the employ of his father at a stated salary. It is sought to base the family relation upon the fact that father and son occupied the same room in a rooming house, and because of this fact and the parental relation existing, apply the rule of De Cottes v. Clarkson, 43 Fla. 1, 29 South. 442, and Caro v. Caro, 45 Fla. 203, 34 South. 309, and thus make the father the head of a family. It seems to me that such a ruling would do violence to the rules of construction above noted. Something more than the mere occupancy of the same room by two adult males is necessary to constitute the family relation contemplated by the Constitution, even though the relation of father and son does exist.

I am of opinion that the exceptions of the creditors to the report should have been sustained by the referee. The petition for review will be granted, and the case remanded to the referee, with instructions to sustain the exceptions.

THE MEE TOO.

(District Court, S. D. Florida. April 12, 1922.)

No. 1310.

Maritime liens ⇐61—Delay of year held not such laches as to defeat lien.

A delay of a year before bringing suit to enforce a lien for money advanced for repairs *held* not to defeat the lien as against a purchaser who completed payment of the purchase price after the suit was commenced.

In Admiralty. Suit by Robert Auman against the Yacht Mee Too; Robert D. Moore intervening lien claimant. Decree for libelant and intervener.

Stanton Walker, of Jacksonville, Fla., for libelant.

Butler & Boyer, of Jacksonville, Fla., and Bobst & Spates, of Miami, Fla., for claimant.

CALL, District Judge. On March 17, 1921, Robert Auman filed a libel against the Mee Too, a gas vessel of some 50 feet in length, claiming a maritime lien for advances made to the owner for the purpose of making repairs to said vessel, then in the port of Jacksonville, in the sum of $1,000, on March 13, 1920. On the same date an intervention interesse suo was filed by Robert D. Moore, claiming a maritime lien for advances made on March 15, 1920, to the owner for like purposes.

Respondent interposed his claim as owner, and on November 3, 1921, after exceptions had been overruled, filed answers to the libel and intervention, in which it is alleged that he became owner of the vessel on March 14, 1921, without any knowledge of the claims of libelant and intervener and that libelant and intervener were guilty of such laches in attempting to enforce their claims as will defeat their recovery, and pray strict proof of allegations of libel.

Testimony was taken, and the case brought on for a hearing upon the libel, intervention, and testimony. There is a sharp conflict in the testimony as to circumstances under which the money was advanced; but, taking the interest of the parties testifying and the circumstances surrounding the parties, I find the issue in favor of the libelant and intervener as to this question.

If the money was advanced to the owner for the purpose of making repairs, there exists a maritime lien, and a maritime lien, once attaching to a vessel, follows said vessel, from its very nature, into the hands of a purchaser, unless it is lost by the laches of the lienor in enforcing said lien. The time expiring, before laches will be declared to bar the claim, differs according to the circumstances of each particular case. Where the interest of third persons intervenes, the time is shorter than where only the owner at the time of the lien attaches is concerned.

In the instant case one year and two days intervene between the time the lien attached and the filing of the libel. Does this delay constitute such laches as will bar the enforcement of the lien? I think not. On the testimony of claimant and his witness, it is apparent that, while the bill of sale was apparently executed March 14, 1921, and

the contract of sale made in February, the consideration was not fully paid until May. The claim was interposed in this case on March 23d, after the libel was filed, and before the final payment of the consideration.

Under the conditions surrounding this case, I find that the delay in enforcing the liens is not such as to bar the enforcement of the maritime liens. There is a conflict in the testimony of libelant and the then owner as to the amount advanced. Upon this issue additional testimony should be taken.

A decree will be entered in favor of the libelant and intervener, declaring a maritime lien to exist in their favor; the amount of said lien in favor of libelant to be ascertained by a reference to the commissioner to take testimony on this issue and report same to this court.

In re THEIBERG.

(District Court, D. New Jersey. April, 1921.)

Bankruptcy ⟸262(3)—Sale of chattels free of mortgage liens exceeding appraised value can be ordered.

Where chattels owned by the bankrupt subject to chattel mortgages, the validity of some of which was disputed, were of such a character as to involve heavy expense in keeping them, the referee, to preserve as much of the estate as possible, can order the sale of such chattels free of the mortgage lien, the lien to attach to the proceeds of the sale, even though the amount secured by the chattel mortgages greatly exceeds the appraised value of the chattels.

In Bankruptcy. In the matter of Morris Theiberg, trading as the La France Silk Company, bankrupt. On review of an order of the referee for the sale of property free and clear of the lien of chattel mortgages, the lien to attach to the proceeds. Order affirmed.

Furst & Furst, of Newark, N. J., for trustee.

Joseph T. Lieblich, of Paterson, N. J., opposed.

BODINE, District Judge. The referee, Frank Van Cleve, Esq., ordered the sale of certain property of the bankrupt free and clear of the lien of certain chattel mortgages, the liens to attach to the proceeds. The certificate discloses that the order was made after due hearing and for the purpose of saving the expenses incident to the preservation of the property.

The referee also expressed doubt as to the validity of some or all of the chattel mortgages, particularly one of the Hamilton Trust Company, which is not dated and was given to secure an antecedent indebtedness. Of course, the validity of the mortgages was not before the referee on the application to sell free of the mortgages, but the inference is a strong circumstance in favor of the sale.

The finding of the referee that the sale of the property of the bankrupt's property is necessary to save expense incident to its preservation seems entirely justified by the facts that the property consists of silk

looms and machinery which are obviously expensive to keep in custody. The chief argument against the referee's action was that the chattel mortgages exceed the sum of $8,000, while the appraised value of the property is but $3,415.70. This circumstance was not enough to strip the bankruptcy court of its power to order the sale of property in its custody.

The jurisdiction of the court to order the sale of property, free of incumbrances, has its origin in the power to conserve the property of the bankrupt and the value of an equity of redemption must always be a matter of more or less, as more or less is obtained for the property. The size of the equity of redemption is always a chance, where the court orders the immediate sale of property because of the advantage to the bankrupt estate. The liens are not affected by the sale, except in this: That they fasten upon money rather than goods. If the mortgages are invalid, the equity of the bankrupt's estate is larger; if they are valid, it is smaller or possibly nonexistent. The jurisdiction of the court does not depend upon the size of an estate or the size of a mortgage. The referee looks to see if the sale will be of benefit to the bankrupt's estate. Clearly, if the property is expensive to keep, it is of advantage to sell. Where the proceeds of sale are in court, they can be disposed of according to law. But a bankrupt, by making excessive mortgages, cannot defeat administration of his effects in bankruptcy.

The action of the referee is also challenged because some one or more of the chattel mortgages were not before him. Nothing is before me from which I can go back of the certificate of notice and appearance.

The order of the referee is affirmed.

AMBASSADOR CHOCOLATE CO. v. CHOCOLATE PRODUCTS CO.

(District Court, D. Maryland. May 6, 1922.)

No. 275.

Trade-marks and trade-names and unfair competition ⇐70(2)—Cherry design on box, different from that of plaintiff, held not unfair competition.

Where defendant, after plaintiff had established a large trade in chocolate-covered cherries, which it marketed in a box having on the outside a design of cherries and leaves, adopted for marketing its chocolate-covered cherries a box having a different shape and having thereon a design of cherries, which was different in appearance from the design on plaintiff's box, there was no invasion of plaintiff's legal rights.

In Equity. Suit by the Ambassador Chocolate Company against the Chocolate Products Company. Bill dismissed.

Blades, Rosenfeld & Frederick and J. Wallace Bryan, all of Baltimore, Md., for complainant.

George W. Lindsay, of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff and defendant are rival makers of chocolate candy. In the late fall of 1921 the defendant purposed to

put on the market a package to be sold for 5 cents, which it originally intended should contain two cherries, in cordial, each incased within a chocolate covering. Subsequently it concluded that it would cost too much to furnish two cordial cherries, and for one of them it substituted a cream chocolate, cherry flavored, containing a fragment of a cherry. It had a box manufacturer design a very neat and attractive box, upon which rather large-sized cherries and leaves were displayed. It first put its goods on the market about December 27th, and they at once came into large demand; the sales, in the four months which have since elapsed, being between 3,500,000 and 4,000,000 of such packages.

The defendant at once became interested. It hunted up the box maker, and got estimates on similar boxes. It, however, objected to the price he charged. The box maker notified the plaintiff of what had happened. The plaintiff sent a warning notice to the defendant, telling it that it had learned that it was purposing to infringe upon its rights, and giving it notice that, if it did, the plaintiff would take the matter into court. The defendant did put a box on the market, which had cherries on it, too. It contained two cordial cherries, incased in chocolate. The box, however, had not the same shape as the plaintiff's, which was, to appearance, cubical, although it was not quite as high as it was long and broad. The defendant's was oblong, and so appeared to the eye. The cherries on it, except that they were cherries, did not resemble those on plaintiff's box.

It is, of course, evident that the defendant wanted to share the market which the plaintiff had discovered. What it would have done, had it not received the warning, no one can tell. In view, however, of the fact that cherries, of every form and design, had been used on the outside of boxes before, and were the natural thing to put on boxes which contained cherries, I do not find that the defendant did anything which it had not the legal right to do. There was no holding out of its goods as those of the plaintiff. Unquestionably the defendant has largely cut into plaintiff's trade, but that I am persuaded is not due to the box, or to the method of display adopted by defendant, for its box not only is different, but is, to my eye, distinctly less attractive than that of its adversary, but to the fact that it is furnishing two whole cherries in cordial, with their appropriate chocolate coverings, while the plaintiff gives but one cordial cherry and a part of another cherry in cream.

The bill must therefore be dismissed.

THE RAKEL.

LINDHOLM v. N. B. BORDEN & CO.

(District Court, S. D. Florida. April 12, 1922.)

Shipping ⊂⊃35—Respondents held bound by a charter made by brokers as their agents.

Brokers, in chartering libelant's vessel, *held* to have been acting as agents for respondents, who were bound by the contract.

In Admiralty. Suit by J. A. Lindholm, as master of the bark Rakel, against N. B. Borden & Co. Decree for libelant.

Axtell & Rinehart, of Jacksonville, Fla., for libelant.
George C. Bedell, of Jacksonville, Fla., for respondent.

CALL, District Judge. The charter party in this case was executed by G. M. Fryxell & Co., of Barcelona, Spain, as agents for the charterer. The sole question before the court is; Were they acting in behalf of Borden & Co. under such circumstances as bound the respondents as such charterers?

It seems clear from the correspondence passing between Borden & Co. and Fryxell & Co. that the latter firm were acting in the capacity of brokers, obtaining orders for lumber to be supplied by the first-mentioned firm, the prices, terms, etc., subject to confirmation by Borden & Co. before the sale was binding upon them. It is also clear that the senior member of the firm of Borden & Co. was present in Spain prior to the making of the contract, and had guaranteed that the freights would not exceed certain amounts, depending upon the port of shipment, and that Fryxell & Co. had these amounts as a guide in chartering vessels to carry the cargoes; that particular vessels were designated to carry certain cargoes, and that Borden & Co. designated at what port the vessel was to load. It appears, also, that the port of Fernandina, Fla., was so designated by Borden & Co. for the Rakel.

Taking the correspondence passing between Fryxell & Co. and Borden & Co., it appears to me that the parties understood that in making these charter parties Fryxell & Co. were acting for Borden & Co. Take the letter of the 28th of September from Fryxell & Co., which says Borden had taken guaranty of various contracts, and they had promised to use their best efforts to obtain suitable tonnage, and in which certain stipulations should be contained in the charter parties. The contract with Alpera, to carry the cargo mentioned therein, the Rakel came to Fernandina, was made on the 27th of September, and the charter party made on October 4th. In the letter of October 5th, speaking of the charter of a vessel other than the Rakel, I find this:

"So, if you destinate the Osman to load at Fernandina for Valencia, you will earn 5 per cent. the std."

The letter of November 6th, seems to me, clearly shows the understanding of the parties, and that Fryxell & Co. were acting for Borden & Co. in making the charters. The correspondence is rather volumi-

nous, and time does not serve to notice it all bearing upon this question. I find that N. B. Borden & Co. were the charterers, represented by Fryxell & Co. in executing the charter party as agents.

A decree will therefore be entered in favor of the libelant. The amount of same I understand will be agreed upon by proctors for the parties.

COMPANIA NAVIGAZIONE SOTA Y AZNAR v. COALE & CO., Inc.

(District Court, D. Maryland. March 28, 1922.)

No. 732.

Shipping ⇐181—Charterer held liable for demurrage where not ready to load.

Under a provision of a charter party, "Lay days for loading shall commence when steamer is ready to load (or within 96 hours after readiness to load, if delayed awaiting turn at berth)," lay days began as soon as the ship was ready, unless delayed in getting to pier by another ship having the prior right to be there, and charterer was not entitled to credit for 96 hours, or any of them, on owner's claim for demurrage, where charterer had no cargo for the vessel at the time, though it was the custom of the port that the pier owner would not allow a ship, by lying idly at its wharf, to get into the way of other vessels anxious to use it, where there was nothing physically in the way of getting a berth as soon as the ship was ready.

In Admiralty. Libel by the Compania Navigazione Sota y Aznar against Coale & Co., Incorporated. Determination in favor of libelant.

Janney, Stuart & Ober, of Baltimore, Md., for libelant.

Edward N. Rich and J. M. Mullen, both of Baltimore, Md., for respondent.

ROSE, District Judge. Following an opinion in Western Counties Shipping Co., Ltd., v. Archibald McNeil & Sons Co., Inc. (D. C.) 273 Fed. 298, the respondent, as charterer, has been held liable to the shipowner for demurrage. In determining its amount, a question has arisen as to the application of the provision of the charter party which reads:

"Lay days for loading shall commence when steamer is ready to load (or within 96 hours after readiness to load, if delayed awaiting turn at berth)."

The charterer claims that, although there was nothing physically in the way of the ship's getting a berth as soon as she was ready, yet, as the charterer had no coal for her at the time, and as the custom at this port, and doubtless everywhere else, where common sense has anything to do with the matter, is that the prior owner will not allow the ship, by lying idly at its wharf, to get into the way of other vessels anxious to use it, she was delayed, awaiting her turn at the pier, and that 96 hours of such delay was to be at her own cost, and for that time the charterer is not liable.

This contention seems more ingenius than persuasive. The plain import of the agreement between the parties was that the lay days were to begin so soon as the ship was ready, unless she was delayed in get-

ting to the pier by another ship having the prior right to be there, and it was not intended to modify the general rule that it is the duty of the shipper to have the cargo ready for the ship, or make its failure to do so chargeable to the ship, in whole or in part.

The charterer is, upon the facts, not entitled to credit for these 96 hours, or any of them.

FOX v. EDWARDS.

(District Court, S. D. New York. December 12, 1921. On Rehearing, February 24, 1922.)

Internal revenue ⇐38—Item of income tax voluntarily paid not recoverable.

Item of income tax voluntarily paid for the year 1918 without protest or complaint, without calling the government's attention to the right to a refund prior to March, 1921, could not be recovered, notwithstanding Revenue Act 1918, § 252 (Comp. St. Supp. 1919, § 6336⅛uu).

At Law. Action by Benjamin Fox against William H. Edwards. Defendant's demurrer sustained, and complaint dismissed.

Alexander Slater, of New York City, for plaintiff.

William Hayward, U. S. Atty., and Richard S. Holmes, Sp. Asst. U. S. Atty., both of New York City, for defendant.

KNOX, District Judge. When the within demurrer came on for argument, there was a default upon behalf of the plaintiff, and no brief has been filed by or for him. I am therefore deprived of the benefit of such views as he or his counsel may entertain with respect to the facts and law here involved. It appears from the complaint, to which defendant demurred, that the money for the recovery of which suit was brought was paid voluntarily in March, 1919, as and for a part of plaintiff's income tax for the year 1918. The item of loss, upon account of which plaintiff now believes himself entitled to a refund, was not called to the attention of any government official prior to March, 1921. The original tax having been transmitted to the treasury without protest or complaint upon the part of plaintiff, it seems to me that as against the collector there could be no recovery at common law, nor under the statutes relating to him or his office.

It is possible that plaintiff has some rights granted to him under the provisions of section 252 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6336⅛uu); but, if so, I am of opinion that such rights cannot be asserted in a suit against the collector who received plaintiff's voluntary payment in 1918. Judgment may be entered sustaining the demurrer of defendant and dismissing the complaint.

On Rehearing.

It is my judgment that there is nothing in section 252 of the Revenue Act upon which plaintiff relies which relieves him from the effect of having voluntarily paid an amount of tax against which he might have offset a bad debt. The tax was paid by plaintiff with full knowledge

of all the facts, and without any interposition of the government or any of its officials, and to hold that a taxpayer is entitled for years after the payment of a tax to harass and annoy the taxing officials and the courts as to the unwisdom, impropriety, or oversight of what he himself did, when under no coercion and compulsion upon the part of the government, is something I am unwilling to do. As to the purpose and effect of section 252 of the Revenue Act, see Holmes, Federal Taxes (1922 Ed.) p. 890. The order heretofore entered herein will stand.

In re HEMMER et al.

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

Fixtures ⟸18(5)—Property of milk company held personalty.

Machinery sold a milk and cream company under contracts of conditional sale did not attach to the realty and become subject to mortgage liens, where it could be removed with very little, if any, damage to walls or to the building, though foundation had to be placed under a boiler and a wall erected to protect it.

In Bankruptcy. In the matter of Anthony Hemmer and others, doing business in the name and style of the Shepherd Milk & Cream Company, bankrupts. Controversy concerning whether certain property goes to trustee as personal property or became part of realty subject to mortgage liens. Property held personalty.

Tracy, Chapman & Tracy, of Syracuse, N. Y., for trustee.

Olmstead, Van Bergen & Searl, of Syracuse, N. Y., for mortgagees.

RAY, District Judge. In view of the conditional contracts of sale and the circumstances under which the personal property, machinery, etc., was placed in the building I think a question of fact is presented for the determination of the court.

I do not think it was intended to make this machinery a part of the realty, and in view of the contracts of conditional sale, and what was done by way of attaching same to the realty, do not think the personal property in question ever became a part of the realty and subject to the mortgage lien. True, a sort of foundation had to be placed under the boiler, and it is also true that a wall was erected to protect same; but this property can be removed with very little, if any, damage to these walls or to the building.

In view of Tifft v. Horton, 53 N. Y. 377, 13 Am. Rep. 537; Ford v. Cobb, 20 N. Y. 344; Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458; Sisson v. Hibbard, 75 N. Y. 542, and other cases of like import, I hold that this personal property in question did not become a part of the realty, and subject to the lien of the mortgages, and that the trustee in bankruptcy is entitled to the same.

There will be an order accordingly.

BALL & ROLLER BEARING CO. v. F. C. SANFORD MFG. CO.

(District Court, D. Connecticut. May 6, 1922.)

No. 1529.

1. **Patents ⟸328—Reissue 15,035, for roll grinding machine, held valid as a reissue.**
The Heim reissue patent, No. 15,035, for a roll grinding machine, *held* not to broaden the claims of the original patent, and valid as against objections to the reissue.

2. **Patents ⟸17—Changing polishing machine to obtain grinding machine involves only mechanical skill.**
The art of polishing and the art of grinding iron rolls are interrelated, and so close together that the obvious changes in a polishing machine to obtain a grinding machine involves only mechanical skill.

3. **Patents ⟸17—Transferring construction from wood-working art to metal-working art, and adding conveyor of stream of water, involves only mechanical skill.**
Taking a construction from the wood-working art, or any other art employing a polishing or grinding mechanism, and transferring it to the metal-working art, or attaching thereto a device for conveying a stream of water on the work to keep it cool, involves nothing more than mechanical skill.

4. **Patents ⟸328—Claims of reissue 15,035 held anticipated, and other claims valid, but not infringed.**
Claims 1, 2, 4, 6–10, 12, 13, 15, 18–21 of the Heim reissue patent, No. 15,035, for a roll-grinding machine, *held* invalid in view of the prior art, and the remaining claims, excepting claim 3, valid but not infringed.

5. **Patents ⟸17—Attaching of device for laterally adjusting support of rolls being ground does not involve invention.**
The making and attaching to a roll-grinding machine consisting of a grinding wheel and an oppositely rotating regulating wheel in combination with means for supporting the blanks being ground, of means for laterally adjusting the carrier or work support, involves mere mechanical skill, and does not rise to the dignity of invention.

6. **Patents ⟸328—1,264,930, claims 1 and 4, for roll-grinding machine, invalid as aggregations.**
Claims 1 and 4 of the Heim patent, No. 1,264,930, for a roll-grinding machine, consisting of a rotary peripheral grinding wheel, an oppositely rotating regulating wheel, and means for supporting the blanks while being ground, etc., *held* invalid, as for mere aggregations.

7. **Patents ⟸328—1,210,936, for feeding device for roll-grinding machines, not infringed.**
Claims 2–6, inclusive, of the Heim patent, No. 1,210,936, for feeding device for roll-grinding machines, *held* not infringed; claims 4 and 6, calling for a carrier with a removable wearing strip, being limited to a strip having a plurality of wearing surfaces, and not covering a cylindrical rod, under the doctrine of equivalents.

In Equity. Suit by the Ball & Roller Bearing Company against F. C. Sanford Manufacturing Company. Decree for defendant.

Livingston Gifford, Robert S. Blair, and William T. Knieszner, all of New York City, for plaintiff.

William W. Dodge, of Washington, D. C., and F. W. Smith, of Bridgeport, Conn., for defendant.

THOMAS, District Judge. This suit was brought for an injunction and accounting, and is predicated upon an alleged infringement of letters patent No. 1,210,936, issued January 2, 1917, on a "feeding device for roll-grinding machines," and No. 1,264,930, issued May 7, 1918, for a "roll-grinding machine," to both of which patents were later added reissued letters patent No. 15,035, for a "roll-grinding machine," under date of January 25, 1921. All three patents were issued to Lewis R. Heim and were subsequently assigned to the plaintiff.

All formal matters, such as title, manufacture, and sale, have been stipulated, and there appears to be no vital controversy as to the construction of defendant's forms of alleged infringing machines. So that the issues between the parties raise the questions of the validity of the patents and their infringement by the defendant.

The defenses to the patents in suit are: (1) Noninfringement. (2) Anticipation by prior patents and publications. (3) Nonpatentability. And as to the reissue patent, No. 15,035, an additional defense is set up, to wit, that it was unlawfully granted, and hence void.

The art disclosed by these inventions relates to the means or method by which roller bearings are manufactured in large quantities, rapidly, accurately, and at a minimum cost, and all three characteristics are today vitally essential to a successful manufacturer. The inventions relate to centerless grinders; that is to say, to machines in which the work or the blank roll is neither supported on spindles, nor lathe centers, nor held in a chuck or other centering device, as is usual in turning cylindrical bodies in a lathe, and which was previously one of the methods employed in the manufacture of a roll for a roller bearing.

Speaking generally, the patents in suit disclose a grinding machine comprising a grinding wheel generally made of natural or artificial stone such as grindstones, or wheels of emery or carborundum or similar abradant facings, having relatively high speed, and an oppositely rotating governing or regulating wheel having a relatively low speed and co-operating with the grinding wheel, in combination with means disposed between said wheels for supporting the blanks while being ground; means being provided for yieldingly pressing one of said wheels toward the other, and also means for limiting the movement of said wheels toward each other. The work support or blank carrier is vertically and laterally adjustable; provision being made for effecting an angular adjustment in a vertical plane of said support, so as to vary the rate of speed of the blanks along said support with a given rate of drive of the machine. In addition, means are provided for guiding the blanks up to the operating surfaces of the wheels, and means adapted to receive the rolls as they pass out of the grip of said surfaces. The leading feature of this general construction, as claimed by the plaintiff, is the provision of a three-sided channel, formed by the operative surfaces of the grinding wheel, the regulating wheel, and the work support. The grinding wheel, due to its high speed, insures the work remaining on the upper surface of the support, and the regulating wheel, which travels upwardly, or backward with respect to the downwardly moving grinding wheel, and has a secure grip on the work,

forces it along the support, in whatever direction it has a component along the support.

Patent No. 1,210,936 relates to the carrier or work support alone. The device described in this patent includes a carrier, by which the rolls are conducted to a position to be operated upon, and by which they are carried past the operative surfaces, in combination with a trough secured to the inner end of the carrier by which the ground rolls are conducted away from the operative surfaces. There is, furthermore, provided a wearing strip in said carrier, which is removable and has a plurality of faces, which may be used successively. The carrier is pivoted to a slotted body to enable it to swing in a vertical plane, so as to give it the most convenient degree of inclination to the grinding and regulating wheel.

The Reissued Patent.

It is urged by the defendant that the reissue, as such, is invalid, because of (1) the introduction of new matter and the broadening of the patent and the claims; (2) the alteration of drawings; (3) laches; and (4) intervening rights.

[1] From an examination of the file wrapper and contents of both the original and reissued patents introduced in evidence, I am satisfied that the additions to the specification and the changes of the drawings are fully supported by the original patent, and that the claims have not been broadened, but, on the contrary, narrowed. True, applicant waited about 3 years and 8 months before attempting to correct his original patent, but the excuse offered is held to be sufficient, and was justly held so to be by the Commissioner of Patents. The claim respecting intervening rights hardly merits serious consideration, and the defendant should be the last to raise this question; it having intervened through knowledge acquired from a former employee of the plaintiff.

Holding the reissue valid, the next question to consider is: In what respect does defendant's machine differ, if it differs at all, from the machines and devices disclosed by the patents in suit? In defendant's machine means are lacking to permit relative vertical adjustment between the carrier and one of the wheels. It appears from the record, and I am satisfied, that defendant's machine furnishes work supports of varying heights to suit different diameters of work. The work support in defendant's machine includes a carrier, in the form of a cylindrical rod, which may be turned to present to the work new supporting surfaces; but this cylindrical rod has not attached to it a discharge spout, nor is it pivoted to a slotted or any other body. No other essential difference is found, and particularly none in the mode of operation, as the wheels on defendant's machine move or rotate in opposite directions, the same as in the plaintiff's machine, and the relative angular relation of the carrier and the path of the operative surface of the regulating wheel is just as much variable in defendant's machine as in plaintiffs. The fact that defendant changes the inclination of the regulating wheel in relation to the work support, and that the patents in suit show and describe machines in which the work support is angularly changed in relation to the regulating wheel, in no way changes the

situation, as the claims of the reissued patent are, in this respect, readable on both constructions.

This brings us to the question of anticipation. A large part of the record is taken up by the testimony of experts on this question. Unfortunately, in cases of this kind, the experts seem to be bent on one purpose, and that is, not to agree on any one point. Instead of being, as they should be, helpful to the court by pointing out differences of function or operation, they advance, as it seems to me, theories which becloud the issue to such an extent that a heavy burden is imposed upon the court. They also seem to feel it their duty to explain at length the meaning of words and phrases which are clear and can be understood, whether or not one is versed in mechanics; and what makes it still worse is that in most instances the ordinary and common meaning of words and phrases is not employed, but only such as will not, in the opinion of the witness, hurt the cause of the litigant for whom he is testifying. The situation, however, is clear enough in this case, so that the court can decide the questions presented upon this issue without having reference to the lengthy opinions of the experts. What the Circuit Court of Appeals said in Kohn v. Eimer, 265 Fed. 900, at page 902, is particularly apposite to the case at bar.

[2, 3] It cannot be questioned that the art of polishing and the art of grinding are interrelated. They stand so close together that it could not be seriously contended that it would require more than mechanical skill to make the desired and obvious changes in a polishing machine to obtain a grinding machine. Furthermore, in view of the state of the art, to contend that it requires more than mechanical skill to bodily take a construction from the wood-working art, or any other art employing a polishing or grinding mechanism, and transfer it to the metal-working art, is to contend for a proposition the mere statement of which compels its rejection. So, also, to contend that it is new and requires invention to substitute a wood-working tool for a metal-working tool, and attach to it a device for conveying a stream of water on the work to keep it cool, is to contend for a principle which is not recognized in the law of patents.

[4] Taking up the three patents in suit, one after the other, it appears that the general principle described and claimed in the reissued patent No. 15,035 is clearly described in British patent No. 12,190, issued to Lowman on June 10, 1905, United States letters patent No. 967,798, issued to Lowman on August 16, 1910, and the United States letters patent No. 1,111,254, granted to French & Stephenson on September 22, 1914. All that is lacking in the disclosure of these patents is the means which permit relative vertical adjustment between the carrier or work support and one of the wheels. True, the Lowman British patent permits the concave ledge *8* to be vertically raised or lowered; but this is not done in order to accommodate the machine to rolls of different diameters. The British specification clearly describes that, and says that, in order to accommodate the machine to rolls of different diameters, the controlling device or wheel *11* is moved toward or away from the grinding disc.

[5] Claims 1, 2, 4, 6, 7, 8, 9, 10, 12, 13, 15, 18, 19, 20, and 21 of the reissue patent are therefore held to be invalid, in view of the prior art. Even granting that the aforementioned reference patents do not clearly show nor describe means for laterally adjusting the work support, it must be held that the making and attaching of such an adjusting device would not rise to the dignity of invention, but is within the realm of mechanical skill. The remaining claims of the reissued patent, except claim 3, which is not in suit and is not passed upon, are held to be valid, but not infringed, as defendant's machines do not embody means for vertically adjusting the work support.

Patent No. 1,264,930—Roll-Grinding Machine.

The defendant is sued only under claims 1 and 4 of this patent. The machine described in this patent differs only from that in the reissued patent in that a peripheral grinding wheel and an oppositely rotating peripheral regulating wheel are shown. Claims 1 and 4 are as follows:

"1. A grinding machine comprising a rotary peripheral grinding wheel having a relatively high speed, an oppositely rotating regulating wheel having a relatively low speed and co-operating with said peripheral grinding wheel, means between said wheels for supporting the blanks while being ground, and means for yieldingly pressing one of said wheels toward the other."

"4. A machine for grinding cylindrical or like blanks comprising a peripheral grinding wheel rotating at a relatively fast speed, a peripheral regulating wheel adjacent said grinding wheel, and rotating at a relatively low speed in the opposite direction, said wheels being relatively yieldingly mounted, spring-controlled means for forcing said wheels toward each other, a blank support, and means for limiting the movement of said wheels toward each other."

[6] If these claims are valid, and can be taken at their face value, they are clearly infringed. It appears, however, that the machines defined in the claims differ from the machine shown in the reissued patent in one respect only—they specify "peripheral" wheels. This is the only limitation. The combination otherwise set forth in these claims was old and well known in the art at the time the application for this patent was filed in the Patent Office; the several elements being clearly shown and described in the reissued patent, the original of which was granted prior to the filing date of this patent. Leaving out the limitation mentioned—that is to say, the word "peripheral"—the claims could and should have been made in the original of the reissued patent. If the plaintiff thought that the use of "peripheral" grinding and governing wheels was new, their combination should have been claimed per se. The claims in suit, therefore, must be held to be aggregations and hence invalid.

Patent No. 1,210,936—Feeding Device for Roll-Grinding Machines.

[7] The claims under which the defendant is sued on this patent are 2 to 6, inclusive. They are as follows:

"2. A roll-feeding device for grinding machines, comprising a carrier by which the rolls are conducted to a position to be operated upon and by which they are carried past the operative surfaces and a trough secured to the inner end of the carrier by which the ground rolls are conducted away from the operative surfaces.

"3. A roll-feeding device for grinding machines, comprising a carrier by which the rolls are conducted to a position to be operated upon and by which they are carried past the operative surfaces, a wearing strip in said carrier, and a trough secured to the inner end of the carrier by which the ground rolls are conducted away from the operative surfaces.

"4. A roll-feeding device for grinding machines, comprising a slotted body, a carrier pivoted in the slot, said carrier being provided with a groove, and a removable wearing strip in said groove having a plurality of faces, which may be used successively.

"5. A roll-feeding device for grinding machines, comprising a body having a slot, a carrier pivoted in said slot to swing in the vertical plane and means for locking the carrier at any required adjustment.

"6. A roll-feeding device for grinding machines, comprising a body, a carrier and a removable wearing strip in the carrier having a plurality of wearing surfaces."

It will thus be seen that claim 2 is limited to a roll-feeding device, wherein a trough is secured to the inner end of the carrier, by which the ground rolls are conducted away from the operating surfaces. This element, as above stated, is missing in defendant's construction. What has been said in reference to claim 2 is equally applicable to claim 3.

Claim 4 calls for a carrier provided with a groove and a removable wearing strip in said groove having a plurality of faces which may be used successively; the carrier being pivoted in the slot of a supporting body. This combination cannot be found in defendant's machine. The same is true of claim 5.

As to claim 6, it is to be noted that defendant's machine does not include a carrier and a removable wearing strip therein having a plurality of wearing surfaces. This construction must be held to be limited to a strip having distinct and separate surfaces, one to be used after another. Defendant's cylindrical rod does not come under the terms of this definition.

My conclusion is that the claims in suit are not infringed, some of the same, as above set forth claiming combinations not present in defendant's machine, and others being limited to the particular construction therein set forth. There is no room left for the doctrine of equivalents, as removable wearing strips are old and well known, as is shown in patent to Guppey, No. 1,034,362, dated July 30, 1912. A cylindrical rod could be considered a removable wearing strip, but its construction does not permit of presenting a distinct and new surface when needed.

There may be a decree for the defendant in accordance with this opinion; and it is so ordered.

RICHICHI et al. v. JAMES B. DRAKE & SONS et al.

(District Court, D. Maine, S. D. May 2, 1922.)

No. 726.

1. Shipping ⟸35—Captain in foreign port held to have no implied authority to charter vessel.

A captain of a vessel in a foreign port, in easy cable communication with the owners, has no implied authority to bind them by a charter of the vessel.

2. Shipping ⟸39—Contract of master construed as to its binding effect upon owners; "fixed."

A charter entered into by captain of ship, containing the condition, "Provided ship not fixed previously," *held* not to bind the owner, if unable to perform by reason of any contract or condition under which the vessel would not be free to be used to carry out the charter, and which were unknown to the captain; the word "fixed" being equivalent to "tied up," "closed," "not free."

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

In Admiralty. Action in personam by Giovan Battista Richichi and another against James B. Drake & Sons and others, as former owners of the schooner James B. Drake. Judgment for defendants.

Gerry L. Brooks, of Portland, Me., for libelants.

J. F. A. Merrill and N. W. Thompson, both of Portland, Me., for defendants.

PETERS, District Judge. This is an action in personam brought by Richichi & Figli, of Trapani, Italy, against the former owners of the schooner James B. Drake, to recover damages for the failure of the owners of the schooner to carry out the terms of a charter party signed by the master of the vessel on behalf of the owners, while in Trapani with his vessel, in February, 1916.

I find the following essential facts:

The defendant corporation, James B. Drake & Sons, was at the time in question, and had been previously managing owner of the schooner James B. Drake, which was owned by James B. Drake & Sons and a number of individuals residing in different parts of the New England states. The schooner James B. Drake was, at the time in question, in command of Jason C. McKown.

The vessel was chartered late in 1915, for a trip from Norfolk, Va., to Trapani, Italy, with lumber returning with salt to Gloucester, Mass.

From January 7 until February 20, 1916, the Drake was in Trapani, unloading lumber, loading salt, and waiting for favorable weather. On February 20th she sailed for Gloucester.

While at Trapani Capt. McKown was in easy communication by cable with the managing owners in Bath, Me., and did, as a matter of fact, exchange frequent cables with them.

While at Trapani the captain opened negotiations with the plaintiff Richichi, looking toward carrying a cargo from the United States to Italy, after his return to the United States.

On February 3d the captain wrote Richichi asking for an order for such a cargo. Evidently Richichi telegraphed from Palermo to the captain, as, on February 6th, the captain wrote him giving prices on lumber from Pensacola and saying:

"* * * I would want to take cargo from Boston, or nearby port, to Pensacola or some nearby port, that is coal or some quick cargo, as could go more quickly; also, want in charter (provided vessel not closed previous), so that, if anything has been done at home and I have not been informed, we would be released. This is only for safety. I am bound to Gloucester, Mass., with the salt, and will get away about next Sunday."

Capt. McKown had no express authority to charter the vessel, and was seeking this business on his own initiative. On February 12th he cabled to the managing owners, at Bath, that he had been offered $15 freight from Baltimore to Italy. The managing owners immediately cabled back to the captain: "Do not charter." This cablegram was sent by the captain, and reply was received by him inside of about 24 hours, and on February 12th the captain wrote to Richichi as follows:

"Trapani, February 13, 1916.

"Mr. Antonio Richichi, Palermo—Dear Sir: I have just received a telegram from home; and, at the present time, can do nothing as they think rates will be higher. If you write to Mr. Drake, you may do some business a little later. I will sail Tuesday for Gloucester, Mass. Would like very much to come to Palermo.

"Yours very truly,

Jason C. McKown,
"Master Schooner James B. Drake."

On the 18th of February Capt. McKown signed a charter party with Richichi, whereby it was agreed that the schooner Drake, after her voyage to and discharge of salt at Gloucester, should proceed to Pensacola, or some Gulf port, and load with lumber for West Italy, on certain terms specified in the instrument, which was signed:

"Jason C. McKown, Master,
"Agent for Owners.
"Ant. Richichi & Figli."

At the end of the printed portion of the charter, and before the signatures, the following words were inserted:

"Provided ship not fixed previously."

On February 19th, Capt. McKown wrote Richichi, among other things:

"In regard to charter of to-day, will say that I think better not to have but one port of discharge. * * * I have wired Mr. Drake that I have closed, subject to not being fixed previously. Will sail first chance, and hope to hear from you at Gloucester, Mass. Be sure to get everything in that charter which will help us out, as you know lumber is a slow cargo. * * *"

On February 20th, the day Capt. McKown sailed, he also wired the managing owners as follows:

"Tripani, February 20, 1916.

"Drake: Sailing chartered conditional lumber Gulf Italy seventy dollars standard. McKown."

On March 5th Richichi cabled the managing owners as follows:

"Palermo, March 5, 1916.

"James Drake, Bath, Maine: Have Capt. McKown communicate you 'fixare' Drake Pensacola West Italy wire. Richichi."

In the confirmation of this cable, the word "fixare" appears to be "fixure."

The following reply was sent by the managing owners:

"March 6, 1916.

"Richichi, Palermo, Italy: No. We have sold Drake. Drake."

In subsequent communications between the parties it was claimed on the one hand that the charter party was binding, and on the other that it was not. The respondents repudiated the charter party when it was brought to their attention.

While the master of the vessel in Italy was arranging for a charter, the owners of the vessel in this country were arranging for a sale, had given options, and, on February 9th, while negotiating for a sale of the vessel, they gave one Hobbs, of New York, an opportunity to charter the vessel, if not sold.

Before the vessel arrived in this country, negotiations for a sale had been consummated by a deposit of money, and bills of sale were subsequently executed.

It appears that, on May 1, 1916, Richichi assigned the charter to Rosasco Bros., of Pensacola; that Rosasco Bros., agreed to load the vessel with pine and pay a sum in addition to the charges called for in the charter. The respondents were notified of the transfer of the charter, and directed to have the schooner proceed to Pensacola to carry out its terms. The respondents refused to permit the vessel to be used for that purpose. It is alleged that Rosasco Bros. claimed and recovered damages of the libelant to the amount of $20,000, which increases the claim of the libelants against the respondents to about $42,000, for the failure of the owners of the vessel to permit her to be used for the purposes specified in the charter.

On March 15, 1917, Rosasco Bros. reassigned the charter to Richichi before this action was brought.

The managing owners of the vessel had only two possible agents in Trapani—one, a bank, for the purpose of collecting and forwarding freight; the other, the master of the vessel. Neither had any authority to charter.

The principal executive officer of James B. Drake & Sons, managing owners, was called as a witness by the libelants, and was questioned concerning the authority of the bank in Trapani:

"Q. Did they have any authority to enter into any charter?

"A. No. Nobody did.

"Q. No one outside of your own firm?

"A. No one had any authority to charter our vessels at all; outside of ourselves."

It not being now questioned that the master had no express authority to charter the vessel, it is claimed by the libelants that he had implied authority to do so, by reason of the fact that the ship was in a

foreign port at a place where the owners had no agents expressly authorized to enter into chartering contracts.

A preliminary question, however, is whether the master did attempt in the charter to bind the owners, regardless of any contracts they might have made concerning the vessel. This brings up the question of the meaning of the words, "Provided ship not fixed previously," inserted by the parties in the charter party. It is contended by the libelants that this means provided the ship was not "chartered" previously. And, as bearing on this, they quote from a letter which, as a matter of fact, was written by the master to the managing owners the day after he signed the charter, and in which, among other things, he said:

"I * * * closed conditionally lumber from Gulf to west coast Italy. * * * I hope, if the vessel is not chartered, you will be pleased with this freight. * * *"

It does not appear whether or not the captain knew of the negotiations for sale that were going on in this country, but the language used by him was broad enough, and sufficiently apt, to cover a sale, or an option to buy, or an option to charter, or any contract condition the existence of which would prevent the vessel being free. If the language used had been intended to cover a charter only, it would have been very simple to have said:

"Provided ship not chartered previously."

Nowhere in his correspondence with the libelants did the master, in relation to this contract, refer to the vessel being chartered previously. In one of his first letters to Richichi, that of February 6th, the master said:

"Also want in charter (provided vessel not closed previous)."

Apparently the captain used parentheses for quotation marks, and expected that the above, or equivalent language, would be put in the charter party. The word "fixed" was subsequently used, instead of "closed."

In the letter of February 6th, above mentioned, the captain goes on to explain to Richichi the purpose of the proposed clause in the charter, "Provided vessel not closed previous," and says:

"So that, if anything has been done at home, and I have not been informed, we would be released."

This does not limit the condition at home to a chartering. He says, if "anything" has been done at home, they would be released.

This language that the captain used to the libelants is more important than the language in his letter to the owners, in which he spoke of only one condition that might prevent the charter being fulfilled. It was not necessary to be so explicit with the owners as it was with the third parties. It is what the libelants had a right to rely upon that is important.

[1, 2] It seems quite clear, in view of all the circumstances and the correspondence, that the parties intended the exception in the charter party to cover any condition which might exist in America, due to contracts made by the owners, unknown to the captain, under which

the vessel would not be free to be used to carry out his charter with Richichi.

The word "fixed," having no technical signification, roughly used in this way in a contract between a sea captain and a foreign firm, is quite clearly equivalent to "tied up," "closed," "not free"—in other words, "prevented from performing the contract on account of other contracts previously made by owners."

From the view that I take of the case, however, the libelants could not prevail, even if the condition had been omitted from the charter party.

This is a case of agency. The captain had no express authority to charter the vessel. The managing owners had, by cable message, ordered him not to charter her. The libelants urge, however, that the captain, under the circumstances, had authority implied by law to bind the owners. They earnestly contend, through their counsel, that the master of a ship in a foreign port, where the owners do not have a known authorized agent, has authority to enter into a charter party binding the owner.

The learned counsel for the libelants, to sustain their contention, cite a line of authorities running back, as they say, into the Middle Ages for its foundation. If this case had been tried in the Middle Ages, possibly the libelants might have recovered, although it is at least doubtful whether, even then, or ever, the master had implied authority to charter his vessel while in a foreign port, to run from his home country after an intervening voyage. That was the case here. The captain of the vessel, while in a foreign port, attempted to make a charter to commence after the vessel returned to America, and made another trip from Massachusetts to Florida.

In Scrutton on Charter Parties and Bills of Lading, p. 33, the author says:

"Before the arrival of his ship in port no captain has any authority in law to bind his owners by letters written to an agent in port asking him to make a charter of the ship before its arrival; and a charter so made would not be binding on the owners, unless subsequently ratified by them."

Whatever authority the master had in olden times to charter his vessel in a foreign port, without knowledge or permission of his owners, was based on a rule that was evolved from the exigencies of the situation. Not being able to communicate with his owners, and the ship being entirely beyond their control, sent out to engage in the commerce of the world, the master was what might be termed an agent by necessity, and when the necessity ceases the rule falls. In these times —at least in a case like this—when a master is in easy and frequent communication by cable with the owners, there is no necessity or reason to rely upon implied authority and none can be invoked. The communication was so easy in this case that, so far as making contracts for the future business of the vessel was concerned, she might as well have been in her home port, and it will hardly be claimed that there the master has implied authority to bind the owners by such a contract. In The Tribune, 3 Sumn. 144, 149, Fed. Cas. No. 14,171, Story, J., says:

"As to his right to make such a contract in the home port of the owners, I agree, that it cannot be ordinarily presumed from his character as master. It is not incident to his general authority; nor can it be presumed, under such circumstances, as an ordinary superadded agency."

In Botsford v. Plummer, 67 Mich. 264, on page 271, 34 N. W. 569, on page 572, the court said:

"Thus, it is well settled that where the owner is himself present, or within easy access, agency of the master which is founded on necessity disappears, for the necessity ceases to exist. No necessity can be sufficient, if the owner be so near that the master is not obliged to act without instructions."

Several other defenses of more or less merit have been interposed in this action, but it is unnecessary to consider them, in view of my conclusion that the master had no authority, either express or implied, to execute this contract.

The entry will be:

Judgment for defendant, with costs.

RAUSCH et ux. v. CONE et al.

(District Court, S. D. Florida. April 3, 1922.)

No. 81.

Mortgages ⇐38(1)—Evidence held insufficient to show that deed was intended as mortgage.

Evidence *held* insufficient to sustain the burden resting on complainants of proving that a quitclaim deed executed by them, absolute on its face, was given as security, and under the state statute did not convey title.

In Equity. Suit by Charles E. Rausch and Minnie E. Rausch against E. E. Cone and others. Decree for defendants.

Marks, Marks & Holt, of Jacksonville, Fla., for complainants.

Mabry, Reaves & Carlton, of Tampa, Fla., for defendants.

CALL, District Judge. The bill of complaint herein, filed October 12, 1921, charges: That Minnie E. Rausch, one of the complainants, was on June 27, 1917, the owner in fee simple of a certain piece of real estate situated in the city of Tampa, Fla., subject to a certain mortgage to one Hobbs for the sum of $11,200. That said mortgage had become in default and foreclosure proceedings commenced, which resulted in a decree of foreclosure. The title was deraigned through the defendant Cone through mesne conveyances to said complainant, subject to said Hobbs mortgage, the payment of which was assumed by the said Rausch. That upon commencement of said foreclosure proceedings Cone approached the complainants about taking care of said mortgage. Whereupon certain consultations were had between them, looking to the preservation of the equity of complainants in the property, which resulted in an agreement being reached between them whereby Cone was to take a certain $4,000 mortgage owned by Mrs.

Rausch, and sell or take the same himself at a discount of 10 per cent., the proceeds to be employed in reduction of the decree, and a new mortgage given by Cone covering the property for the reduced amount. In order to effectuate this agreement, the property was deeded by complainants to Cone, and after that the new mortgage was given by Cone; the property was to be deeded by Cone to the complainant, Minnie A. Rausch, subject to said new mortgage. That said new mortgage was given, and the deed from Cone to complainant was executed and placed in the hands of defendant Mabry for delivery to complainant. That, feeling that said deed was entirely safe in the hands of Mabry, no demand was made for such delivery at the consummation of the understanding in the matter of the decree of foreclosure. That, as the result of further negotiations between complainants and defendant Cone, Cone agreed to have put in the building a concrete floor, take care of the installments of interest as they became due, as well as the taxes, etc., and retain possession of the premises, and rent same at a rental of $125 per month until he should be reimbursed for his expenditures. That about April 1, 1918, complainants procured Cone to go on a supersedeas bond for them in another suit, and to secure him against loss by reason of going on said supersedeas bond the property in controversy in said last-named suit was deeded to Cone, he to be allowed to retain possession of the first-named property, and that defendant Mabry should be allowed to retain possession of the deed from Cone to complainant Minnie A. Rausch, and that complainants at the request of Cone executed a quitclaim deed to the first-mentioned property to Cone, and left same in possession of said Mabry in escrow. That it was specifically agreed between the parties that, as soon as the liability of Cone on said supersedeas bond was terminated, said quitclaim deed should be delivered by Mabry to complainants. That said litigation in which the supersedeas bond was given was settled shortly thereafter and said litigation terminated without loss to Cone, and the second-mentioned property conveyed, and that matter entirely closed. That complainants had removed their residence from Tampa and through loss of papers sent by mail to an attorney in Tampa, causing a delay of 17 months before demand was made upon said Mabry by an attorney in Tampa, and in the month of November, 1920, the defendant Mabry took the position that he had never received any deed from complainants to be held in trust or escrow. That in December, 1920, defendant Cone, upon demand for an accounting of the rents, etc., of the first-mentioned property, took the position that he owned the first-mentioned property and was not required to account, and had never executed a deed reconveying said property to complainant after negotiating the new Hobbs mortgage. The bill then alleges the value of the property and its rental value, and prays for an accounting against Cone, a reconveyance of the property, and, if that was impossible, then a money decree against Cone and Mabry for the amount of damage sustained.

To this bill the defendants filed separate answers. Mabry's answer admits title of complainant Minnie A. Rausch, subject to a mortgage as alleged in the bill. He admits the foreclosure of said mortgage, and alleges the entry of decree in said foreclosure suit for a sum approxi-

mating $13,000, which the complainants and defendant Cone were required to pay; that after the refinancing of said Hobbs mortgage he was advised by said Cone that he was ready to reconvey the property to said Minnie A. Rausch upon the payments of the amounts due him, and that he endeavored to get such settlement, and in the month of February, 1918, prepared such a deed to be executed by Cone and wife, but said deed was never in fact executed, for the reason that complainants were never ready to settle with Cone; that finally the title to the property was vested in Cone by a quitclaim deed executed by complainants on April 1, 1918; that said quitclaim deed was prepared by him upon instructions received by him from the complainants and defendant Cone, for the purpose of vesting the absolute title to the property in Cone. He denies that any deed was ever left with him in escrow for the complainants, or that he ever held any deed for either of the complainants, except the unexecuted form of deed before mentioned; admits the settlement of the suit in which the supersedeas bond was given; alleges ignorance of other charges in the bill, and a general denial of any other matter or thing not otherwise fully answered.

The defendant Cone in his answer admits the title of the complainant Minnie A. Rausch, subject to the Hobbs mortgage as set out in the bill; admits that the mortgage had become in default and foreclosure proceedings commenced and pending; admits negotiations between himself and complainants which resulted in the use of the mortgage held by complainant Mrs. Rausch for $4,000 to settle pro tanto the Hobbs mortgage; admits the execution of the agreement of October 30, 1917, setting forth the agreement of the parties thereto; admits that pursuant to said agreement he was able to handle said foreclosure suit, so as to effect a settlement by paying several thousand dollars and arranging a renewal by defendant Cone giving a new mortgage for the difference; admits the conveyance by complainants to Cone in order that the settlement might be effected, the defendant Cone to reconvey "upon the payment of said mortgage, and upon certain other payments and compliance with certain conditions under which the said property was deeded" to him by complainants. The defendant admits, further, that the deed from complainants to him was dated December 17, 1917, and that the mortgage was renewed substantially as alleged in the bill. The answer then alleges that the mortgage being foreclosed was an obligation of the defendant, and he was a party to said foreclosure suit, and was under the necessity of protecting himself against same, and to that end handled the same between the complainants, who were primarily liable for said mortgage debt, and himself; that a decree had been actually entered in said foreclosure suit, which was practically for $13,000, and was actually paid upon said decree the equivalent of the mortgage turned over to him by complainants.

The answer further states that the complainant in the foreclosure suit refused to accept a new mortgage from the said Rausches and demanded that this defendant execute the new mortgage and continue his liability for said debt; that the new mortgage was given for $8,600. He admits he put a new cement floor in said building, and alleges other expenditures which are material in the matter of accounting, but not

material in settling the equities. He denies that he ever executed a reconveyance of the property to the complainants and left with defendant Mabry as alleged in the bill, but alleges that complainants, in contemplation of removing from Tampa, stated that they were unable to carry the property and pay the debts incumbering same, and requested him to relieve them from further obligations therefor, and himself retain the title under the conveyance theretofore executed to him; that he took legal advice as to whether such an arrangement would be binding, and was advised that it would not, and that an additional deed would be necessary; that thereupon the complainants executed the quitclaim deed for the purpose of vesting the full legal title in him; and that since the date of said quitclaim deed he has claimed and held said property as his own. The defendant Cone denies that he ever executed an agreement dated April 1, 1918, and attached to the bill. Then the general denial.

Upon March 23, 1922, the hearing of testimony was commenced, and concluded on March 24, 1922, when counsel for the respective parties argued and submitted said cause to the court. The issues under the pleading in so far as Mabry is affected are: (1) Did Cone and wife execute a deed reconveying the property to Minnie A. Rausch and place it in his custody for delivery to the complainants? and (2) did the complainants execute the quitclaim deed of April 1, 1918, for the purpose of further securing the defendant Cone in his liability on the supersedeas bond, and deliver the same to Mabry, to be redelivered to them upon the cessation of any liability on said bond?

There is only one witness, the husband of Minnie A. Rausch and co-complainant, who testifies that any such deed reconveying said property was ever in existence. As opposed to this testimony, there is the testimony of the defendants Mabry and Cone, and as a part of Mabry's testimony is produced the form of deed which he had prepared to carry out the agreement executed October 30, 1917, between the complainants and the defendant Cone. The witness testifying to the existence of the deed in Mabry's office could not give the time with any definiteness, nor was his reason for not taking the deed, then, as he claims, offered him, of much cogency. It seems to me that the most natural action on his part, had the deed been offered him, was to take it. The refinancing of the Hobbs mortgage was then an accomplished fact, according to his own contention. Had he been then dissatisfied with the amount for which the new mortgage was given, it seems to me he would have made his dissatisfaction known, and to Mabry. Yet according to his testimony he left it with Mabry, because he had every confidence that it was in safe hands, etc., and stating that he did not think a sufficient amount had been paid on the decree. This last seems to have been as afterthought, not expressed to Mabry, and so far as the evidence is concerned never expressed to defendant Cone. Then a conversion with Mabry was had just previous to complainant C. E. Rausch going to Chicago on account of the death of his brother, and nothing said about dissatisfaction with the amount of the new mortgage; then the letter of March 6, 1918, to Mrs. Rausch, of which the husband admits he was cognizant, and the utter silence in regard thereto. Subsequently

the evidence shows Rausch importuning Cone to go on a supersedeas bond, and Cone's unwillingness to incur such liability, and still no dissatisfaction expressed.

Nor does it impress me as reasonable that one would leave a deed to a valuable piece of property in the hands of any one unrecorded, when a third party held the record title and was in possession of same. Taking into consideration the surrounding circumstances, I am constrained to find that no such deed as is alleged in the bill of complaint was ever delivered to defendant Mabry, for delivery to the complainants, or either of them. I find the first issue heretofore stated against the complainants.

The second issue, so far as defendant Mabry is concerned, is: Did the complainants execute the quitclaim deed for the purpose of further securing Cone against liability on the supersedeas bond, and was this deed for that purpose delivered to Mabry, to be held by him in escrow or in trust for the complainants? The discussion of the first part of this issue concerns also the defendant Cone.

The testimony shows that the complainants were then contemplating the removal of their residence from Tampa to Charleston, S. C.; that the house which they had in Hyde Park was then advertised for sale under foreclosure proceedings, to take place April 1, 1918; that they were without means to protect this house from forced sale under the decree, and in which the complainants believed they had, and it afterwards appeared did have, an equity of several hundred dollars, and had been importuning Cone to become surety on their supersedeas bond, to enable them to stay the proceedings while the case was pending in the Supreme Court of Florida; that Cone was unwilling to incur this liability, although the title to the Hyde Park property was to be conveyed to him to secure him from loss on said bond. Up to this point there is little dispute between complainants and Cone.

The complainants insist that, Cone being unwilling to incur this liability on the security of the Hyde Park property alone, therefore the quitclaim deed to the other property of April 1, 1918, was executed. Cone, on the other hand, contends that he refused to go on the supersedeas bond until and unless the complainants vested the absolute title to the property in dispute in him, and that the quitclaim deed was executed for that purpose. Cone and Mabry both testify to this, and that the quitclaim deed was executed and delivered to Cone in Mabry's office on the day of its execution, and then the supersedeas bond was executed or delivered to the complainants. Mabry testifies to the conversation between himself and the complainants preceding the preparation and execution of the quitclaim deed, detailing that the parties thought the deed theretofore executed by the complainants to Cone, to enable him to refinance the Hobbs mortgage, was sufficient to vest the title; whereas he explained to them that that deed, being given under the agreement of October 30, 1917, did not have that effect, and therefore the quitclaim deed was necessary to carry out the intention of the parties, and he then, at the instance of the complainants, prepared it. This is denied by the complainants. A consideration of the agreement of October 30, 1917, convinces me that any careful lawyer would have

taken this view of the matter, where a client's interests were involved, and the explanation is reasonable.

It will be borne in mind that this latter transaction took place in the midst of the World War, when, as one of the witnesses says, there was no demand for property and few sales being made. It must also be borne in mind that Minnie A. Rausch was a married woman, and her assumption of the payment of the mortgage could only bind her separate property, and, in so far as the evidence shows, she had none, except the Bailey mortgage, already assigned for the purpose of having its proceeds applied to the reduction of the Hobbs mortgage and the Hyde Park property then advertised for sale. And Cone was bound by his mortgage to Hobbs covering this property. From the testimony it appears that Cone was unable to sell the past-due Bailey mortgage, with its accrued interest, at 10 per cent. discount as provided in the October agreement, and had borrowed money to make the payment on the Hobbs decree, in order to get the extension desired.

Under the circumstances, the assignment of the Bailey mortgage, executed on April 1, 1918, seems a perfectly natural proceeding, if Cone was to take the absolute title to the property, subject to the existing incumbrances. The letter of Mabry to Mrs. Rausch of March 6, 1918, bears out to my mind the contention of the defendants. If the contention of complainants, that all they had to do was to demand and receive the deed reconveying the property to Mrs. Rausch, is correct, then why the expression, "as soon as the matter can be closed out." The matter, according to the complainants' contention, had been closed out in December of 1917, and the new mortgage given. And yet, as noticed above, the complainants made no objection to the letter, nor asserted any such claim as made in their bill.

The complainants produced at the hearing a paper dated April 1, 1918, signed by themselves, but unsigned by Cone. Cone swears he never executed such a paper, and Mabry swears he prepared it in his office at the instance of complainants, and they executed it in his office, after Cone had gone, and after the delivery of the quitclaim deed to Cone. The paper does not purport to have been executed in duplicate, and the complainants are unable to explain why this particular paper appears unexecuted by Cone, except to suggest that he signed the copy. The peculiar thing about the paper to me is that it has reference to the Hyde Park place, and the reconveyance of same to complainants, purports to secure payment of the sum of $172, the amount of the first note under the new mortgage on the property in dispute, and is silent as to the quitclaim deed that day executed by the complainants to Cone. Certainly the transaction was then fresh in the minds of the complainants, and if this quitclaim deed was given as a further security against Cone's liability on the supersedeas bond, they would scarcely have overlooked so important a matter as the reconveyance of a valuable property, when having the contract reduced to writing in regard to the Hyde Park property; especially is it so when they do refer to an interest note due upon the mortgage on that very property. It, however, appears that the matter of the Hyde Park property and Cone's liability on the supersedeas bond was entirely settled shortly after complainants

had removed from Tampa, in August or September of 1918, without any payment to Cone of the $172 interest note.

The complainants, to corroborate their contention, produced a registered letter to Mrs. Rausch, purporting to be signed by Cone, dated July 24, 1918, and demanding the repayment of two interest notes of $172 each. This letter is typewritten, except the signature. Cone would not positively deny the signature—says it looks like his, but points out certain differences, and says he never wrote any such letter, although it is on his stationery.

There is a likeness between this signature and certain admitted signatures in evidence; yet I cannot say, from a comparison of same, that it is the signature of defendant Cone. The complainants also produce a canceled check to Cone, dated May 8, 1918, for $7.60, which complainants claim was given in payment for paint purchased by Cone and used by Mr. Rausch in painting the building on the property subsequent to the date of the quitclaim deed. This is again met by the denial of Cone, and I am unable to say whose recollection is correct. I am therefore constrained to find the second issue in favor of defendant Mabry and against the complainants.

It seems to me the sole issue as to defendant Cone on this hearing is whether the quitclaim deed given him by the complainants was given to secure him against liability on the supersedeas bond, or whether it was given with the purpose to vest the title absolutely.

On its face it is a deed absolute, and the rule of law, as I understand it, is that one claiming a deed absolute upon its face is given as security has the burden of proof. Therefore the complainants in this case have the burden of proof resting upon them to establish to the satisfaction of the court that this quitclaim deed, although absolute upon its face, is really a security, which under the Florida law does not vest title.

I have discussed the evidence produced by the parties fully bearing upon this question in discussing the second issue as to defendant Mabry, and a rediscussion would serve no useful purpose. I find that the complainants have failed to sustain the burden cast upon them by the law, and that the equities are with the defendant Cone.

A decree will be entered, dismissing the bill of complaint against all the defendants, at the cost of the complainants in this suit.

In re ALPERN et al.

(District Court, W. D. New York. March 3, 1922.)

1. Intoxicating liquors ⇐255—Commissioner without authority to return property wrongfully seized under Prohibition Act.

National Prohibition Act, tit. 2, § 2, which, inter alia, authorizes United States commissioners to issue search warrants "under the limitations provided in title 11 of the act approved June 15, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼a–10496¼v), does not authorize the commissioner to return property wrongfully seized thereunder, as provided in section 16 (section 10496¼p); such provision being superseded as to such seizures by National Prohibition Act, tit. 2, § 25, providing that

property seized thereunder "shall be subject to such disposition as the court may make thereof."

2. Intoxicating liquors ⊂⊃248—Liquor in possession of druggist holding permit not subject to seizure on affidavit charging unlawful sale.

Liquor in possession of a drug company, under a permit to keep and sell the same for lawful purposes, cannot lawfully be seized under a search warrant issued on an affidavit charging unlawful sale of liquor on the premises.

At Law. In the matter of application of Julius Alpern and David K. Gritz, partners doing business as the Alpern-Gritz Drug Company, for an order directing return of certain intoxicating liquors, canceled physicians' prescriptions, and internal revenue record book, seized under a search warrant. Order granted as to the liquors.

William J. Donovan, U. S. Atty., of Buffalo, N. Y. (Edward N. Mills, Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for the United States.

O'Connor, Newton & Doyle, of Buffalo, N. Y., for petitioners.

HAZEL, District Judge. This is a petition for the return of a quantity of intoxicating liquor in bottles, an internal revenue book, and physicians' prescriptions in the possession of the petitioners, seized under a search warrant pursuant to the provisions of the National Prohibition Act (41 Stat. 305). The petitioner Gritz concededly is a licensed druggist, engaged in partnership with one Alpern in business at Buffalo under the firm name of Alpern-Gritz Drug Company. The petition, which is not controverted, shows that on October 24, 1921, in accordance with law, the petitioners in their firm name applied for and later received from the Commissioner of Internal Revenue a permit and authority to sell and dispense intoxicating liquors under the provisions of the National Prohibition Act. On January 20, 1922, while the permit was in full force and effect, the United States commissioner issued a search warrant on information that the petitioners had sold liquor illegally. Federal Prohibition Agent Christal was authorized to search the drug store of petitioners, which was the place specified in the permit, and there seize all intoxicating liquors discovered therein. Pursuant thereto the property above specified was taken and is now in the possession of the local prohibition agent.

[1] It is now contended that the search and seizure were in violation of the National Prohibition Act; that the search warrant was void, and the United States Commissioner was without authority in law to issue the same. This contention involves the construction of title 2, §§ 2–25, of the National Prohibition Act, and comparison with the Act of June 15, 1917 (Espionage Act, tit. 11 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10496¼a–10496¼v]) to which section 25 refers. Section 2 of title 2 of the National Prohibition Act provides as follows:

"Sec. 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of the act. Officers mentioned in said section * * * are authorized to issue search warrants in the method provided in title XI of the Act approved June 15, 1917."

In section 25 of title 2 of the National Prohibition Act it is provided:

"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, and 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."

By section 1 of title 11 of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496¼a) a search warrant may be issued by a judge of the United States District Court or by a United States commissioner for the district wherein the property sought is located, and section 16 (section 10496¼p) reads:

"If it appears that the property or paper taken is not the same as that described in a warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken."

The above provisions relating to the disposition of liquor or property taken, "designed for the manufacture of liquor," or "property or paper taken," are apparently conflicting, for in the one it is subject to disposition or destruction by the court, while in the other the judge or commissioner must cause the property to be returned to the person from whom it was unlawfully taken. It is true that section 25 of the Prohibition Act, read in connection with section 1 of title 11 of the Act of June 15, 1917 (Espionage Act), vests the District Judge and United States commissioner for the district where the property is located with the power to issue search warrants and to vacate the same. This power under section 25 is, I think, limited to such issuance and vacation, and does not include the disposition or return by the commissioner of any liquor unlawfully seized or found to have been unlawfully possessed or used. That section specifically provides that, the "property so seized shall be subject to such disposition as the court may make thereof * * * and shall be destroyed, unless the court shall otherwise order." This enactment as to disposition or destruction by the court supersedes section 16 of title 11 of the Espionage Act, relating to the return of property by the judge or commissioner.

The case of Francis Drug Co. v. Potter (D. C.) 275 Fed. 615, is direct authority for this construction. There the question arose in a proceeding to punish the Prohibition Director for contempt in failing to obey an order of the United States commissioner to return liquor unlawfully seized. Judge Morton held that the commissioner did not have the power to order the return of the liquor, and he said:

"Both the Espionage Act and the Prohibition Act contemplate the possibility that property may be seized which ought not to have been seized. The Espionage Act gives the Commissioner who has issued the search warrant the power to cause such property 'to be restored to the person from whom it was taken.' The Prohibition Act provides that 'property so seized shall be subject to such disposition as the court may make thereof.' The latter is the later enactment, and refers specifically to property seized under the Pro-

hibition Act. As to such property it supersedes, I think, the broader provision of the Espionage Act."

It is, however, contended by the government that this court is without jurisdiction to pass upon the validity of a search warrant issued by a United States commissioner while the matter is still pending before him; that the authority to issue impliedly carries with it the equal authority with the court to make return of the property unlawfully seized. Reliance is placed upon U. S. v. Maresca (D. C.) 266 Fed. 713, to support this contention. In that case Judge Hough, who wrote the opinion, did not construe sections 2 and 25 of the Prohibition Act. He held that an order of a United States Commissioner, requiring the return of property unlawfully seized under a search warrant issued by him, is in effect a judgment of the District Court, from which the writ of error must be taken to the Circuit Court of Appeals, and that the District Court cannot set aside the order of the commissioner directing the return of the property.

There, however, the search warrant was issued under section 6364 of the U. S. Compiled Statutes, wherein it is substantially provided that the judges of the Circuit and District Courts and United States commissioners of Circuit Courts (now United States commissioners) may, within their respective jurisdictions, issue search warrants directed to any internal revenue officer to search premises upon which he has reason to believe that a fraud upon the revenue is being committed. The decision was also based upon the traditional and general practice that commissioners holding court have power to issue criminal process, including search warrants; that they are in fact a part of the District Court, and as the jurisdiction of both, in respect to issuing search warrants and the return of property, was equal, the District Court could not set aside an order of the commissioner for the return of property seized under his search warrant, any more than one District Judge may vacate an order entered by another. But in this case no equal power is conferred by the Prohibition Act. The power of disposal and destruction of liquor and property designed for the manufacture of liquor intended to be used in violation of the act is expressly given to the court, not to the commissioner whose duties are prescribed by special statute (U. S. v. Allred, 155 U. S. 594, 15 Sup. Ct. 231, 39 L. Ed. 273), and who, as has frequently been decided, is not a judge of a court, but simply an administrative officer thereof. Hence the principle of the Maresca Case, which, as pointed out, did not construe or pass upon section 25 of the Prohibition Act, is inapposite.

[2] That the petitioners had a permit to keep and sell intoxicating liquor for lawful purposes at their drug store is unquestioned in this proceeding. Therefore the possession of the liquor seized was not unlawful. The Commissioner of Internal Revenue is empowered by section 9 of the Prohibition Act to issue an order citing permittees to appear before him at a specified time and answer any complaint there may be with reference to their failure in good faith to conform to the provisions of the act, or to violation by them of the laws of any state relating to intoxicating liquor. The statute states that on the return of the citation, which shall be accompanied by a copy of the complaint,

a hearing must be held within the judicial district and within 50 miles of the place where the offense is alleged to have been committed, and if it is ascertained as a result of the hearing that the permittees were guilty of willfully violating the prohibition laws, or have failed in good faith to conform to its provisions, then the permit shall be revoked, and none shall be granted them within one year thereafter. The permittees in such case have the right of review before a court of equity, and during the pendency of the action the permit "shall be temporarily revoked."

It will be observed that the statute in plain and unambiguous terms prescribed the manner in which a permit to possess liquor by a permittee may be revoked. No proceedings to revoke have been begun against the petitioners. In the circumstances the possession by them of the intoxicating liquor seized by the prohibition agent was not unlawful and as to such liquor there was insufficient ground for issuing a search warrant or making a seizure of liquor thereunder. In Francis Drug Co. v. Potter, supra, the learned court decided, and I think the case was correctly decided, that liquor in the possession of the drug company under a permit to keep and sell the same for lawful purposes cannot lawfully be seized under a search warrant issued on an affidavit charging illegal sale on its premises; that a single sale did not afford ground for seizing the entire stock of liquor.

Inasmuch as all the facts relating to the unlawful seizure are uncontroverted, the custodian of the liquor must be required to return the same to the petitioners at their place of business, but not the revenue book or physicians' prescriptions, since section 25 is apparently limited to the disposition of the intoxicating liquor and containers, together with any property designed for the manufacture of liquor intended for use in violation of the act. The internal revenue book and physicians' prescriptions are not shown to have been "property designed for the manufacture of liquor" or articles related thereto.

It is not held herein that the petitioners cannot be proceeded against for violations under appropriate sections of the Prohibition Act, but this proceeding is separate and independent thereof. The prescriptions and book no doubt relate to the specific charge of selling intoxicating liquor for beverage purposes without a prescription. Hence their return at this time is not required.

Petitioners further contend that the officer or officers who executed the search warrant should be enjoined from testifying to facts and information obtained while conducting the unlawful seizure of liquor possessed under a permit, under the doctrine of Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319. But in that case the information upon which the charge was based was obtained through previous unconstitutional search and seizure. There is nothing shown to indicate that such were the facts here. However, the witness to support the specific charge may be cautioned not to give testimony based upon information acquired during the unlawful seizure of liquors. Any question as to the asserted unlawful seizure of prescriptions and internal revenue book is therefore reserved to the hearing.

The motion of the petitioners for the return of liquor seized, of which they were lawfully possessed under their permit, is granted.

Since writing the foregoing, Judge LEARNED HAND, with whom I communicated on the subject, has written me that the preferred rule in the Southern district, when the United States commissioner has vacated a search warrant, is to allow the owner of the liquor unlawfully seized a period of ten days to apply to the District Court for its return. For convenience and to secure uniformity of practice in this state, this rule will be adopted and applied in future cases in this district.

In re NALETSKY.

(District Court, D. Connecticut. September 21, 1921.)

No. 4918.

1. **Bankruptcy ⟸28—Bankrupt, claiming full schedules would incriminate, may file partial schedules and submit eliminations to the court.**
   Where the bankrupt claims that the filing of full schedules would tend to incriminate him, but he offered to file such schedules as could not be used against him in pending criminal proceedings, he will be permitted to file his schedules in accordance with the offer, and to submit to the court the matter eliminated, so that the court may say whether the part eliminated, if filed, would tend to incriminate the bankrupt.
2. **Bankruptcy ⟸136(1)—Bankrupt need turn over only assets which do not incriminate, submitting to court question as to the rest.**
   A bankrupt, who relies on his constitutional privilege not to testify against himself as ground for refusing to turn over all his assets to his trustee, should turn over to the trustee such assets as he does not claim would incriminate, and submit to the court the question whether the delivery of the other assets would in fact incriminate.
3. **Bankruptcy ⟸242(2)—Bankruptcy Act, providing against using testimony in criminal prosecution, does not give full immunity.**
   The provisions of Bankruptcy Act, § 7 (9), being Comp. St. § 9591, that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, but not giving him immunity from prosecution with reference to the subject-matter concerning which he testified, does not give him the full protection against being compelled to testify against himself to which he is entitled, under Const. Amend. 5.
4. **Witnesses ⟸308—If answer may incriminate, witness alone determines whether it will.**
   If the question asked a witness who claims his privilege is of such a description that the answer may or may not incriminate, the witness can refuse to answer, since it must rest with him to determine whether in fact it would or would not.
5. **Bankruptcy ⟸242(2)—Court can collaterally determine whether claim of privilege by bankrupt is in bad faith.**
   Since it would defeat the administration of estates under the Bankruptcy Act (Comp. St. §§ 9585–9656) to permit a bankrupt to refuse to answer questions whenever he claims the answer would tend to incriminate him, it is within the power of the court to determine in a collateral inquiry, where objection is raised concerning the good faith of the witness in claiming his privilege, whether the fear that the answer will tend to criminate him is well founded, and, if it is not, to compel the witness to answer.

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6. **Bankruptcy ⟸242(2)—Indictment of bankrupt for concealing assets shows fear of incrimination was real.**

Where a bankrupt had been indicted for concealing assets from his trustees two days prior to the hearing, the claim of the bankrupt that his answers to questions at the hearing concerning his property would tend to incriminate him is not frivolous, imaginary, or fanciful.

7. **Bankruptcy ⟸242(2)—Referee should caution bankrupt as to privilege, and liability to perjury for false claim.**

The referee, in examining a bankrupt who has been indicted for concealing his assets, should caution the bankrupt as to his privilege, and also advise him that, if his statement that his answers will tend to incriminate him is false, he thereby renders himself liable to a prosecution for perjury.

In Bankruptcy. In the matter of Morris Naletsky, bankrupt. Proceedings certified by the referee to obtain a ruling as to the obligation of the bankrupt to file schedules, to deliver assets, and to answer questions propounded. Matter referred to referee, with instructions.

Solomon Badesch, of Bridgeport, Conn., for petitioning creditors.
Brooks & Brooks, of New Haven, Conn., for bankrupt.

THOMAS, District Judge. Upon the examination before the referee the bankrupt refused to file his schedules, or to answer questions relative to his assets and liabilities, or the whereabouts of any of his property, or to give any information which would enable the trustee to take possession of his property, or to proceed with the administration of the estate. The referee accordingly certified the proceedings to the court for the purpose of obtaining a ruling as to the obligation of the bankrupt—(1) to file schedules pursuant to the provisions of the Bankruptcy Act; (2) to comply with the orders of the referee relative to the delivery of his assets to the trustee; and (3) to answer the questions propounded concerning his assets and liabilities.

It further appears from the certificate, that at the request of counsel for petitioning creditors, the facts are certified. To this certificate is attached a transcript of the evidence taken before the referee. It is sufficient to say that an examination of that record shows that, if the bankrupt was within his constitutional rights, his refusal to answer the questions or to comply with the orders of the referee was no contempt, as the questions asked were material to the issue, the answers to most of which, it is quite clear, might tend to criminate the witness.

From the record it appears that on November 26, 1919, an involuntary petition in bankruptcy was filed by creditors against the abovenamed bankrupt, and he was duly adjudicated on February 9, 1920. On March 9, 1920, an indictment was found by the grand jury against the bankrupt and others, charging them with a violation of section 37 of the Penal Code (Comp. St. § 10201). Two days later, pursuant to subpœna, the bankrupt appeared before the referee for examination, and it was under these circumstances that the hearing proceeded and during which the bankrupt, on advice of counsel, declined to answer all questions relating to his assets and liabilities or to comply with any of the orders of the Referee.

[1] 1. *As to Schedules.* The bankrupt was ordered to file schedules. Acting on the advice of counsel, he refused to do so and invoked his constitutional privilege in support of the refusal. But in his brief counsel say:

"It is not, nor has it been the intent of the bankrupt to refuse to file bankruptcy schedules. His attorney has offered to file such schedules, eliminating therefrom only such matter as the bankrupt honestly believed might be used against him in a criminal proceeding."

This offer makes further discussion as to the schedules unnecessary. Let the bankrupt file his schedules with the referee in accordance with the offer, and submit to the court the matter eliminated, that the court may say whether the part eliminated, if filed, would tend to criminate the bankrupt.

[2] 2. *As to Assets.* It necessarily follows that he should turn over his assets to the trustee, unless such act will tend to criminate him, and if he relies upon his constitutional privilege in this connection, the matter may be submitted to the court to decide whether such act will in fact incriminate him. In re Hess (D. C.) 134 Fed. 113; Podolin v. Lesher Warner Dry Goods Co., 210 Fed. 97, 126 C. C. A. 611. This ruling is intended to follow In re Podolin et al. (D. C.) 205 Fed. 563, where it was held that, where there was actual danger of prosecution of the bankrupts for an offense arising out of a certain transaction, they would not be compelled to make any reference thereto in their schedules. On page 567 of 205 Fed. Judge McPherson said:

"The referee's order * * * will be so modified, ex majori cautela, as to provide expressly that the bankrupts may omit from their schedules any reference to the transaction with Rudsky. They are still exposed to the danger of prosecution in connection with that transaction, and they should not be compelled to run the not remote risk of having their statements used against them in such a prosecution. The connection between such statements and the evidence required to sustain the prosecution is direct and immediate."

This ruling was affirmed by the Circuit Court of Appeals for the Third Circuit in 210 Fed. 97, and at page 103, 126 C. C. A. 611, 617, Judge Gray said:

"Where the bankrupt claims his constitutional privilege under the amendment, and refuses to give the information required by the Bankrupt Act, on the ground that it may incriminate him it must at least appear to the court from the character of the information sought or the question propounded, that his claim is justified, or the bankrupt must produce facts on which he bases such claim, in order that the court may judge of their sufficiency to support it."

And on page 104 of 210 Fed. (126 C. C. A. 618), in stating the court's conclusion generally, the learned judge said:

"Liberal as to the scope given to the Fifth Amendment by the court is and ought to be, it was never intended that a bankrupt, dishonest or otherwise, should be clothed with the power to decide for himself when and under what circumstances he was authorized by the amendment to interrupt the bankruptcy procedure, by refusing to conform to the requirements of the law. In the present case, there is clearly no direct and apparent self incrimination that necessarily attaches to the information that is required to be given in the schedule, and in the absence of the facts and details of what that information would be, there is no basis upon which the court could sustain the asserted right of the bankrupts to decline to comply with the requirements of

the law. There is merely a suggestion that, though not directly incriminating, it might perhaps to their disadvantage give clues for investigation in the prosecution of the indictment against them. As was said by the Supreme Court in the case of In re Harris, 221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732, in deciding that the bankrupt's books belonged to the trustee in bankruptcy and cannot be withheld from him on the ground that they incriminate the bankrupt, 'that is one of the misfortunes of bankruptcy if it follows crime.'"

[3] 3. *As to Refusal to Answer Questions.* The claim is made by the bankrupt that he was under indictment and charged with conspiracy to conceal his assets, and that the answers which he would give might be used in the prosecution against him, which was in fact pending, and that he might also be subjected to additional criminal charges if compelled to testify before the referee. So that the only question left is whether the bankrupt could invoke the aid of his constitutional privilege and refuse to answer the questions propounded, and further whether the bankrupt or the referee shall be the judge of whether the answers will tend to criminate him.

The question presented is not a new one, therefore it is not necessary to discuss at any length, the sufficiency of that provision of the Bankruptcy Act—section 7 (9), being Comp. St. § 9591—which provides, so far as is here pertinent, that:

"No testimony given by [the bankrupt] shall be offered in evidence against him in any criminal proceeding."

It is well settled that, even with the above provision of the Bankruptcy Act, the bankrupt is nevertheless entitled to rely upon the constitutional privilege accorded him under the Fifth Amendment to the federal Constitution which provides, so far as it is here necessary to consider, as follows:

"No person * * * shall be compelled in any criminal case to be a witness against himself."

The authority in support of this ruling is found in the decision of the Supreme Court of the United States in Counselman v. Hitchcock, 142 U. S. 547, 560, 12 Sup. Ct. 195, 35 L. Ed. 1110.

The provision of section 7, supra, is similar to section 860 of the Revised Statutes, which was under consideration by the Supreme Court in the Counselman Case, and which provides that:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

Mr. Justice Blatchford, writing the opinion in the Counselman Case, said (142 U. S. on page 562, 12 Sup. Ct. 198, 35 L. Ed. 1110):

"It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a

crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

On account of this decision, Congress in 1893 amended the Interstate Commerce Act (Comp. St. § 8577), so as to make it provide that the witness shall have absolute immunity from prosecution regarding the subject-matter as to which he testifies. It was under this amendment that the Supreme Court decided Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. It is to be noted that the statute passed in 1893 secures to the witness absolute immunity from prosecution, as distinguished from section 860, which merely provided that the testimony shall not be "used against him or his property or his estate."

And in this connection it is interesting to note that in Brown v. Walker, Mr. Justice Shiras, Mr. Justice Gray, Mr. Justice White, and Mr. Justice Field dissented from the majority opinion, holding that even Congress could not grant a pardon, and that the influence of the constitutional privilege relied upon under the Fifth Amendment, should not be weakened in any respect by the statute which attempted to exercise a prerogative solely possessed by the President. Thus it will be seen how guarded has been the Supreme Court to protect the citizen when invoking the aid of the Fifth Amendment.

It is also instructive to consider what Mr. Justice Bradley said, speaking for the Supreme Court in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in connection with the rights of a person to invoke the protection of the Fourth and Fifth Amendments. On page 635 of 116 U. S. (6 Sup. Ct. 535, 29 L. Ed. 746) he said:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, 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 thereon. Their motto should be 'obsta principiis.'"

Thus it will be seen that the Supreme Court has always carefully guarded against any "stealthy encroachment" on the constitutional rights of the citizen, has always given such rights a liberal construction, has said that such rights are substantial, and has warned the courts in passing on the vital principles affecting the rights and liberties of the people in a way forcibly epitomized by Mr. Justice Bradley "obsta principiis."

It necessarily follows, if we are to obey that injunction, that the exigencies of the immediate case are of far less importance than the enforcement of those sacred rights guaranteed by the Constitution, and which were promulgated to protect the innocent. A careful examination of the cases decided by many federal judges shows that it has been the policy of the courts to enforce those rights guaranteed

by the Constitution, and it will be sufficient to refer to a few of them. Judge Brown of the Southern District of New York, in In re Feldstein (D. C.) 103 Fed. 269, said on page 271:

"Section 7a (9) of the present Bankruptcy Act provides as respects the bankrupt himself, that 'no testimony given by him shall be offered in evidence against him in any criminal proceeding.' This provision, even if applicable in favor of a witness (which it is not in terms), seems to be no stronger or more effective as a protection that section 860 of the Revised Statutes, which in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, was on full discussion held insufficient."

Judge Carland, in In re Walsh (D. C.) 104 Fed. 518, held that a bankrupt in his examination before the Referee, cannot be required, over his claim of privilege, to give testimony which may tend to criminate him, unless the question asked is clearly cross-examination upon a matter as to which he has volunteered information, either in his petition or schedules, or in his previous testimony, and that the provisions of section 7 (9), fell short of the full immunity from prosecution, which alone can meet the requirement of the constitutional guaranty that no person shall be compelled in any criminal case to be a witness against himself. On page 519 of 104 Fed. Judge Carland said:

"In my opinion, the case of Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, forecloses any inquiry by this court as to whether or not such an expression in the bankruptcy law is as broad as the protection guaranteed by the Constitution of the United States. In that case the Supreme Court of the United States held that the general law of the United States, as found in Rev. St. § 860, which, so far as this case is concerned, is identical with the language of the bankruptcy law, was not as broad and effectual for the purpose of securing the liberty of the citizen as the language of the Constitution of the United States, and, it not being a full protection, the witness was not bound to answer the questions set forth in that case."

Speaking of the effect of a strict enforcement of the rule, the learned judge further said, on page 519 of 104 Fed., in reference to the ruling made by the Circuit Court of Appeals for the Ninth Circuit, which ruling has never been followed for reasons explained by Judge Carland:

"Now, while it is very desirable, as the Court of Appeals in the Ninth Circuit says, that the bankrupts should be compelled to answer these questions, so that the estate of the bankrupt should be properly administered and distributed, still the Bankruptcy Law, and the courts, and all of us are bound by the superior provisions and paramount authority of the Constitution of the United States, and all and everything must give way to its mandates. I can see that in some instances the fact that the bankrupt stands upon his constitutional guaranty would interfere with the proper administration of the Bankruptcy Law, but that is not a question which the court has the power to remedy. If the Congress of the United States desires to draw from the bankrupt testimony that may tend to criminate him, it must by legislation provide, under the ruling in the case of Brown v. Walker, nothing short of immunity from prosecution. Not that it shall never be used in any criminal proceeding against him, but that he cannot be prosecuted by reason of any information gained in this manner."

[4] In the Matter of Levin (D. C.) 131 Fed. 388, at p. 389, Judge Holt stated the rule as follows:

"As I understand the rule, if the question is of such a description that the answer may or may not criminate the witness, he can refuse to answer (Judge Marshall's opinion on Burr's Trial, 25 Fed. Cas. 39); but if the court is convinced that the answer to the question cannot by any possibility criminate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer."

The first part of the rule there stated is in harmony, not only with the decisions, but as well with the words, of Chief Justice Marshall, who in June, 1807, in the Circuit Court for the District of Virginia, in Burr's Trial, 1 Burr's Trial, 244, Fed. Cas. No. 14,692*e*, said:

"If the question be of such a description that an answer to it may or may not criminate the witness, * * * it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact."

And after further discussion the learned Chief Justice concludes as follows:

"It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

[5] Thus it will be seen how securely is this right given and guaranteed the citizen by the courts in their construction of the law. But the remaining question, and the one necessarily arising, is whether the witness is at all times to be the judge of whether an answer to a question will criminate him. If the answer be "Yes," then it would follow that no force or effect could be given to the administration of the Bankruptcy Act wherever any bankrupt asserted his constitutional privilege, and in order to prevent this the courts have ruled, in their desire to allow the administration of the Bankruptcy Act to proceed in an orderly way, and in their endeavor to fully protect the witness and enforce the constitutional privilege, that if the witness, under the peculiar circumstances of each case, honestly believes, and on oath honestly asserts, that his answer will criminate or tend to criminate him, he need not answer; but, if objection be raised concerning the good faith of the witness, the court will determine, in a collateral inquiry, whether his judgment be sound or not, and whether his fear that his answer will tend to criminate him is well founded, and, if it is, that he need not answer, but, if it is not, that he is then compelled to answer. Perhaps Judge Holland, in In re Hess (D. C.) 134 Fed. 109, has stated the rule as well as it can be stated. On page 113 he said:

"When a witness is before the court in a proceeding, and a question is propounded, it must appear to the court, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from being compelled to answer, to entitle him to the privilege of silence; and, when the fact of the witness being in danger be once made apparent to the court, great latitude should be allowed to him in judging for himself of the effect of any particular question. Brown v. Walker, 161 U. S. 599, 16 Sup. Ct. 648, 40 L. Ed. 819. 'The object of the law is to afford to a party called upon to give evidence in a proceeding, inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse, if it were to be held that a mere

imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' Brown v. Walker, supra. This being the practice when witnesses are called to testify and claim their privilege, it is equally important, under the Bankrupt Law, that the court should pass upon the probability of danger to the bankrupt when he pleads his constitutional privilege, upon a demand made by a trustee in bankruptcy for him to deliver his books and papers as required by that act. Where, under these circumstances, a bankrupt pleads this privilege, he should be required to bring the books and papers which he alleges contain the incriminating evidence before either the court or referee in bankruptcy; and, when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and at the same time, if possible, enable the trustee to obtain such information from the books as is always necessary and indispensable in the settlement of bankrupt estates."

The Supreme Court in Brown v. Walker, supra, 161 U. S. at page 599, 16 Sup. Ct. 648, 40 L. Ed. 819, quoted with approval the words of Lord Chief Justice Cockburn in Queen v. Boyes, 1 B. & S. 311, 321. He said:

"'To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer,' although 'if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.' 'Further than this,' said the Chief Justice, 'we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.'"

In a very well considered case the Court of Appeals of New York, in People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303, discusses these questions in the light of the decision of the Supreme Court in Counselman v. Hitchcock, supra, and that learned court concludes (143 N. Y. on page 231, 38 N. E. 306), respecting the question of how far the witness shall be protected against an invasion of his rights under the Constitution of New York, which is the same as the Constitution of the United States upon the right to assert the constitutional privilege, as follows:

"The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution. But the courts have recognized the impossibility in most cases of anticipating the effect of the answer. Where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected."

[6] As in that case, so here, considering the relation of the witness to the subject of the inquiry and the character and scope of the questions propounded, and the fact that an indictment had been returned by the grand jury only two days prior to the hearing, the conclusion

that the objections were frivolous, imaginary, or fanciful finds no basis in fact or law. In re Nachman (D. C.) 114 Fed. 995, followed Counselman v. Hitchcock and Brown v. Walker, supra, and Judge Brawley, after discussing those cases, stated his conclusion (114 Fed. on page 996) as follows:

"It may be well contended that the object designed to be accomplished by section 7 of the Bankruptcy Act, which requires the bankrupt to submit to an examination concerning the conduct of his business, will be defeated, if the witness is thus permitted to refuse to testify concerning his dealings with his creditors and others, and such undoubtedly is the unfortunate result; but it is for the Congress to provide, if it can, against such contingencies. * * * The courts cannot deprive a citizen of the constitutional right invoked by him for his protection upon any consideration of inconvenience or for the purpose of administering what it may regard as a salutary and useful law."

Upon the question of the duty of the referee under the circumstances presented, Judge Brawley says, on page 997:

"Under the provisions of section 7, the witness is compelled to give testimony concerning his business, and he cannot interpose objections which will shut out all light whatever from his creditors. The constitutional immunity can only be invoked to protect him from answering a question the answer to which might subject him to prosecution. In the further conduct of the examination the referee is directed, whenever a question is propounded, to notify the witness that he is not required to answer it if the answer would tend to criminate himself. It is only questions of that nature that he may refuse to answer. He is not to be permitted to interpose his constitutional immunity as a shield to every inquiry concerning his business, nor is his counsel to be permitted to delay or obstruct inquiry by making objections for him. If he claims that the answer to any question propounded would tend to criminate him, he cannot be compelled to answer. This claim, to be effective, should be made by the witness himself, but the referee should notify him that a statement that such answer would tend to criminate him would, if false, subject him to a prosecution for perjury, as would any other false oath."

Apropos of the general discussion, see, also, In re Feldstein (D. C.) 103 Fed. 269; In re Franklin Syndicate (D. C.) 114 Fed. 205; In re Henschel (D. C.) 7 Am. Bankr. Rep. 207; In re Smith (D. C.) 112 Fed. 509; In re Kanter et al. (D. C.) 117 Fed. 356. In the last case it appeared that the bankrupts were under indictment in a state court, charged with state crimes committed shortly before the filing of the petition in bankruptcy and related to matters involved in the bankruptcy proceedings. It was alleged by the bankrupts that the schedules, books, etc., would be competent and relevant evidence against them in the criminal actions, and if they were compelled to make and file the schedules, and produce the books, they would be deprived of their constitutional privilege. The matter came before the court on the motion of petitioning creditors to punish the bankrupts for contempt in failing to obey the usual order of the referee requiring the bankrupts to file schedules, and to compel them to turn over to the receiver all books of account, records, papers, etc. In denying the motion, Judge Adams, of the Southern District of New York, said on page 357:

"The answer of the petitioning creditors to the contention [of the bankrupts that if they complied with the order of the referee] is, while recognizing the rule that parties cannot be compelled to furnish such evidence when it reasonably appears that it will have a tendency to expose them to penal

liability, that it is for the court to determine whether the evidence will incriminate them and that they can not be permitted to judge for themselves in a case of this kind, thus depriving their creditors of an opportunity to ascertain the condition of the estate. And it is urged that schedules, books, etc., would not furnish incriminating evidence. In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which can not possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself, and where it is not perfectly evident and manifest that the evidence called for will not be incriminating, the privilege must be allowed. People v. Forbes, 143 N. Y. 219, 38 N. E. 303; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. Here the inculpated parties explicitly depose that the books, etc., sought to be obtained would furnish evidence against them and so far from being able to say that it clearly appears such would not be the case, I should be inclined to believe that it would, from the nature of the evidence which the books, etc., would in all probability furnish."

[7] The matter is referred back to the referee, with instructions to follow the rulings set forth in this memorandum. The bankrupt will be ordered: (1) To file his schedules with the referee in accordance with the terms of counsel's offer, and submit to the court the matter eliminated, that the court may say whether the part eliminated, if filed, would tend to criminate the bankrupt; (2) to turn over his assets to the trustee in so far as the same may be done without incrimination, and submit to the court the matters eliminated, to decide whether such act will in fact incriminate him; and (3) the bankrupt will answer such questions as can be answered without incrimination—and, if under these three orders the results are unsatisfactory, the matter may be brought again before the court for the purpose of having the court determine whether the claim of the bankrupt as to privilege is made in good faith or is contumacious. The referee should caution the bankrupt, not only as to his rights, but advise him that, if his statement that the answers to the questions propounded will incriminate or tend to incriminate him is false, he then renders himself liable to a prosecution for perjury. If counsel are unable to agree as to form, the orders will be settled on notice.

Ordered accordingly.

THE INTERSTATE.

THE ANNIE E. FLANNERY.

(District Court, E. D. New York. March 28, 1922.)

1. **Collision ⟸102—Between two tugs off the pierheads in North River held due to faults of both.**

A collision between two tugs in the daytime in North River, off New Jersey pierheads, *held* due to faults on the part of each in navigating on an erroneous assumption as to the course of the other and without due caution.

2. **Collision ⟸90—Narrow channels and bends.**

A vessel is not expected to hold her course and speed in a continuous straight line when following a channel course that of necessity curves around bends.

In Admiralty. Suit for collision by the Flannery Towing Line, Inc., owner of the steam tug Annie E. Flannery, against the steam tug Interstate. Decree dividing damages.

Macklin, Brown, Purdy & Van Wyck, of New York City (by W. F. Purdy and Frank P. Treanor, Jr., both of New York City), for libelant.

Park & Mattison, of New York City (by Anthony V. Lynch, Jr., of New York City), for claimant.

CHATFIELD, District Judge. The collision from which this case arises occurred in broad daylight immediately off the Port Liberty coal pier, some distance south of the Communipaw Terminal, in Jersey City. The Flannery, owned by the libelant, was proceeding up the channel inside of Ellis Island, against an ebb tide, and was intending to go into a coal pocket on the north side of the Port Liberty pier, after learning which pocket would be empty. For this purpose the Flannery intended to and did come to rest a few feet outside of the tug John F. Lewis and the Britannia, two tugs lying moored at the end of this pier. The Flannery had proceeded up the starboard side of the channel, which in general is some 300 to 350 feet in width, and, when opposite the end of the Port Liberty pier turned under a starboard helm toward the pier.

The Interstate, which had been moored at Pier 5, some four slips up the river, after backing out into the stream, had headed down the river, on a course which brought her some 150 feet outside of the Burns Bros. coal pier, which is next above the Port Liberty coal pier. The Interstate had, before reaching the Burns Bros. pier, blown a one-whistle signal to the Flannery, which was not answered nor observed by the Flannery, and the evidence shows that the captain of the Flannery gave no heed to the presence of the Interstate until the Interstate reached the vicinity of the Burns Bros. pier.

The general line of the channel and of the pier heads in this vicinity bears to the southwest, and the course of the Interstate was therefore directly toward the slip between the Burns Bros. pier and the Port Liberty pier. In front of this slip a boat, proceeding down the starboard side of the channel, must make a considerable turn under a starboard helm, and until this turn was reached it would be impossible to be sure, from the vessel's course, whether she was bound down the channel or into the slip south of the Burns Bros. pier.

It is shown by the testimony that many tugs proceed each morning into this slip to obtain coal. It is the Interstate's habit to go there for coal, but on the morning in question, according to the testimony, she did not need coal, and therefore did not stop at the Burns Bros. pier, but, upon reaching the point where ordinarily the turn into the slip would be made, she starboarded her helm and went on down the channel, to go to the third pier below, where she could obtain the water.

The master of the Interstate was in the pilot house and his mate at the wheel. Both of them saw the Flannery at all times, and there was no reason at all for any failure on their part to observe the rules of navigation. The captain of the Flannery was handling his boat,

but had no lookout forward, and, as has been stated, did not pay much attention to the Interstate, even when he saw her approaching off the end of the Burns Bros. pier, because of his assumption that she was headed into that slip for coal. In a similar way, the captain and pilot of the Interstate seem to have assumed that the Flannery was headed up the channel toward the Hudson river, and they therefore held their course without regard to the Flannery's movements, and under the right created by their one-whistle signal, until they were so close to the Flannery that the collision could not be avoided.

The captain of the Flannery answered a second one-whistle signal blown by the Interstate, after it had reached a point south of the Burns Bros. pier, by himself blowing a one-whistle signal, and, according to his testimony in court, he understood this signal to mean that the Interstate was intending to cross his bow and go into the slip, but did not, until his ideas were corrected by the movements of the Interstate, contemplate the possibility of the Interstate's proceeding down the channel.

The boats were then so close together, and he was so startled by the movements of the Interstate, that he concluded (as he testifies) that the Interstate had suddenly changed her mind, and under a starboard wheel attempted to swing around, so as to pass him starboard to starboard. The Interstate blew no two-whistle signal for any such maneuver, nor did it give any alarm, and according to the testimony of all the witnesses the vessels were so close together at this time that an alarm would have been of no avail.

It must be found as a fact that the Interstate did not make a turn to swing out of the slip, except in so far as she altered her course off the Burns Bros. pier, to proceed down the channel, instead of into the slip. The vessels came together very close to the two tugs moored off the head of the Port Liberty coal pier; a witness from one of these tugs testifying that he could almost jump upon the Flannery from his boat. The stem of the Interstate struck the Flannery a few feet back of the prow on the starboard side, and did extensive damage, indicating that the Interstate was under considerable way at the time, although, according to the testimony, she had stopped her engines off the Burns Bros. pier until the Flannery answered her one-whistle signal, and had then proceeded under one bell.

It is suggested by the Flannery that the captain of the Interstate may not have directed his pilot to go down the channel, instead of into the slip, until the point where the boat usually stopped for instructions as to which coal pocket should be used; but this does not materially affect the situation.

The captain and pilot of the Interstate testify that the captain of the Flannery was on the starboard side of the channel coming up, until after he had accepted the one-whistle signal of the Interstate, and that he then abruptly starboarded his helm, turned at a right angle, and crossed the channel at such speed as to advance substantially the same distance as the Interstate, which was proceeding under one bell and with the help of the strong ebb tide. This distance is indicated by witnesses at some 100 or 125 feet. The entire testimony and the move-

ments of the Flannery seem to show that she could not have been proceeding with sufficient speed to make any such sharp turn within the time which elapsed, although it is apparent that the Flannery did not come to rest, lying crosswise of the channel, until just before the collision.

The situation presented is one for which no excuse is adequate. The captain of the Flannery had an insufficient lookout. He undoubtedly relied upon his assumption of what the Interstate intended to do, and did not appreciate the full effect of accepting the one-whistle signal from the Interstate, in case his guess as to what the Interstate intended was incorrect. His testimony as to the abrupt turn of the Interstate into collision, while attempting to turn and run out of the slip, cannot be accepted.

[1, 2] A vessel is not expected to hold her course and speed in a continuous straight line, when following a channel course that of necessity curves around bends. But the Interstate should have realized that her direct course down past the Burns Bros. pier would carry her into the slip, and that a turn down the channel would be a change of course on her part. She evidently did not carefully watch the Flannery, so as to observe that the Flannery was turning toward the Port Liberty pier, and, relying upon her own one-whistle signal, started ahead, when so close to the Flannery that the maneuver was dangerous. As the Interstate had stopped her engines at the time of blowing the one-whistle signal, it must be found that the Interstate was negligent in starting up upon what was in effect a changed course, and in running into collision at such a speed that she could not avoid the Flannery, if the Flannery did not lie still or go back on her engines, to give the Interstate room to pass down the channel.

For these reasons, both boats must be held at fault, and the libelant may recover one-half damages.

In re NATIONAL CONSUMERS' EXCHANGE.

Petition of MARYLAND FINANCE CORPORATION.

(District Court, D. Maryland. March 30, 1922.)

1. Corporations ⟸415—President has no power to authorize mortgage of corporate property without authority of directors.

As a general rule, the president of a corporation has no power to mortgage its assets without the authority of the board of directors.

2. Corporations ⟸415—Mortgage executed by president of bankrupt corporation held invalid.

Where the by-laws of a corporation empowered its directors to authorize mortgages, a mortgage executed by the president, without the consent or even the knowledge of the directors, in favor of a lender which was in the business of making loans, and which retained from the face of the notes and mortgage, maturing in three months, a sum equivalent to interest at the rate of 70 per cent. per annum, and the proceeds of the mortgage were transferred by the president to his personal account, and were

not traced into any of the assets which came into the hands of the trustee in bankruptcy of the corporation, the mortgage is invalid against the trustee.

In Bankruptcy. In the matter of the National Consumers' Exchange, bankrupt. On petition of the Maryland Finance Corporation to establish a mortgage. Mortgage held invalid.

J. Wallace Bryan, of Baltimore, Md., for trustee.

William Stanley and Hershey, Machen, Donaldson & Williams, all of Baltimore, Md., for petitioner.

ROSE, District Judge. Early in January, 1920, the bankrupt obtained a Delaware charter, by which its authorized capital was fixed at $200,000. In October of the same year those who ran it went through the form of amending its certificate of incorporation, so that its permissible capital was raised to $5,000,000. Although it was incorporated in Delaware, and did business in Baltimore City, and apparently nowhere else, its few corporate meetings were held in Springfield, Mass., presumably because that had been the former home of one Hale, who was its promoter and its president. Such capital as it actually had came from the contributions of literally hundreds of stockholders, who were secured as the result of a door to door canvass in certain sections of this city. It is possible that as much as $70,000 in the aggregate may have been obtained from them. When in March, 1921, it was put into the hands of state court receivers, all this had disappeared, and it owed to unsecured creditors upwards of $20,000.

Almost all of its fixtures had been bought under conditional sales contracts, upon which so little had been paid that there was practically no valuable equity in them. In January, 1921, Hale, its president, had application made to the Maryland Finance Corporation, hereinafter called the petitioner, for a loan of $5,000, to be secured by a mortgage on all its property, except provisions, situate in its several stores in the city of Baltimore. The petitioner was told that some of the property was covered by conditional sales contracts and bills of sale, and that the greater portion of the loan would be applied to their payment. It was also told that the loan would be repaid out of the receipts of the subscription to the bankrupt's capital stock and from the income of its several stores. As the result, on the 1st day of February, Hale, in the name of the bankrupt, executed a chattel mortgage to the petitioner for $5,000, to secure a note for that amount, payable 3 months after date. The amount actually advanced was only $4,250, and Hale, for the bankrupt, therefor promised to pay $750 for the loan of $4,250 for three months, or at the rate of slightly over 70 per cent. per annum.

This mortgage was signed "National Consumers' Exchange, Inc., by D. Everett Hale, President." The bankrupt's corporate seal was also attached, attested by its assistant treasurer. The mortgage was never authorized at any meeting of the board of directors, and it does not appear that any director, other than Hale, ever knew anything about it. The by-laws of the corporation provided that:

"With the consent in writing and pursuant to the affirmative vote of the holders of a majority of the capital stock issued and outstanding, the directors

shall have authority to dispose in any manner of the whole property of the corporation."

"The directors are given power to authorize and cause to be executed mortgages and liens, without limit as to the amount, upon the property and franchises of the corporation."

By the same by-laws the—

"president is empowered to sign or countersign, as may be necessary, all such bills, notes, checks, contracts, and other instruments as might pertain to the business and affairs of the company, and he shall sign, when duly authorized, all contracts, orders, deeds, liens, licenses, and other instruments of a special nature."

The last meeting of either stockholders or directors had been held in October, 1920. The mortgage was then not even in contemplation, and of course not mentioned at the meeting. At the time it was executed a majority at least of the directors were residents of Baltimore City. It does not appear, however, that any of them were formally or informally consulted about it. No mortgage, other than the one now in controversy, was ever made by the corporation. Not until shortly before the bankruptcy did Hale ever execute any notes in the corporate name, and they were issued to take up money which he personally borrowed from individuals, and which he says he had relent to the bankrupt.

[1, 2] All the authorities and all the text-writers agree that, as a general rule, the president of a corporation has no power to mortgage its assets, without the authority of the board of directors. If there ever was a case in which this rule should be applied, it is the one at bar. Neither directors nor stockholders had any actual knowledge of the making of the mortgage. There was no previous practice which might have led others to assume that the president had the authority which he undertook to exercise. Moreover, the lender was in the business of making loans. It would have been easy for it to have seen to it that all proper formalities had been observed. The disproportionate compensation it was receiving for the advance it was making should have warned it to be careful as to what it was doing. It would have been a simple matter to have called for a production of the by-laws of the bankrupt, and to have declined to make the loan until proper authority had been given for its execution. The $4,250, advanced by the petitioner, was almost immediately transferred by Hale to his personal account. If his story is believed, it was used to pay certain preexisting debts of the bankrupt. None of it is traced into any of the assets which came into the hands of the trustee in bankruptcy.

It follows that the mortgage must be held invalid.

RICE AUTO CO., Inc., v. SPILLMAN.

(Court of Appeals of District of Columbia. Submitted January 6, 1922. Decided April 3, 1922.)

No. 3605.

1. Pleading ⟸155—Affidavit of defense, not alleging amount of depreciation and use value, in action by infant to recover payment on automobile, is insufficient.

In an action by an infant to recover payments made by him on an automobile retaken by defendant after sale to plaintiff, an affidavit of defense, charging that the use of the automobile had depreciated its value and that plaintiff had received a large income from the use of the automobile, without alleging the amount either of the depreciation or of the income, is insufficient under the seventy-third rule.

2. Pleading ⟸155—Requirements for affidavit of defense must be complied with.

The requirement of the seventy-third rule that the affidavit of defense, to present a question of fact for a jury, must specifically state in precise and distinct terms the grounds of defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim, in whole or in part, is plain and definite, and must be complied with, since the purpose of the rule will not be served, if laxity of statement is countenanced where particularity may be employed.

3. Infants ⟸58(1)—Payments for automobile may be recovered, subject to set-off for value of use.

Where an automobile was sold to an infant, who made partial payments on the purchase price, the contract is not executed as to the payments made by the infant, so as to prevent recovery of them by him, but there can be set off against such recovery the value of the use of the automobile while it was in the infant's possession.

Appeal from the Supreme Court of the District of Columbia.

Action by C. Owen Spillman, Jr., an infant, by his next friend, F. T. Gary, against the Rice Auto Company, Inc. Judgment for plaintiff because of the insufficiency of the affidavit of defense, and defendant appeals. Affirmed.

W. C. Balderston, of Washington, D. C., for appellant.

Henry I. Quinn, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Spillman, by his next friend, sued Rice Auto Company, Inc., for $1,535.45, with interest. He filed an affidavit of merit, under the seventy-third rule of the trial court, in which he stated that he, a minor, entered into a contract so far as he was able to do so with the Auto Company for the purchase of an automobile for $2,119.95, for which he was to pay $1,194.95 in partial payments, and deliver to the Auto Company a used automobile, valued by the parties for the purpose of the deal at $925; that he delivered the automobile as agreed, which, according to his information, the Auto Company afterwards sold for $1,125; and that he paid to the Auto Company in cash $410.45. Considering the used automobile as worth $1,125, the sum for which it was sold, he alleged that he had paid to the Auto Company the sum sued for. He further stated that the automobile which he had purchased was not necessary for him; that he renounced

the contract of purchase, and returned to the Auto Company the machine purchased; and that, at the time the suit was instituted, the automobile was in the possession of the Auto Company. The latter pleaded to the declaration, and filed an affidavit of defense. Spillman moved for judgment, on the ground that the affidavit was insufficient. The motion was sustained, and the Auto Company appeals.

The affidavit of defense avers that Spillman, at the time he purchased the machine, was engaged in the business of operating automobiles for hire; that he entered into a written agreement substantially as set forth in the affidavit of merit; that at the time of the purchase Spillman represented that he was the owner of the used car; that he purchased the same for himself, was engaged in the hacking business, and desired a new car for the one he was then using; that the Auto Company had no knowledge at the time that plaintiff was an infant; that he stated in the written agreement that he was not a minor; that he used the new car for about four months; and that, by reason of his failure to make the payments as agreed to, the Auto Company took possession of it, advising him at the same time that the machine would be redelivered to him upon his compliance with the terms of the agreement. The affidavit does not deny that the old car was sold for $1,125, as alleged by the plaintiff, but asserts that he was entitled to a credit of only $925 on its account, and that he had paid in cash $394.95, plus interest upon the deferred payments. It did not, however, give the amount of interest. Further, it is alleged that the Auto Company is ready, and always has been, to turn back to the plaintiff the car which he purchased, upon his paying the amount with respect to which he is in default.

It is further charged in the affidavit:

"That the continued use of the said new model automobile by the plaintiff has caused the present value of said automobile to be much less than when it was obtained from the defendant, and that this affiant is informed and believes, and therefore avers, that the plaintiff has received a large income from the use of said automobile."

It will be observed that the affidavit does not deny the amount of cash which Spillman says he paid to it, nor does it deny that he was a minor at the time he made the agreement. Therefore the single question for our consideration is as to whether or not Spillman, being a minor at that time, is entitled to recover from the Auto Company the amount claimed.

There are 13 assignments of error, but we do not think it necessary to notice them seriatim. Their purport is that, while Spillman may rescind his contract, he should be required to compensate the Auto Company for the use and depreciation of the machine, and account for the proceeds earned by him while using it in his business; further, that the contract, so far as the payments made are concerned, was executed, and hence the payments cannot be recovered.

With the exception of the last point, the Auto Company's contentions are to the effect that Spillman should not be allowed to rescind unless he compensates for the use and alleged depreciation of the new automobile. Assuming, without deciding, that under a proper pleading

this is true, does the Auto Company state in its affidavit a defense on that ground?

[1] The seventy-third rule, which has the effect of law, says that the affidavit, to present a question of fact for a jury, must specifically state, in precise and distinct terms, the grounds of defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. We have copied above the only allegation of the affidavit bearing on this point. It states that the use of the new car caused its present value to be much less than when it was obtained by Spillman, and that he, according to information received, had obtained a large income from its use. But it does not give the amount of the depreciation or of the income. Suppose the jury found the facts to be as alleged, they would not be sufficient to defeat, in whole or in part, the claim of Spillman. To have that effect the amount of the depreciation and of the income, or of one of them, would have to be shown and found. But there was no allegation which would permit such a showing or support such a finding.

[2] What the seventy-third rule requires is very plain and definite, and must be complied with. King v. Curtin, 31 App. D. C. 23; Columbia Laundry Co. v. Ellis, 36 App. D. C. 583; Fowler v. Cotton State Lumber Co., 39 App. D. C. 220. If laxity of statement is countenanced, where particularity may be employed, the purpose of the rule will not be served. The Auto Company could easily have alleged the value of the use or the amount of the depreciation. If it could not have stated it definitely, it could have given it approximately. Without it, Spillman was not advised as to what he would have to meet. We must take the affidavit as it is, and, so taking it, we are forced to the conclusion that it is insufficient in the respect we are considering.

[3] In support of the second point, namely, that the contract, so far as payments made are concerned, must be treated as executed, and therefore the payments cannot be recovered, the Auto Company cites two New York decisions, one from the Court of Appeals, and the other from a court of common pleas. Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703; Wheeler & Wilson Manufacturing Co. v. Jacobs, 2 Misc. Rep. 236, 21 N. Y. Supp. 1006. The Wheeler Case seems to sustain the point; but the other case, which was decided some six years later, is not in harmony with it. Since the decision in the latter case is by the highest court of the state, it must be regarded as overruling the Wheeler Case. The Court of Appeals holds that the payments may be set off against the value of the use, and, if they are found to equal it, no recovery can be had. The jury had found in that case that the payments and the value of the use balanced. The case is authority for the proposition that, if the Auto Company, in the instant case, had in its affidavit of defense alleged the value of the use, it could have set it off pro tanto against the payments; but, as we have seen, it did not allege it, and hence the case does not help the Auto Company.

The judgment is affirmed, with costs.

Affirmed.

DISSETTE v. DOST.

(Court of Appeals of District of Columbia. Submitted March 8, 1922. Decided April 3, 1922.)

No. 3691.

1. **Master and servant ⟸80(4)—Affidavit of defense to recover for servant's breach of confidence held insufficient.**
   In an action by an employee to recover advancements to his employer, an affidavit of defense admitting the amount claimed by plaintiff, but alleging by way of set-off that plaintiff was under contract not to reveal confidential information relating to the manufacture of defendant's goods, and that he wrongfully divulged to divers persons the matters he was obliged to keep secret, and conspired by other means to injure defendant's business, without alleging who the divers persons were, or the means by which he conspired, or that any act was done in furtherance of the conspiracy, is too indefinite.
2. **Damages ⟸5—Only "special damage" recoverable, if act might have been committed without injury.**
   If all of the acts by plaintiff complained of by defendant might have occurred without causing any injury to defendant, the damage, if any, to the defendant, was special; that is, such damage as is the natural, but not the necessary, consequence of the act complained of.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Damages.]
3. **Damages ⟸142—Facts showing special damage must be pleaded.**
   To permit recovery of special damages, the facts which show how the special damages arose must be stated, though it is not required that evidence shall be pleaded.
4. **Damages ⟸142—Affidavit of defense must allege facts causing special damage.**
   Where the affidavit of defense did not allege the facts showing special damage to defendant from plaintiff's acts, such damage could not be recovered.
5. **Damages ⟸141—Affidavit of defense, stating ground for nominal damages, is not sufficient.**
   Where the affidavit of defense admitted plaintiff's claim, but relied on a set-off, on which only nominal damages could be recovered, because the facts causing special damages were not pleaded, the affidavit was insufficient.

Appeal from the Supreme Court of the District of Columbia.

Assumpsit by Charles O. Dost against John W. Dissette. Judgment for the plaintiff for insufficiency of the affidavit of defense, and defendant appeals. Affirmed.

Dion S. Birney, of Washington, D. C., for appellant.

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

SMYTH, Chief Justice. Dost sued Dissette in assumpsit on the common counts for $1,654.48, and attached to his declaration a bill of particulars, in which he claimed that sum as a balance due to him for salary which Dissette had agreed to pay him, and for money advanced on account of Dissette. In his affidavit of defense Dissette admits that he is indebted to Dost in the sum of $767.53, but alleges

a set-off in the amount of $5,000. There was a motion for judgment on the ground that the affidavit was defective. The court sustained the motion as to the amount which was admitted to be due, but overruled it as to the remainder. Judgment was entered accordingly, and Dissette, alleging error, brings the case here for our consideration.

If there was enough in the affidavit to raise a question of fact in relation to the set-off for the consideration of a jury, the court erred; but, if there was not, the judgment must be affirmed. The sufficiency of the affidavit is, then, the sole question in the case.

[1] It alleges that prior to the commencement of the action plaintiff was in the employ of the defendant under a contract whereby he bound himself to secrecy respecting the trade secrets about goods manufactured by Dissette, the methods and costs of manufacturing them, patents applied for and to be applied for, and confidential information relating to the manufacturing of the goods. But, notwithstanding this, he, so it is averred, without the knowledge or consent of the defendant, wrongfully divulged "to divers persons" the matters which he was obliged to keep secret, and "by divers other means conspired to injure * * * defendant's business, * * * all in breach of said contract of employment, and which caused defendant damage in the amount of $5,000."

It will be noticed the affidavit does not allege who the divers persons were to whom it is alleged Dost revealed the secrets of the business, the means by which he conspired to injure the defendant's business, or that any act was done in pursuance of the conspiracy. Nor does it say even that the divers persons were rivals of Dissette's in business. So far as the affidavit is concerned, the disclosures may have been made to fellow employés, or to other persons who never acted upon them. The mere disclosures could have done Dissette no harm. In these respects we think the affidavit is too indefinite. Durant v. Murdock, 3 App. D. C. 114.

[2] But its more serious defect lies in the averment with regard to damages. All it says on that point is that the breach in the respects alleged caused Dissette damage in the sum of $5,000. In an early case the Supreme Court of the United States used this language:

"Special, as contradistinguished from general, damage is that which is the natural, but not the necessary, consequence of the act complained of." Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791.

Compare Troy Laundry Co. v. Dolph, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083.

[3, 4] It did not necessarily follow that the acts complained of in the affidavit produced any damage. All may have occurred without causing a particle of injury to Dissette; hence, the damage, if any, was special, and the facts which show how the special damages arose must be stated, although it is not required that evidence shall be pleaded. 17 C. J. 1005. As bearing on the same point, consult The Director (D. C.) 26 Fed. 708; Warner v. Bacon, 8 Gray (74 Mass.) 397, 69 Am. Dec. 253; Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602. The necessary facts were not stated

in the affidavit, and because of this could not be established. Rice Auto Co., Inc., v. Spillman, —— App. D. C. ——, 280 Fed. 452.

[5] No doubt the affidavit states a case for nominal damages. This, however, was not enough. Such damages are given, not as an equivalent for wrong, but as a recognition of a technical injury, and by way of declaring the right. They are not damages small in amount. In reality they are damages in name only, and not in fact. 17 C. J. 720, and cases cited in the notes.

For the reasons given, we think the affidavit did not aver a defense, in whole or in part, to Dost's claim, as required by the seventy-third rule, and hence the judgment must be, and it is, affirmed, with costs.

Affirmed.

DISSETTE v. LONG.

(Court of Appeals of District of Columbia. Submitted March 8, 1922. Decided April 3, 1922.)

No. 3692.

Appeal from the Supreme Court of the District of Columbia.

Action by Albert R. Long against John W. Dissette. Judgment for plaintiff, and defendant appeals. Affirmed.

Dion S. Birney, of Washington, D. C., for appellant.

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

SMYTH, Chief Justice. Long sued Dissette for $1,694.28, and filed an affidavit of merit under the seventy-third rule of the trial court. Dissette filed pleas to Long's declaration, and also an affidavit of defense, in which he admitted that he owed Long $627.70, and averred a set-off in the sum of $5,000. Long then moved for judgment, because, as averred, the affidavit did not state a good defense to any part of his claim. The court gave judgment for $1,025.48, and overruled the motion as to the remainder.

On the sufficiency of the affidavit with respect to the set-off the appeal turns. In that regard the affidavit is identical with the one in the case of Dissette v. Dost, —— App. D. C. ——, 280 Fed. 455, this day decided, and hence this appeal is ruled by the decision in that case.

The judgment is affirmed; the costs to be paid by appellant.

Affirmed.

ELLIS et al. v. ELLIS (two cases).

(Court of Appeals of District of Columbia. Submitted March 7, 1921. Decided April 3, 1922.)

Nos. 3684, 3685.

1. Wills ⇐58(2)—Evidence held to show property was acquired by the joint efforts of husband and wife, under agreement it should belong to survivor.

In a suit by a widow to recover property owned by her husband at his death, evidence *held* to show that the property was acquired by the joint efforts of the husband and wife, under an agreement between them that, upon the death of either, it should belong to the survivor.

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

2. **Appeal and error ⟸1050(1)—Admission of inventory and appraisal to identify property in controversy held not prejudicial.**

In a suit by a widow to recover her husband's property under an agreement between them that it should belong to the survivor, the admission in evidence on behalf of plaintiff of the inventory and appraisal of the personal estate filed in the probate court, merely to identify the personal estate, in no way prejudiced defendants.

3. **Witnesses ⟸159(12)—Testimony by widow as to work done in connection with joint business does not concern "transaction or contract with deceased person."**

Testimony by a widow as to the work she did in connection with the joint business of herself and husband is not testimony to a "transaction or contract with a deceased person," which would be inadmissible under Code, § 1064.

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

Appeal from the Supreme Court of the District of Columbia.

Separate suits by Lucretia Ellis against Abron Ellis and others and against Elmyra Ellis and another, consolidated for trial. Decrees for the plaintiff, and defendants appeal. Affirmed.

Benjamin L. Gaskins and Charles S. Cuney, both of Washington, D. C., for appellants.

Charles S. Shreve and Mason N. Richardson, both of Washington, D. C., for appellee.

ROBB, Associate Justice. These are appeals from decrees in the Supreme Court of the District granting the prayers of appellee's bills, the cases having been consolidated for trial. Appeal No. 3684 involves real estate, and appeal No. 3685 personalty, but both depend upon the same set of facts.

In 1901, according to the averments of the bills and the evidence adduced, the appellee, Lucretia Ellis, was married to James N. Ellis in this city. Ellis then was without means and earning $5 or $6 a week as a cook. Mrs Ellis took in roomers and did washings, and the couple were able to save enough to enable them, in 1909, to move into better quarters at No. 1251 Ninth Street, Northwest, next door to the real estate here involved, where they opened a restaurant which they conducted until about 1914. By that time their business had so prospered that they were able to buy the property next door, or No. 1249 Ninth street, paying $3,000 cash toward the purchase price of $5,500. They continued the restaurant business in the same location until the death of Ellis in November of 1919. At that time the couple not only had paid for the house, but had nearly $6,000 on deposit, and personal property of the value of almost $1,200. Mrs Ellis, during all these years, rented out and cared for all available rooms in the house, collecting and turning over to her husband all the rents. In addition, she had virtual charge of the restaurant and did much of the cooking there. Her hours ranged from 7 o'clock in the morning until very late at night, often until 11 or 12 o'clock. Her husband's health was not good, and

he did little more than the marketing. To all outward appearances, therefore, the enterprise was joint, as between this husband and wife.

The family physician, who had been acquainted with Ellis for from 10 to 15 years, and who saw him about once a month during the latter years of his life, testified that upon an occasion when the couple came to his office Ellis stated "that he and his wife were copartners in the business; * * * that if he died first whatever he had he would leave to his wife, would go to his wife; that they were copartners, and that if his wife died whatever she would leave would come to him; * * *" that they were copartners, and at the death of either the other would get the remainder. A witness by the name of Gordan, who was intimately acquainted with Ellis, testified that Ellis stated to him in the presence of Mrs. Ellis:

"What worries me now is that I will break my wife down, because I have been practically no good to her, except to go to market, and I am just some of these days, just going to make my will, and let her know that she is not working for nothing, because she has given me every dollar that we have taken in in our lodging house, and she has never asked me for anything, and she trusts me unboundedly, and she ought to be the recipient of what we have made."

On another occasion, while the witness was at the Ellis restaurant, and Mrs Ellis came in, Ellis said:

"Here is the old war horse; * * * well, she is the old war horse, and she knows who she is doing it for; she is doing it for herself and me."

At another time Ellis stated:

"We got a chance to buy this one (the house in question); then we put all our money together and bought it; that he and his wife had made every dollar of it."

Another witness, by the name of Washington, testified that Ellis, in speaking of the help his wife had been to him, said that when he was married he had practically nothing and—

"lived in a short street; * * * that his wife had done washing and ironing; that she had gone out washing, and that they had saved their money; and that they had bought the property; that some one had suggested to him that they buy it jointly, but that he had not done it, because it might hurt his business, and that he might not be able to get credit, and that it would be hers anyhow; * * * that if she, his wife, was the longest liver, he was going to give her what he had, which would be belonging to her; that she helped me [him] to make it, and I [he] did not have anything when I [he] was married."

The testimony of several other witnesses was to the same effect, and there was no evidence to the contrary. Ellis died without making a will, and the object of this suit was to enforce the agreement under which the property was acquired. The decrees of the trial court were to that effect, and the principal question before us is whether there was sufficient evidence upon which to base those decrees.

[1] That this property was accumulated through the joint efforts of Ellis and his wife is overwhelmingly established. That there was an understanding and agreement that the venture was to be joint, and that Ellis would make a will in favor of his wife, we regard as equally well established. They were uneducated people, and more concerned

with the successful conduct of their business than with legal forms and procedure. Their relations, apparently, were very harmonious, each doing his or her utmost for the common welfare, and we entertain no doubt that the failure of Ellis to execute his promise by making a will is to be attributed to the common frailty of humanity in matters of this sort. In other words, Ellis delayed too long, and his wife was compelled to resort to a court of equity for the protection and preservation of her rights. The decrees in her favor did not charge Ellis upon his parol contract with her, "but rest upon the equities arising out of the acts and conduct of the parties subsequent to the making of the original agreement." Whitney v. Hay, 181 U. S. 77, 89, 21 Sup. Ct. 537, 542 (45 L. Ed. 758).

[2] There was introduced in evidence, on behalf of the appellee, the inventory and appraisal of the personalty filed in the probate court. This was merely to identify the personal estate involved, and in no way prejudiced appellants.

[3] It is further objected that the testimony of Mrs. Ellis as to the work she did was inadmissible under section 1064 of the Code, relating to the testimony of a surviving party. Since the witness did not attempt to testify "to a transaction or contract," her testimony was outside the rule. Tuohy v. Trail, 19 App. D. C. 79.

It results that the decrees must be affirmed, with costs.

Affirmed.

WIDMER v. SIPP.

(Court of Appeals of District of Columbia. Submitted March 14, 1922. Decided April 3, 1922.)

No. 1481.

Patents ⟸93—Dominating feature of one of seven counts held not mere ancillary invention by employee.

In interference proceedings between the president of a machine company and an employee, involving seven counts relating to an automatic feed mechanism for drill presses, the invention of the subject-matter of count 6, which covered particularly planetary gearing, *held* not a mere ancillary improvement on the regular machines of the company, but an invention, as to which the employee was entitled to priority, but the employee's claim as to the other six counts *held* not sustained.

Smyth, Chief Justice, dissenting in part.

Appeal from the Commissioner of Patents.

Interference proceeding between Charles A. Widmer and Grant Sipp. From a decision of the Commissioner of Patents, awarding priority of invention to Sipp, as to all seven counts in interference, Widmer appeals. Affirmed as to six of the seven counts, and reversed as to count 6.

Grafton L. McGill and Francis S. Maguire, both of Washington, D. C., for appellant.

John W. Steward, of Paterson, N. J., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Patent Office in an interference proceeding awarding priority of invention to the senior party and patentee, Sipp, who filed no preliminary statement and took no testimony, and who, therefore, is restricted to his filing date, July 10, 1917, for conception and constructive reduction to practice.

The invention as described by the Assistant Commissioner—

"is an automatic feed mechanism for drill presses. The drill carrier is normally held in its uppermost position by suitable spring devices, and is started downwardly by the operator, but, when it reaches a predetermined position, a connection is made automatically, whereby it is power-fed a definite distance, and then automatically released and returned to its normal elevated position."

Of the seven counts of the interference, the first and sixth are sufficiently illustrative and are here reproduced:

"1. In combination, the frame, a tool carrier, including means movable in a definite direction therein, a going driving means, and a power-transmitting coupling to connect said means with each other, including a master member movable to one position to make, and to another position to break, the coupling, and normally occupying one of said positions, said first-named means having means to move the master member during the movement in one direction of said first means."

"6. In combination, the frame, a tool carrier, including train including a rotary driven member, a rotary driving gear member, a free rotary gear, said members and the gear being concentric, a pinion meshing with the gear and journaled in one and meshing with the other of said members, and a rotation preventing detent device for the gear movable into and out of locking relation thereto and actuable by part of said train."

In October of 1913 Widmer, who was highly skilled in this art, entered into a contract with the Sipp Machine Company, of which appellee was president, to develop and build a model of a sensitive drill press, and to sell the same when manufactured by the company. This contract was to remain in force until September 8, 1918, but on June 3, 1916, a second contract was entered into between the parties, which provided that the first contract was to expire on September 7th following, when the second contract was to take effect. This second contract related to the sale by Widmer to the trade of "quick change speed sensitive drilling machines" and other machine tools then being manufactured by the company. There is no express provision in either contract as to who shall have title to any inventions that may be made.

In the fall of 1916 Widmer, who was endeavoring to devise a drill press of this sort, obtained the services of the company's expert draftsman, Zabriskie, who, under Widmer's directions, prepared drawings of the invention which are in evidence in this interference. Thereupon a machine substantially like the drawings was constructed early in January of 1917, and tested in the factory of the company, where Zabriskie and others saw it operated. It then was sent to New York, where it was exhibited at the Automobile Show. Mr. Widmer testified that one order was received from "a Mr. Edge, at that time general superintendent of the Locomobile Company, at Bridgeport, Conn."; that Mr. Humphreys, his assistant, was with him at the time, and that, while the order placed was verbal, it later was "confirmed by a regular order

from the company." This order, according to the recollection of the witness, "was filled some time in March, 1917." No attempt was made to meet this testimony, although the means were at hand, had the testimony been incorrect. The machine subsequently constructed, while differing somewhat in mechanical detail, was not patentably different from the earlier machine. As stated by the Examiner of Interferences:

"The step from the first to the second form of the invention was no more than the embodiment of the same broad invention in another species."

The Examiner further said:

"It is clear from the record that he (Widmer) alone originated the broad invention in the first machine. * * *"

The Examiner therefore awarded priority to Widmer as to all the counts.

The Examiners in Chief were satisfied that the operation of the earlier machine constituted reduction to practice, and so ruled. But, while satisfied that Widmer was the inventor of the subject-matter of count 6, which relates particularly to the planetary gearing, the Examiners ruled against him, on the ground that this invention was but an ancillary improvement on the regular machines of the company, and hence inured to the company's benefit under the doctrine of employer and employee. The views of the Assistant Commissioner did not differ materially from those of the Board.

We are unable to accept the view that the structure disclosed by count 6 constitutes but an ancillary invention. On the contrary, we are of opinion that the planetary gearing disclosed by this claim constitutes the most essential and dominating feature of the invention, and therefore that Widmer is entitled to priority as to this claim. As to the other claims, however, we do not think Widmer has sustained the heavy burden of proof resting upon him. The question whether, as to count 6, the Sipp Machine Company will be entitled to an assignment of the patent, is not here.

The decision is affirmed as to counts 1, 2, 3, 4, 5, and 7, but reversed as to count 6.

Affirmed as to counts 1, 2, 3, 4, 5, and 7.

Reversed as to count 6.

SMYTH, Chief Justice, dissents as to claim 6, and concurs as to claims 1, 2, 3, 4, 5, and 7.

LINDAU v. SMULSKI.

(Court of Appeals of District of Columbia. Submitted March 14, 1922. Decided April 3, 1922.)

No. 1480.

Patents ⊜91(4)—Facts held to show senior applicant had no right to make claim in issue.

Where the junior applicant was the first to conceive the invention for concrete slab construction, but was lacking in diligence, proof that the senior applicant, at a time when his application did not contain the counts in issue, had endeavored to obtain from the junior applicant the right to use the invention for the company represented by the senior applicant, and that on the failure of such endeavor he copied the two claims in interference into his application, *held* to show that the senior applicant had no right to make the claim in issue.

Appeal from the Commissioner of Patents.

Interference proceeding between Alfred E. Lindau and Edward Smulski. From the decision of the Commissioner of Patents, awarding priority to Smulski, Lindau appeals. Affirmed.

E. S. Clarkson, of Washington, D. C., and James A. Carr, of St. Louis, Mo., for appellant.

Thomas B. Booth, of Boston, Mass., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents in an interference proceeding awarding priority to Smulski, on the ground that Lindau has no right to make the claims.

The invention relates to a reinforcement for concrete floor construction, and is expressed in two claims, of which the second is sufficiently illustrative, as follows:

"2. In a concrete slab construction, the combination with a supporting column of reinforcing members diverging from the axis of the column, each of said members having a reverse bend near the column and presenting a tension reinforcement portion near the upper surface of the slab, and a prolonged compression reinforcement portion near the lower surface of the slab."

Smulski was the first to conceive the invention, but, at the time Lindau filed his application in April of 1910, was lacking in diligence; his inactivity continuing until a short time prior to the filing of his application on January 8, 1913. This application containing the claims of the issue, ripened into a patent on September 21, 1915.

Prior to the granting of the Smulski patent his construction had been embodied in at least two structures. In October of 1915 there was published in the Engineering Record a full description of the Smulski system of reinforcement as embodied in the Youths' Companion Building at Boston, Mass., and at a meeting of the American Concrete Institute, Mr. Lindau being present, Smulski read a paper descriptive of his system, which later was published in the Engineering Record. In February of 1917 Lindau, with two other employees of the Corrugated Bar Company, Lindau's assignee, met Smulski in Chicago, and there

discussed with him, according to a letter subsequently written Smulski by Lindau, Smulski's "system of flat slab construction." According to Smulski, the purpose of this interview was to obtain from him, for the Corrugated Bar Company, the right to use his invention. Soon after it became apparent that these overtures on behalf of the Corrugated Bar Company would not be successful, Lindau, on October 14, 1917, copied the two claims of the issue from the Smulski patent for the purpose of this interference. Down to that time there was no claim in the Lindau application embracing this subject-matter. Smulski, as might have been expected, challenged Lindau's right to make the claims; his contention then and now being that Lindau's member *8* is not so located as to constitute "a prolonged compression reinforcement portion near the lower surface of the slab."

The Law Examiner ruled in favor of Lindau. On final hearing the Examiner of Interferences did not consider the question of Lindau's right to make the claims, as he felt himself bound by the action of the Law Examiner. The Examiners in Chief, while recognizing that Lindau had not mentioned in his application compression reinforcement, and that his method of reinforcement differed from that of Smulski, nevertheless were of the view that Lindau could make the claims. The Board said:

> "It appears to be a fact that the reinforcement member 8 of Lindau is not shaped and located in a manner to effect most efficient reinforcement against compression stresses in the slab, but nevertheless we are of the opinion that as shown and described it serves inherently as a compression reinforcement to a substantial degree."

The Commissioner, however, appreciating that the claims were copied from the Smulski patent, the character of the claims, the circumstances under which the amendment carrying them was made, the meagerness of the Lindau specification and the actual and (as he conceived) material difference between the two structures, ruled that Lindau did not have the right to make the claims, and therefore awarded priority to Smulski.

This is a comparatively new art, and it is apparent that Smulski had a very definite object in mind when he devised the structure described in these two claims. That Lindau must have appreciated this is clear from what occurred, and yet it was not until after he had failed to obtain the benefits of the invention through other means that he asserted a right to make these claims. The fact that he then entertained a doubt about that right, that the claims were copied from the Smulski patent, and must therefore be read in the light of the Smulski specification, coupled with the other facts and circumstances to which we have alluded, and the inherent probabilities of the case, lead us to accept the conclusion and reasoning of the Commissioner.

The decision therefore must be affirmed.

Affirmed.

DE KAY v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 20, 1922.)

No. 1493.

1. Criminal law ⟸1177—Where sentences are concurrent judgment is sustained by evidence warranting conviction on any count.
A judgment of conviction under which sentences imposed on different counts run concurrently, and no sentence exceeds the maximum penalty under any one count, is sustained by evidence which warranted conviction on any count.

2. Banks and banking ⟸257(3)—Evidence held to sustain conviction for aiding in misapplying funds of national bank.
Evidence that defendant caused fictitious drafts to be drawn and sent to the president of a national bank, who in accordance with an understanding between them caused the drafts to be credited at once, before collection or acceptance, to accounts of which defendant, or a corporation in which both were interested, had the benefit, the drafts on maturity being taken up by means of others, the purpose being to obtain loans from the bank without approval by the directors, and with the final result that the bank was illegally subjected to the risk of loss, *held* to sustain a conviction under Rev. St. § 5209 (Comp. St. § 9772), for aiding and abetting the president in misapplying funds of the bank.

3. Pardon ⟸11—Amnesty proclamation held not to apply to a defendant, whose sentence had been deferred awaiting settlement of bill of exceptions.
The President's proclamation of June 14, 1917, granting amnesty and pardon to all persons under suspended sentences of United States courts and to all defendants "in cases where pleas of guilty were entered, or verdicts of guilty returned, prior to June 15, 1916, and in which no sentences have been imposed," included in the second class only defendants on whom the court had purposely refrained from imposing sentence as an act of grace, in accordance with a prevailing, but illegal, practice, and did not apply to a defendant against whom a verdict of guilty had been returned, but who had not yet been sentenced, because the case was still in course of adjudication, and in accordance with the practice in the district imposition of sentence was awaiting settlement of a bill of exceptions.

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Criminal prosecution by the United States against Henry E. De Kay. Judgment of conviction, and defendant brings error. Affirmed.

For opinion below, see United States v. Metcalf, 257 Fed. 184.

Henry M. Boss, Jr., of Providence, R. I. (Thomas Z. Lee and Patrick H. Quinn, both of Providence, R. I., on the brief), for plaintiff in error.

George H. Huddy, Jr., Sp. Asst. Atty. Gen., for the United States.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. Edward P. Metcalf, the president of the Atlantic National Bank of Providence, R. I., the plaintiff in error, and John W. De Kay were jointly indicted in the District Court of the United States for the District of Rhode Island upon three indictments, in which Metcalf was charged with misapplying the funds

of the bank in violation of section 5209, R. S. (Comp. Stat. § 9772), and the two De Kays with having aided and abetted him. John W. De Kay was not within the jurisdiction of the court. These indictments were joined, and Metcalf and the plaintiff in error, who will be hereinafter referred to as the defendant, were tried together. Both were convicted; Metcalf upon all ten counts in all the indictments submitted to the jury and Henry E. De Kay upon all except one count in one indictment.

The misapplication charged was the withdrawal of the money of the bank upon nine drafts, six drawn by one B. M. Riker upon the Mexican National Packing Company, and three by the Massachusetts Chemical Company upon John W. De Kay, when neither the Mexican National Packing Company nor John W. De Kay were indebted to the drawer, and when both Metcalf and the defendant knew them to be worthless, and intended only as a device to obtain money from the bank. The drafts drawn upon the Mexican National Packing Company are designated by counsel as "Mexpac" drafts, and those drawn by the Chemical Company as "Chemical" drafts, and they will be so designated herein.

Five of the "Mexpac" drafts and the three "Chemical" drafts were, by direction of Metcalf, credited to his account at the bank before they had been accepted, or the amount for which they had been drawn collected, and their amounts were afterwards withdrawn by checks of the said Metcalf and paid over to the defendant or his brother, John W. De Kay, or the Mexican National Packing Company, Limited. The other "Mexpac" draft was credited to the account of John W. De Kay at the bank and this amount was withdrawn from the bank by the defendant, who had a power of attorney to draw upon his brother's account.

The jury was fully and carefully instructed upon all the essential elements of the offense set out in the statute, and no error is assigned, either to the instructions given or to the admission or exclusion of testimony.

The only questions raised by the assignment of errors which have been argued are:

First. Whether there was any substantial evidence to sustain the verdict.

Second. Whether Henry E. De Kay is entitled to the benefit of the grant of amnesty and pardon contained in the President's proclamation hereinafter discussed.

The determination of the first question calls for a careful examination of the record.

The defendant and his brother, John W. De Kay, were interested in the reorganization of the Mexican National Packing Company, which had been engaged in the packing business in Mexico. The defendant had been appointed receiver of the company, which had got into financial difficulties, and with his brother, John W. De Kay, had formed a new corporation known as the Mexican National Packing Company, Limited, which had taken over all the assets of the old company, and the De Kays were attempting to finance the new company.

Henry E. De Kay had an office in New York City. John W. De Kay was attempting in London to float the sale of the bonds of the new company, and another brother, Louis, acted as superintendent and manager of the company in Mexico.

E. P. Metcalf, since 1902, had been the president of the Atlantic National Bank. In 1909, as the guest of John W. De Kay, he made a trip to Mexico and as a result of this trip and his examination of the property of the Mexican National Packing Company, he purchased for the bank a draft for £5,000 sterling, drawn by that company upon the British & Mexican Trust Company of London, which was not paid, but afterward put into the form of a note made by a clerk of the De Kays named Moyer, and this note was unpaid when the bank closed. Because of this transaction the directors of the bank were opposed to taking any more obligations of the De Kays, or in which they were interested, and Metcalf knew this. He, however, interested himself in the reorganization of the Packing Company, and admitted that, for his services in assisting the De Kays in financing the new company, he was to receive the sum of $25,000 and also a block of its stock. Through his own holdings, and those of others which he managed, he controlled a majority of the stock of the Atlantic National Bank. Outside of his indebtedness, he estimated, at the time of the transactions covered by the indictments, that he was worth $50,000; that his income was $15,000 per year, $9,000 being derived from his salaries as president of the bank and as an officer of two corporations, and $6,000 as dividends upon stock owned by him. The bank was closed on April 14, 1913, and a receiver appointed.

[1] The sentences imposed by the court upon all the counts of all the indictments were to be served concurrently, and in no case exceeded the maximum penalty provided by the statute, so that, if there was any substantial evidence to sustain the verdict against the defendant upon any count, it must stand. Abrams v. United States, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173.

[2] These "Mexpac" drafts were signed by one B. M. Riker, who was a stenographer in the office of the defendant. The name of the drawee was left blank, as well as the date and amount of each draft, and all were sent, by direction of the defendant, to Metcalf to use as he saw fit. They were made payable five to ten days after sight at a bank in the city of Mexico and all but one were credited, by order of Metcalf, to his account at the bank before their acceptance or collection. One was credited to the account of John W. De Kay at the bank, upon which the defendant was authorized to draw. Metcalf then, with checks upon this account, obtained cashier's checks, which were sent to the defendant in New York, or he caused the account of John W. De-Kay at the bank to be credited with them. Many "Mexpac" drafts had been used at the bank in a similar manner by Metcalf before the use of these six, and the defendant, from his New York office, had kept Metcalf informed as to the dates of maturity of these drafts and sums necessary to cover them.

The Chemical Company drafts were drawn, by direction of the defendant at the request of Metcalf, upon John W. De Kay, payable in

London, and were credited to the account of Metcalf at the bank, by his direction, and cashier's checks for approximately their amounts were sent to John W. De Kay.

There was evidence that Metcalf knew that all the drafts were fictitious, and that he was told, both by Henry E. De Kay and his brother, that there were no funds to meet them when they were drawn, and that it would be necessary for him to supply funds at their maturity.

The defendant admitted that the purpose of using both the "Mexpac" and "Chemical Company" drafts was to borrow money; and there was evidence from which the jury could find that it was to be borrowed from the bank by the use of fictitious paper, which did not have to meet the approval of its directors, as loans. These drafts were not indorsed by any one and were not secured by any collateral, and the result was that money was withdrawn from the bank for the benefit of the defendant or his brother or the Mexican National Packing Company, Limited, without any security, and the bank subjected to the risk of loss, and that in any event it would lose the interest upon a considerable sum of money for the time that would necessarily elapse before the drafts became due.

It is admitted by counsel that, if Henry E. De Kay caused these drafts to be furnished to Metcalf with the knowledge that he intended to make an unlawful use of them by the misapplication of the funds of the bank, he was guilty of aiding and abetting, as charged in the indictment. It is contended, however, that he had no knowledge of the unlawful use of these drafts and that he and his brother both supposed that the money they received from Metcalf was loaned by him personally, and that their indebtedness was to him, and not to the bank.

It must have been apparent to the jury that Edward P. Metcalf was applied to and offered a large return to assist in promoting the reorganization of the Mexican Company in which they were interested, not because of his personal financial strength, but because of his control, as president, of the funds and credits of the bank.

The defendant admitted that the drafts which were placed in the hands of E. P. Metcalf were intended to be used by Metcalf in borrowing money for his personal use and that of his brother and of the company.

The following excerpts from letters of the defendant to Metcalf show that he was requesting him to use "Mexpac" drafts and that he knew that there were no funds to meet them:

"You understand, of course, that the funds to take up these drafts and checks are not available at this time."

One of the drafts referred to is one of the "Mexpac" drafts covered by one of the counts in one of the indictments.

"While you were in the West it was necessary for me to give my check on the Atlantic National Bank for $1,000, this check being sent to London to take care of a matter there; and I presume it will be in on Saturday of this week or Monday of next week, and I wish you would be good enough, when this check comes in, to use the inclosed draft on Mexpac for $2,000, drawn at five days' sight on the Mexico City office, and place the proceeds to my credit, so that the check may be protected and my account not be in the red,

and I expect, by the time this draft will have become payable, to be in funds to cover it. When it is used, if you will be good enough to advise me, I will write my brother Louis to accept it, and to cable me its maturing date, so that it may be taken care of in due course."

"Inclose you herewith copy of cable received from Mexico. The draft referred to is 2,900 pesos and is due on the 23d. I wish, if you can possibly see your way to do so, that you would use a Mexpac draft for this amount and send me the money, so that I may cable it to Mexico to take up this matter. I will in the meantime, before this draft matures, take the matter up with Louis and try and get him to pay it at maturity."

"As you have the paper which I sent you Friday, and will be able to discount it I believe, it will be all right, if necessary, for you to use Mexico or London draft to cover this amount."

"I know, of course, from my experience down there, that the things he has done have had to be paid for, and with the condition of business down there of course, he has not been in a position where paying for them would not cripple him. I wish there were some way whereby we could figure out to send him $1,500 gold to help him over the present situation. I do not know, however, if he would be able to repay the amount if you drew a draft on Mexico, 10 days' sight, for $1,500, but it seems to me that something ought to materialize in London between now and the time the draft would be due for that amount, provided you can see your way clear to draw it."

That the defendant knew there were no funds to meet the "Chemical" drafts when drawn is shown by his letter to Metcalf of March 6, 1913, in which he incloses copy of letter written by him to the Massachusetts Chemical Company at Metcalf's request, and adds:

"You and Mr. Baldwin of the Massachusetts Chemical Company, of course, understand that, unless John gets some funds out of the reorganization of Mexpac, he will be unable to take care of these drafts when they arrive in London; but we hope that the business will be so far along by the time they reach there that he will be able to meet them."

That there was evidence tending to show that the defendant knew that the bank was the medium through which Metcalf had used these drafts appears from the following extracts from letters and cables of Metcalf which passed through his hands:

"I have asked our bank to telegraph Mexico to extend drafts 34 and 35 for ten days."

"Regarding draft 49, $2,600, we have requested our bank to extend the draft ten days, and at the end of that time to accept payment of one-half and give a further extension of ten days on the balance."

On May 20, 1912, the defendant cabled to Louis De Kay in Mexico:

"Mr. Metcalf has wired Mexico bankers to extend all of the drafts which he drew on Mexico, with the exception of No. 36 for $900 gold, which is dated May 3d and due May 23d. It is held by the London Bank of Mexico and South America. I will cable you this money on the 23d of May."

In July, 1912, Metcalf, through the defendant, sent a cable to J. W. De Kay stating the indebtedness of the Mexican National Packing Company, Limited, to him personally was $60,000, and including in other indebtedness "Mexican drafts now outstanding $8,500."

Led on by the alluring prospects of success which were cabled from London by J. W. De Kay to H. E. De Kay, and of which Metcalf was kept fully informed, the latter had used his official position as president of the bank to assist the De Kays in their enterprise until, within the knowledge of the defendant, as appears from one of his letters to his

brother, Metcalf had become "badly tied up," and in another letter he writes of him as "badly pressed." In a letter of August 7, 1912, he quotes a statement from a letter of Metcalf to him that he "cannot hold out until September." Fully knowing Metcalf's financial condition, the defendant thereafter urged him to use these worthless drafts to secure funds for himself and his brother, and the company in which they were interested, holding out that, in case of success in placing the bonds of the company, all of the indebtedness of the company would be paid, and that Metcalf would receive his compensation of $25,000 and a large block of the stock of the company. He testified that Metcalf was to use these drafts as "he saw fit." He knew that the drafts were being perverted from their ordinary use to serve as instruments of credit upon which to obtain loans, and that, without waiting for their collection, their proceeds were at once received by him or credited to the account of his brother in the Atlantic National Bank, upon which he had authority to draw. He had asked to have the bank extend payment on some of them after they had reached Mexico. He knew that checks on the Atlantic National Bank in the form of New York exchange were usually employed to take up these drafts. There was abundant testimony that he knew and contemplated that when not only the drafts set out in the indictments, but many others, were used, the drawee did not have funds to meet them, and that they were not handled according to the usual course of business, but that the amounts for which they were drawn were credited to the account of John W. De Kay before the drafts were accepted, or the amounts for which they were drawn collected, and that the company was thereby obtaining the use of the money of the bank without the payment of interest, and that these drafts, when they matured, were not being paid, but, if payment was not extended, they were met by the use of like drafts.

One of the "Mexpac" drafts, dated December 7, 1912, signed by B. M. Riker and drawn for the sum of $1,200, was the instrument by which it was charged the misapplication was made in one of the indictments. This draft was credited as cash upon the account of John W. De Kay at the bank when presented by Metcalf.

As this account was subject to be drawn upon by check of the defendant through the power of attorney given him by his brother, it does not seem probable that he did not know of this credit, as the account had but a small amount of money in it before this credit was made, and only two days later was overdrawn by the sum of $72.60.

The trial of the case consumed 31 days and the record is voluminous, containing evidence of transactions extending over several years between the defendant and his brother uopn one side, and Metcalf on the other, in which worthless drafts, drawn, not only upon the Mexican Company, but also upon the brother in London, and the latter's worthless checks and those of other persons in London, were the means employed to supply funds for the indigent promoters of an enterprise in which the prospects of success were uncertain.

We think that the inferences which could be fairly and reasonably drawn from the proven and admitted facts furnish substantial evidence

that the defendant had knowledge of the unlawful methods practiced by Metcalf as president of the bank and are sufficient to sustain the verdict.

[3] The second question raised by the assignment of errors makes it necessary to examine the several steps that were taken in the case after a verdict was rendered and also the President's proclamation, upon which the defendant relies to support his contention that he was included within the grant of amnesty and pardon which it contains.

After the verdict of guilty the defendant applied for and obtained leave to file a bill of exceptions, and the time for presenting it was successively extended to April 23, 1915. On this date he filed a motion for a new trial, which was heard June 19, 1915, and overruled on September 29, 1915.

On November 12, 1915, a motion was filed by the United States for the assignment of the case for hearing upon the settlement and allowance of the defendant's bill of exceptions and the case was assigned for hearing on November 20, 1915. On that date the case was continued to November 27, 1915, and was thereafter continued from time to time because of the illness of counsel for the defendant to May 22, 1916, when the court ordered a continuance to the next regular term of all cases open and undisposed of on the docket at the close of the May term.

On May 27, 1917, the court ordered a continuance to the next regular term of all cases remaining open and undisposed of on the docket at the close of the November, 1916, term.

On June 14, 1917, the President promulgated a proclamation containing a grant of amnesty and pardon to certain defendants who had been convicted in federal courts, but upon whom sentence had not been imposed or carried into execution.

This proclamation followed the decision of the Supreme Court of the United States on December 4, 1916, in the case of Ex parte United States, Petitioner, 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355, known as the "Killits" Case, in which it was held that an order indefinitely suspending the execution of a sentence of the defendant in a criminal case was illegal.

The proclamation was as follows:

"Whereas, a practice has existed for many years among the judges of certain United States courts of suspending either the imposition or the execution of sentences whenever, in their judgment, the circumstances warranted it, which practice is illegal as has been held by the Supreme Court of the United States in a case entitled 'Ex parte United States, petitioner,' known as the Killits Case, decided December 4, 1916; and

"Whereas, the practice was widespread, and many thousands of persons are now at liberty under such suspension, never having served any portion of the sentences duly authorized and required by the statutes; and

"Whereas, many of these persons are leading blameless lives and have reestablished themselves in the confidence of their fellow citizens, and it is believed that the enforcement of the law at this late date would, in most instances, be productive of no good result; and

"Whereas, the Supreme Court of the United States, in recognition of the necessity for meeting this situation, has stayed the mandate in the Killits Case, until the end of the present term, to wit, until about June 15, 1917:

"Now, therefore, be it known that I, Woodrow Wilson, President of the

United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby declare and grant a full amnesty and pardon to all persons under suspended sentences of United States courts liable to penalties as aforesaid, where the sentences imposed were less than the period between the date of imposition and June 15, 1917, and to all persons, defendants in said courts, in cases where pleas of guilty were entered or verdicts of guilty returned prior to June 15, 1916, and in which no sentences have been imposed.

"In all other cases of suspension either of the imposition or the execution of sentence by judges of the United States courts occurring prior to December 4, 1916, the date of the decision in the Killits Case, a respite of six months is hereby granted from June 15, 1917, in order that the facts and merits of the respective cases may be investigated and considered and appropriate action taken, where warranted, by way of executive clemency.

"In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

"Done at the city of Washington this fourteenth day of June, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

"Woodrow Wilson.

"By the President:
T. W. Gregory, Attorney General."

On July 17, 1917, the defendant filed an alleged acceptance of the pardon and grant of amnesty, and on July 24, 1917, a plea in bar in arrest of judgment, because of the grant of amnesty and pardon extended by this proclamation.

To this plea the government filed a replication August 20, 1917, to which the defendant demurred. The demurrer and defendant's plea in arrest of judgment were overruled by the District Court in an opinion rendered April 2, 1919, to which defendant duly excepted.

A bill of exceptions was presented and allowed on February 6, 1920, and upon motion of the attorney for the United States the defendant was sentenced, upon each of the counts in the indictments upon which he had been convicted, for a term of five years, the terms of sentence upon all the counts in all the indictments to run concurrently.

In construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes, and the whole proclamation must be considered to find the presidential intent.

In the preamble it clearly appears that the President's attention had been called to the decision of the Supreme Court in the "Killits" Case and that, in the proclamation, he intended to deal with a practice which—

"has existed for many years among the judges of certain United States courts of suspending either the imposition or the execution of sentences whenever, in their judgment, the circumstances warranted it."

The preamble states that the practice is widespread and many thousands of persons are now at liberty under such suspension; that such persons are "leading blameless lives," and "that the enforcement of the law at this late date would in most instances be productive of no good result"; that, "in recognition of the necessity for meeting this situation," the Supreme Court of the United States "has stayed the mandate in the 'Killits' Case until the end of the present term, to wit, until about June 15, 1917."

Then follows the grant of amnesty and pardon, which, read in the light of the preamble, makes it apparent that it was intended by the President to apply only to such defendants as fell into the class discussed in the preamble.

In the "Killits" Case the court dealt only with the defendants whose sentences had been indefinitely suspended. Taken in connection with the decision in that case, which had brought to the attention of the President that such practice was illegal, it is evident that the grant of pardon and amnesty, although stated in general terms to extend "to all persons, defendants in said courts, in cases where pleas of guilty were entered or verdicts of guilty returned prior to June 15, 1916, and in which no sentences have been imposed," must be restricted to the defendants whose sentences had been illegally suspended, and would not apply to a defendant who had been found guilty and upon whom sentence had not been imposed, not because of its suspension by a judicial act, but because the case was in process of adjudication.

Applying the same rule of construction as was applied in Church of the Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, it is apparent that, although the contention of the defendant that the pardon was extended to him by the grant of amnesty contained in the proclamation "may be within the letter of the statute," it is "not within its spirit."

The purpose and intent of the proclamation were made certain by a second proclamation of the President made upon August 21, 1917, in which it is stated:

"I, Woodrow Wilson, President of the United States of America, in order to avoid possible misunderstandings, do hereby proclaim, declare, and make known that the aforesaid proclamation, in purpose and intent, applied and does apply to the following cases, to wit:

"(1) Cases of defendants in United States courts, under suspended sentences. * * *

"(2) Cases of defendants in United States courts, not actually in process of adjudication on June 14, 1917 (the date of the aforesaid proclamation), wherein pleas of guilty were entered or verdicts of guilty were returned prior to June 15, 1916, and in which the imposition of sentence had been illegally suspended by the court or in which the court had illegally declined to impose sentence upon proper motion by the prosecuting attorney."

It was not the purpose of the second proclamation to make any change in the class of defendants to whom the grant of amnesty and pardon (contained in the first proclamation) was extended, but simply to explain and make certain the class of defendants to which it actually applied, and which did not include defendants in the United States courts whose cases were "actually in process of adjudication on June 14, 1917."

The entries upon the docket of the District Court in this case do not show any indefinite postponement of sentence or any suspension of the same, but show that the case was actually in process of adjudication, and that the District Court, in the exercise of reasonable discretion, was awaiting the presentation of a bill of exceptions before the imposition of sentence, in accordance with the practice in that district.

This appears from this statement in the opinion of the learned judge of the District Court:

"It has long been the practice in this district and circuit to defer sentence until after the settling of the bill of exceptions, in order that the record which is to be re-examined upon writ of error may be perfected before judgment thereon."

We are therefore compelled to hold that the defendant was not included in the pardon granted by the President's proclamation, and, having adversely disposed of all the questions raised by the assignment of errors which have been argued, the entry must be—

The judgment of the District Court is affirmed.

GREENBAUM v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1922.)

No. 3594.

1. **Bankruptcy ⟸494—Indictment charging concealment of property held sufficient.**

An indictment charging that defendant knowingly, fraudulently, and feloniously, while he was a bankrupt, concealed from the trustee a large portion of his property belonging to the bankrupt estate, said property consisting of money and merchandise to the value of $30,000, alleges in plain and unambiguous terms all the essential elements of the offense, and is sufficient.

2. **Bankruptcy ⟸491—Confirmation of composition does not bar prosecution for concealment of assets, begun before confirmation.**

An order confirming a composition by a bankrupt with his creditors, which recited that bankrupt had not been guilty of any of the acts which would bar his discharge, did not bar a prosecution of the bankrupt for fraudulently concealing his assets, since it was made in a civil proceeding in which the United States was not a party, and therefore would not be res judicata as to it, even in a civil proceeding, and since the statute provides that offense may be committed by a person while a bankrupt or after his discharge, and the fact that the indictment was returned before the order confirming the composition was entered does not affect the rule.

3. **Bankruptcy ⟸387, 438—Composition supersedes bankruptcy proceedings; books belong to bankrupt after confirmation of composition.**

Under Bankruptcy Act, § 70f (Comp. St. § 9654), the title to the bankrupt's property, including books and documents relating thereto, immediately revests in the bankrupt on the confirmation by the court of a composition with creditors, the composition proceedings having the effect, when confirmed by the court, of superseding the bankruptcy proceeding, so that the trustee in bankruptcy had no further duties to perform after the confirmation, and had no authority to undertake the collection of money due the bankrupt, not included in the composition, and which therefore belonged to the bankrupt.

4. **Criminal law ⟸393(1)—Statements of counsel held not to establish agreement of bankrupt to return books to trustee.**

A statement by the district attorney that the books of a bankrupt had been delivered to the bankrupt's counsel under an agreement they would return the books was not admitted, where the attorneys to whom the books were delivered were not present in court, and the attorney in charge of the trial said he had no knowledge as to what the arrangement

was, and is insufficient to establish the arrangement, where the trustee was a witness in the case and did not testify to such an arrangement.

5. **Criminal law ⊂⊃393(1)—Consent of district attorney to return of books does not justify order requiring production by bankrupt in prosecution against him.**

The fact that a trustee in bankruptcy obtained consent of the district attorney before he returned to the bankrupt, who had been indicted for concealing property, the books to possession of which bankrupt was entitled after confirmation of his composition with creditors, does not justify an order of the court, on the trial of a criminal charge, requiring the bankrupt to produce the books to be used in evidence.

6. **Criminal law ⊂⊃393(1)—Order requiring production of books held one in criminal prosecution.**

The court, sitting at the trial of a criminal charge against a bankrupt for concealing assets from his trustee, was not sitting as a bankruptcy court, and could not make an order or decree in the bankruptcy proceeding, which had been terminated previously by confirmation of a composition with creditors, so that an order then made requiring the bankrupt to produce his books was an order made in the criminal case.

7. **Criminal law ⊂⊃393(1)—Searches and seizures ⊂⊃7—Discharged bankrupt cannot be compelled to produce books in prosecution for concealment of property.**

A bankrupt, who has been discharged by confirmation of a composition with creditors, so as to become revested with title to his property, including his books, cannot, under Const. Amend. 4, relating to unreasonable searches and seizures, and amendment 5, relating to self-incrimination, be required, in a prosecution against him for fraudulently concealing assets, to produce the books to be used in evidence in the criminal prosecution.

8. **Criminal law ⊂⊃393(1)—Production of books in response to unconditional order is not voluntary.**

Where the court entered an unconditional order requiring defendant, to whom had been returned his books after confirmation of a composition with his creditors, to produce the books in court, his failure to produce the books would have subjected him to punishment by imprisonment for contempt until he complied with the order, so that the production of the books was not a voluntary act on his part.

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

Joseph Greenbaum was convicted of fraudulently concealing property from a trustee in bankruptcy, and he brings error. Reversed and remanded for new trial.

See, also, 249 Fed. 468, 161 C. C. A. 426.

On the 19th day of May, 1916, a petition in involuntary bankruptcy was filed against Joseph Greenbaum in the District Court, Eastern District of Michigan, Southern Division. On June 5, 1916, Greenbaum was adjudged a bankrupt and on the 5th day of July, A. D. 1916, H. C. Moulthrop was appointed trustee of the bankrupt estate and qualified as such trustee on July 6, 1916. Pending the bankruptcy proceeding, the bankrupt made a composition with his creditors, which composition was affirmed and approved by the District Court September 3, A. D. 1918. In the order confirming this composition the court found and adjudged that such composition "was for the best interest of the creditors; that the bankrupt had not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; that the offer and its acceptance were in good faith and had not been procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy." On the same date an order was entered by the District Court directing the referee in bankruptcy to distribute the deposit made by the bankrupt.

On May 11, A. D. 1917, and prior to the making of this composition and the entry of the order confirming the same, an indictment was returned against the bankrupt, Joseph Greenbaum, charging that on the 5th day of July, A. D. 1916, he did knowingly, fraudulently, and feloniously, while he was a bankrupt, conceal from the trustee a large portion of his property belonging to the bankrupt estate; said property consisting of money and merchandise to the value of $30,000. To this indictment Greenbaum filed a demurrer and also a demand for a bill of particulars, specifying and describing the property that he was charged with having concealed, and the place, time, and manner of such concealment. This bill of particulars was furnished in so far as it was in the power of the government to furnish the same, with the further statement that the information demanded by the defendant was peculiarly within his knowledge and not within the knowledge of the government. The court overruled the demurrer to the indictment and the cause came on for trial, at which time counsel for defendant moved the court to dismiss the indictment and discharge the defendant for the reason that the issue presented by the indictment had been judicially determined by the order of the court confirming the bankrupt's composition with his creditors, which motion was overruled by the court.

At the time the trustee was appointed and qualified the bankrupt's books of account were delivered to him. After the bankrupt had made the composition with his creditors and the order confirming the claim had been entered, the trustee continued in the possession of these books until two or three weeks before the trial. Mr. Moulthrop, the trustee, testified in reference to the return of these books that Mr. Brand of Selling & Brand, attorneys for Greenbaum, got them from him at his office; that they were never returned to witness after Mr. Brand took them away; that, before letting Mr. Brand take them, the witness asked and secured the permission of the district attorney; that afterwards he asked the permission of the district attorney to turn them over to Mr. Mendelsohn, who was also an attorney for Greenbaum; that the trustee understood, at that time, that Mendelsohn and Maloney were acting as attorneys for the defendant, but he cannot remember that they notified him that they wanted the books to prepare the defense, but that he understood that they did want them for that purpose. He further testified that he qualified as trustee on the 6th day of July, 1916; that he had not attempted to exercise any of the duties of trustee until that date; that he did not distribute the composition deposit; that he was not the agent for that purpose; that since the composition with creditors had been made and approved by the court he had tried to collect the balance due on the land contract for the sale of the homestead; that money due on that contract was not a part of the fund of the composition, but belonged to the bankrupt estate; that the balance on the land contract was past due September 3, 1916.

He further testified in response to a question by the court that he was still acting as trustee. Thereupon the court said: "Then I will direct the books be turned in to your possession as trustee. I will ask you to let counsel on both sides have full use of them." In obedience to this order, to which the defendant at the time excepted, he delivered these books to the trustee, and they were used in evidence against the defendant in the trial of this case, which trial resulted in a verdict of guilty and sentence thereon.

J. Shurley Kennary and Wm. F. Connolly, both of Detroit, Mich., for plaintiff in error.

Frederick L. Eaton, Asst. U. S. Atty., of Saginaw, Mich. (Earl J. Davis, U. S. Atty., of Detroit, Mich., on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] The demurrer to the indictment was properly overruled. The indictment discloses in plain and unambiguous terms all the essential ele-

ments of the offense charged. Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; Cochran et al. v. U. S., 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704; Burton v. U. S., 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; U. S. v. Comstock (C. C.) 161 Fed. 644; Ripon Knitting Works v. Schreiber (D. C.) 101 Fed. 810; Stern v. U. S., 193 Fed. 888, 114 C. C. A. 102; In re Lasky (D. C.) 163 Fed. 99.

[2] It is also insisted on behalf of the plaintiff in error that the order confirming the composition is a bar to the prosecution of this indictment. Certainly it is not equivalent to a former acquittal upon a criminal prosecution for the same offense. It was made in a civil proceeding in which the United States was not a party, and therefore the question was not res adjudicata as to it, even in a civil proceeding. The statute provides that this offense may be committed by a person while a bankrupt or after his discharge. This order is, in effect, a discharge in bankruptcy. Clearly, from the language of the statute, a discharge in bankruptcy cannot affect the right of the United States to prosecute the bankrupt for this offense. In many cases the criminal act of concealment may not be discovered until after a composition, or until a discharge in bankruptcy. Such concealment of assets, without knowledge on the part of the court or the creditors, may induce the creditors to accept such composition, and the court to approve the same or discharge the bankrupt, in due course, when no composition is made. The fact that in this case the indictment was returned against the bankrupt before the composition was made with his creditors and confirmed by the court cannot change the law upon this subject even though it might affect the question of the guilt or innocence of the accused.

Whether the order of the court, directing the bankrupt to turn over his private books and accounts to be used in evidence against himself, was or was not an invasion of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States, for the purposes of this case, may be conceded to depend upon whether he was, at that time in the lawful possession and entitled to the possession of these books.

[3] Under the provisions of section 70 of the Bankruptcy Act (Comp. St. § 9654) the trustee, upon his appointment and qualification, became immediately vested, by operation of law, with the title of the bankrupt to all the bankrupt's property and estate, including the documents relating to his property. Under the provisions of section 70f of the Bankruptcy Act, upon the making and entering of the order of the court confirming the composition, the title to the bankrupt's property, including documents relating thereto, immediately revested in the bankrupt. The effect of a composition proceeding under the Bankruptcy Act, when such composition is confirmed by the court, is to supersede the bankruptcy proceeding and substitute the composition proceeding for it. Cumberland Glass Mfg. Co. v. De Witt & Co., 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042.

In this case the referee in bankruptcy was ordered and directed by the court to distribute the composition fund deposited by the bankrupt. The trustee had no further duties to perform in relation to the bank-

rupt's property, except to return the same to him. He had no authority as trustee to collect money still due upon the land contract for the sale of the bankrupt's homestead, which money was not a part of the composition fund. The title to the money due upon that contract at once revested in the bankrupt, free from any claim or right of the trustee, and the trustee's efforts to collect the same were gratuitous, and did not justify him in retaining possession of the bankrupt's property or any part of it. In re Friscknecht, 223 Fed. 417, 139 C. C. A. 11.

[4] It is claimed that a colloquy between counsel justified the court's conclusion that the books were received by the defendant's former attorneys under a promise to return them to the trustee. We think this inference not justified. The district attorney stated that he had been informed by the trustee that these books had been delivered by him to the attorneys for the bankrupt, upon the promise that they would return the same. The trustee was later called as a witness, but he did not testify, either upon direct or cross examination, that any promise whatever was made to him, at the time he delivered these books to the attorneys for the defendant, that they would be returned; and while he understood that counsel desired these books for the purpose of preparing the defense, yet he does not recall that anything was said to him by either of defendant's counsel upon that subject. The receipt given him for these books does not recite the purpose for which they were delivered, nor does it contain any promise on the part of Greenbaum or his attorneys to return same when wanted. Defendant's former attorneys, who received the books and were charged with this arrangement, were not present in court. Defendant's attorney in charge of the trial said he had no knowledge as to what the original arrangement was. This falls far short of an admission, expressly or by silence. If a court has any power to make such an order as was here made, it should be exercised only where there is no doubt as to the facts. The statements of counsel cannot be accepted as evidence justifying an order of this kind, especially where, if the facts were as claimed by counsel, the evidence of such facts was easily obtainable from the witness, who the district attorney claimed in his statement had made such arrangement, and who, of course, would have had knowledge thereof, if any such arrangement had been made. In any event, such an inquiry and such an order for return to the trustee would be for the court of bankruptcy, and could be had and made only after due notice, and after the bankrupt, claiming the possession and right to possession of these books, by reason of the composition with his creditors and the order affirming the same, had been given his day in court.

[5] The further evidence of Mr. Moulthrop, that he secured the consent of the district attorney before delivering these books to counsel for the defendant, does not affect this question in any manner or form whatever. The district attorney was not in possession of these books, and never had any possession or control over them; nor had he attempted while the books were in the possession of the trustee to secure their production in court by a subpœna duces tecum. They were in the possession of the trustee solely and only for the purposes of the bankruptcy proceeding, and when that bankruptcy proceeding was su-

perseded by the composition proceeding, it became the duty of the trustee, regardless of whether the district attorney consented thereto or not, to deliver these books without terms, to Mr. Greenbaum or his counsel upon demand therefor. There is no evidence in this record to show that the trustee did not perform his duty in that respect or that he did not deliver these books to the attorneys for the defendant without exacting any promise that they should be returned to him or to any one else to be used as evidence in this criminal case, or for any other purpose. The conclusion necessarily follows from the uncontradicted evidence of Mr. Moulthrop that the defendant, Greenbaum, was at the time this order was made in possession of these books, and that under the provisions of section 70f of the Bankruptcy Act, he was the owner of the same and entitled to the possession thereof.

[6] The court sitting in the trial of this criminal case was not sitting as a bankruptcy court and was not called upon to make any order or decree in the bankruptcy proceeding which had several months prior thereto been superseded by the composition proceedings. Cumberland Glass Mfg. Co. v. De Witt & Co., supra. Therefore the order made by the court requiring the defendant to produce his private books of account to be used as evidence against himself was an order made in a criminal case and cannot be sustained upon the theory that it was an order made in the civil proceeding in bankruptcy.

The Fourth Amendment to the Constitution of the United States declares that 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. The Fifth Amendment declares that no person shall be compelled in any criminal case to be a witness against himself or be deprived of life, liberty, or property without due process of law.

In Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, it was said by the Supreme Court that both of these amendments relate to the personal security of citizens; they nearly run into and mutually throw light upon each other; that it does not require actual entry upon premises and search for and seizure within the meaning of the Fourth Amendment, but that a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment.

The Boyd Case, supra, was not a criminal case, but was a proceeding under the customs revenue laws of the United States to declare a forfeiture of defendant's property. The fifth section of the Act of June 22, 1874 (Comp. St. § 5799), entitled "An act to amend the customs revenue laws," etc., authorized a court of the United States, in revenue cases, on motion of the government's attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney to be taken as confessed.

Under the provisions of this section of that act the trial court made an order requiring the defendant Boyd to produce an invoice covering 29 cases of plate glass imported from Liverpool, England, into the port

of New York, and further ordering that upon the failure of the defendant to produce this invoice, the allegation of the government's attorney, as to what these invoices would prove, would be taken as confessed. The court held the section of the statute, under the provisions of which this order was made, unconstitutional and void, and further held that an order of the court requiring the claimants to produce invoices in their possession, to be offered in evidence against him in an action seeking to declare a forfeiture of defendant's property, was in violation of both the Fourth and Fifth Amendments to the Constitution, and that the inspection of the invoice by the government's attorney and its admission in evidence were erroneous and unconstitutional proceedings. This case is perhaps the leading case upon this subject, but it is cited, followed, and approved by many subsequent cases. Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; Ballmann v. Fagin, 200 U. S. 186, 26 Sup. Ct. 212, 50 L. Ed. 433; Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319; Amos v. U. S., 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654; Gouled v. U. S., 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647; Flagg v. U. S., 233 Fed. 481, 483, 147 C. C. A. 367; Linn v. U. S., 251 Fed. 476, 480, 163 C. C. A. 470; Bram v. U. S., 168 U. S. 532, 544, 18 Sup. Ct. 183, 42 L. Ed. 568.

It is unnecessary to review the cases above cited in detail. In Ballmann v. Fagin, supra, the court declared in so many words that "a person against whom criminal proceedings are pending is no more bound to produce books of account, than to give testimony to the facts which they disclose." This is the substance and effect of all the other cases as appears from the following extract from the opinion in Gouled v. U. S., supra:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, in Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property,' that they are to be regarded as of the very essence of constitutional liberty, and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right, to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers."

It is also said in Flagg v. U. S., supra, that—

"What becomes of this defendant, important as it is, sinks into insignificance when compared with the right of the people of the United States to be protected from unlawful search."

[7, 8] It is contended on behalf of the United States that these books were not obtained by any unlawful search and seizure but were obtained by due process. In the quasi criminal case of Boyd v. U. S., supra, a conditional order requiring Boyd to produce the invoice to be used in evidence in that case, or, upon his failure to do so, the statement of counsel for the government should be taken as confessed by him was held by the Supreme Court to be an invasion of the defendant's constitutional rights, for the reason that it virtually compelled the defendant to furnish testimony against himself in violation of both the Fourth and Fifth Amendments. The order in this case is identical with the order in the Boyd Case, except that it unconditionally required the defendant to produce his private books and accounts which were then lawfully in his possession and under his control, to be used in evidence against himself in the trial of this criminal case. His failure to produce the books in obedience to this order would be contempt of court, for which he no doubt would have been punished by imprisonment until he purged himself of the contempt by producing the books. The production of the books, under this order was therefore not a voluntary act on his part. If a defendant in a criminal case can be required by order of court, to produce his private books and accounts, letters or other private documents to be used as evidence against himself, then, as said, in substance, by the Supreme Court in Weeks v. U. S., supra, and Silverthorne Lumber Co. v. U. S., supra, the Fourth and Fifth Amendments would be reduced to a mere form of words.

In the case of Adams v. New York, 192 U. S. 588, 24 Sup. Ct. 372, 48 L. Ed. 575, the question was not raised as to the means by which the evidence was secured. An objection was made to the introduction of the books and papers in evidence on the ground that they were incompetent and irrelevant. The distinction between that case and the other cases is fully explained in the Weeks Case. In Matter of Harris, Bankrupt, 221 U. S. 274, 31 Sup. Ct. 557, 55 L. Ed. 732, the court made an order that the bankrupt should deposit his books of account in the office of the receiver, there to remain in the custody of the bankrupt; the latter to afford the receiver free opportunity to inspect the same, but the receiver to use and permit them to be used only for the purpose of the civil administration of the estate and not for any criminal proceeding. This order was affirmed by the Supreme Court upon the theory that, as the bankruptcy court could have enforced title in favor of the trustee, it could enforce possession ad interim in favor of the receiver, and that, in the properly careful provision to protect the bankrupt from use of the books in aid of prosecution, the bankrupt got all that he could ask. In reply to the claim of Harris that no statute protected him from the knowledge gained from the use of the books to find and gain evidence that might be used against him in a criminal prosecution, the court said: "That is one of the misfortunes of bankruptcy if it follows crime." In that case the order was made in a civil proceeding, the books to be used only for the purpose of the civil administration of the bankrupt estate. The bankruptcy proceedings were still pending, and Harris was not entitled to these books as against his trustee, or as against the ad interim receiver. In this case the bankruptcy pro-

ceedings had been superseded by the composition proceeding, and the order confirming the composition had revested in the bankrupt, the title and right to the possession of these books. Not only that, but he actually had the possession of them, so that the Harris Case has no application to the question presented in this case, other than it recognizes the rule as announced in Counselman v. Hitchcock, supra.

There are no other assignments of error that it is necessary to discuss in detail. It is sufficient to say that no error intervened in the proceedings and trial prejudicial to the defendant, other than the order directing him to produce his private books of account to be used in evidence against himself, and for which error this judgment is reversed, and cause remanded for a new trial.

VANCEBURG & STOUT'S LANE TURNPIKE ROAD CO. et al. v. CHESAPEAKE & O. RY. CO.

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

No. 3615.

1. **Turnpikes and toll roads ⟸10—Right given to collect taxes held "power" and "privilege," within meaning of Kentucky repealing statute.**
The right of Vanceburg & Stout's Lane Turnpike Road Company to collect taxes, given it by Loc. & Priv. Laws Ky. 1889–90, c. 1034, creating it, was a "power" and a "privilege," within the meaning of Ky. St. § 573, providing that all powers or privileges or immunities of a corporation, not obtainable under such chapter, should stand repealed on September 28, 1897.

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

2. **Corporations ⟸41—Power of state Legislature to abolish powers and privileges granted by special act depends on Constitution and laws.**
The power of the Legislature to repeal powers, privileges, or immunities of existing corporations granted by special acts depends on the provisions of the Constitution of the state or the general laws of the state, reserving to it the right to revoke any special grants of power given or granted by the Legislature subsequent to the enactment of such general statute.

3. **Turnpikes and toll roads ⟸10—Charter giving right to tax held subject to repeal reserved in Kentucky statute.**
Loc. § Priv. Laws Ky. 1889–90, c. 1034, creating the Vanceburg & Stout's Lane Turnpike Road Company, and giving it the right to levy and collect taxes, was passed in contemplation of Laws Ky. 1855–56, c. 148, providing that all charters and grants to corporations shall be subject to amendment or repeal, and such corporation must be held to have accepted such charter, subject to such power of repeal.

4. **Turnpikes and toll roads ⟸10—Acceptance of provisions of Kentucky Constitution held to effect a surrender of special privilege of levying tax.**
Acceptance by the Vanceburg & Stout's Lane Turnpike Road Company, created by Loc. & Priv. Laws Ky. 1889–90, c. 1034, giving it the privilege of levying the collecting taxes, of the provisions of the Constitution of Kentucky of 1891, did not mean merely that it thereby acquired the power to amend its charter and increase its stock, but it was also a surrender by it of all its special privileges and immunities, including right it had to

levy and collect taxes, and its increase in capital stock did not extend its right to levy and collect taxes beyond the limit authorized by the special act, especially in view of Ky. St. § 573.

Appeal from the District Court of the United States for the Eastern District of Kentucky, at Covington; Walter Evans, Judge.

Bill by the Chesapeake & Ohio Railway Company to enjoin the collection from it by the Vanceburg & Stout's Lane Turnpike Road Company and others of any further tax levied upon its property. Decree for plaintiff, and defendants appeal. Affirmed.

Allan D. Cole, of Maysville, Ky. (H. W. Cole, of Maysville, Ky., on the brief), for appellants.

Le Wright Browning, of Maysville, Ky., for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The Vanceburg & Stout's Lane Turnpike Road Company is a corporation created by special act of Kentucky Legislature April 24, 1890 (Loc. & Priv. Laws 1889–90, c. 1034), with a capital stock of $20,000, for the purpose of constructing a turnpike road 7½ miles in length and parallel with the Ohio river, from Vanceburg to Stout's Lane, both in Lewis county. To assist in providing funds for the building of this turnpike road, the act incorporating this company created a taxing district comprising all the property lying between the termini of the road, the Ohio river on the north, and a line parallel with that river two miles south thereof, and further provided for the levying and collection of a tax of 50 cents per year upon each $100 worth of taxable property located in the taxing district so created, commencing with the year 1891, and continuing until the road is built and paid for; the funds arising from such tax to be expended solely in the location, building, and construction of the road. The turnpike was also authorized to charge and collect tolls from persons using the road for travel. The company was also authorized to receive stock subscriptions, and the county of Lewis was authorized to subscribe the sum of $1,000 per mile to assist in the construction of the road, and also to issue bonds for the purpose of constructing a bridge over Quick's Run creek. It was further provided by this act that stock in this company should be issued to taxpayers, to the extent of taxes paid, and to the county of Lewis, to the extent of its subscriptions, whenever the taxes or subscriptions paid should amount to $25.

On December 29, 1911, the Chesapeake & Ohio Railway Company, having at that time paid $9,761.97 taxes levied under this act, filed its bill of complaint in the District Court of the United States in and for the Eastern District of Kentucky, to enjoin the collection from it by the turnpike company of any further tax levied upon the company's property in that special taxing district for the construction of this turnpike for the year 1908 and subsequent thereto for the reasons: First, that section 573 of the Kentucky statute passed September 28, 1897, terminated the power of taxation by the turnpike company as originally granted to it in the special act incorporating that company. Second, that the articles of incorporation limited the capital stock of

the company to $20,000; that it is required to issue certificates of stock, not only to the subscribers to its capital stock, but also to the taxpayers to the extent of taxes paid, and to the county of Lewis to the extent of the subscription made by it; that it has already received from subscribers to its capital stock, from taxes paid by the taxpayers owning property within the special taxing district, and from subscriptions made by the county of Lewis, in excess of $20,000; that it has no power to issue stock in excess of that amount, and no right or authority to collect taxes for which it has no power to issue stock to the taxpayers. Third, that the turnpike company had actually collected and received from taxes and subscriptions more than enough money to have enabled it, by proper management, to have constructed the turnpike road described and contemplated in its charter.

The District Court granted a preliminary injunction as prayed for in the bill of complaint. Upon appeal this court (Lykins et al. v. Chesapeake & Ohio Ry. Co., 209 Fed. 573, 126 C. C. A. 395) affirmed the decree of the District Court, granting a temporary injunction, for the reason that, if sufficient funds had been collected by the turnpike company to construct the turnpike, the power of taxation was exhausted, and the plaintiff was entitled to an accounting for the purpose of determining that question. The other questions presented in the bill of complaint were not determined by this court in that appeal.

The cause was remanded to the District Court, and was by that court referred to a special master for such accounting. The master found and reported to the court, among other things, that the turnpike company had received from the various sources enumerated in its charter, including the tax levied upon the property in this special taxing district over $20,000; that the reasonable and probable cost for the construction of defendant's turnpike, if constructed in the years between 1891 to 1908, ought not to have exceeded $2,666.23 per mile. To this report the defendant filed exceptions, which were overruled by the court, the report of the master confirmed, and a decree entered perpetually enjoining the collection of any further taxes.

It is wholly unnecessary to review in detail all the questions presented by this record. The capital stock of this corporation was limited to $20,000. It was required by the act of incorporation to issue stock to the extent of all subscriptions and taxes actually received by it. Necessarily this limitation of its capital stock was and is the limitation of the taxes levied by this act for its benefit. It has no right to receive taxes without issuing an equivalent amount of stock to the taxpayer, and it has no authority to issue stock in excess of the capital stock authorized by its charter.

It is contended, however, upon the part of the appellant, that in 1907 it accepted the provision of the present Constitution of Kentucky whereby it then obtained and now possesses the power to amend its charter and increase its capital stock to an amount equal to the additional amount of taxes needed to build and complete this turnpike. If it be conceded that this turnpike company is a corporation entitled to enlarge its powers by filing an acceptance of the provisions of the Constitution adopted since its incorporation, it would perhaps be a suffi-

cient answer to that contention to say that it has not done this, and therefore it has not in this manner extended, or attempted to extend, or increase the amount of the tax levied for its benefit by the special act granting its charter.

Chapter 32 of the Kentucky Statutes, which chapter contains the general incorporation laws of the state of Kentucky, has been passed since the adoption of the present Constitution, and the powers, privileges, and immunities of all corporations created since that time and those corporations created prior thereto, that have accepted the provisions of this Constitution, must be measured by the terms and provisions of the several sections of that chapter. Section 573 of chapter 32 of the Kentucky Statutes, provides in express terms that:

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897."

[1, 2] The right to receive and expend the tax levied by the act creating this corporation is a power and a privilege, within the meaning of section 573, and is wholly inconsistent with the provisions of chapter 32 "concerning similar corporations." Undoubtedly it was the purpose and intent of the Legislature to repeal by section 573 all such inconsistent powers and privileges that had theretofore been conferred upon private corporations. The power of the Legislature to do this would necessarily depend either upon the provisions of the Constitution of that state or the general laws of that state reserving to it the right to revoke any special grants of power given or granted by the Legislature of the state subsequent to the enactment of such general statute.

[3] On February 14, 1856 (Laws 1855–56, c. 148), the Kentucky General Assembly enacted a general statute providing, among other things:

"That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed."

This special act incorporating this company was passed in contemplation of this general law declaring the public policy of the state in reference to such grants, and the corporation created by this special act must be held to have accepted its charter subject to such reserved power of repeal.

[4] But, if it were conceded that section 573 is wholly inoperative to revoke or repeal this special grant of power, the acceptance by this company in 1907 of the provisions of the Constitution of Kentucky of 1891, did not mean merely that it thereby acquired the power to amend its charter and increase its capital stock. On the contrary, it was also a surrender by it of all its special privileges and immunities. Upon this subject the Kentucky Court of Appeals, in Commonwealth v. Southern Pacific Co., 164 Ky. 818, 176 S. W. 375, said:

"Among the benefits which this chapter affords to old corporations, as a condition for surrender of their special privileges, is the power to amend their

charter and to alter their capital stock, As already stated, the only price the Legislature exacted for these benefits was a formal acceptance of the Constitution, and this, in effect, amounted to a surrender of the old exclusive privileges."

It is therefore wholly unnecessary to consider the question of reasonable cost of the construction of this turnpike, either during the years between 1891 to 1908 or at any other time. This company has exhausted its special power and privilege to receive and expend taxes under its original charter. It cannot, under the present Constitution and Statutes of Kentucky, extend that privilege and power beyond the limits of the original grant. Not only that, but by its acceptance of the present Constitution it surrendered this exclusive privilege of taxation in exchange for the benefits conferred by the new Constitution and the general incorporation laws of the state. It cannot now increase its capital stock under the provisions of the present Constitution and Statutes of Kentucky, and at the same time claim the power of taxation, or rather the power to collect and expend taxes, which is practically equivalent thereto, which it has voluntarily surrendered in exchange for the right to increase its capital stock.

The appellant having voluntarily surrendered the special powers, privileges, and immunities inconsistent with the present Constitution and general incorporation laws of Kentucky, that were conferred upon it by the act creating it, it is wholly unimportant whether section 573 of chapter 32 of the Statutes of that state is effective to revoke or repeal the same.

For the reasons stated, the decree of the District Court is affirmed.

McKINNEY v. BLACK PANTHER OIL & GAS CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. March 25, 1922.)

No. 5574.

1. **Estoppel ⇐68(1)—One appearing in representative capacity estopped to deny appearance as such.**
   One who appeared in an action and was recognized by the court as guardian for an incompetent is estopped to deny or question that he appeared in that capacity.

2. **Insane persons ⇐92—One not entitled to intervene as guardian of incompetent party.**
   In a suit in equity between heirs, claiming the estate of a decedent, *held*, that an application to intervene by one claiming to be guardian of one of the parties, an incompetent, on the ground that another claiming to be her guardian had neglected to protect her rights, and had been a party to a disposal of her estate for a wholly inadequate consideration, was without equity.

3. **Equity ⇐114—Intervention held properly refused after decree.**
   In a suit in equity between persons claiming to be heirs of a deceased Indian, court did not err in refusing to permit one to intervene as guardian of one of the parties, an incompetent, after a decree had been entered, based on a contract or contracts having the approval of the

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

*Rehearing denied June 21, 1922.

Secretary of Interior, Indian officials, and the probate judge; there being a final and complete adjustment and settlement of the claims of the incompetent.

4. Attorney and client ⇐155—Counsel of one claiming to be guardian of incompetent held not entitled to compensation out of fund.

Counsel employed on contingent basis by one claiming to be guardian of incompetent Indian, claiming as heir of an estate of a decedent, *held* not entitled to compensation for services out of the sum adjudged to the incompetent under a settlement contract approved by the Secretary of Interior, the decree providing that such sum be paid to the Superintendent for the Five Civilized Tribes for the use and benefit of such incompetent; property involved being an allotment and proceeds of oil taken therefrom during the litigation.

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

Bill by United States to cancel an allotment to Barney Tholocco, in which the Black Panther Oil & Gas Company and others became interested. From an order denying him the right to intervene as guardian of Martha Jackson, W. E. McKinney appeals. Cause remanded, with directions to modify decree.

See, also, 273 Fed. 113; Saley v. Black Panther Oil & Gas Co., 280 Fed. 496.

Sid White, of Okemah, Okl. (Robert J. White, of Paris, Ark., on the brief), for appellant.

C. Guy Cutlip, of Wewoka, Okl. (R. C. Allen, of Tulsa, Okl., on the brief), for appellee Parmenter, as guardian.

Charles B. Stuart, of Oklahoma City, Okl. (James H. Gordon, of McAlester, Okl., Joseph C. Stone, of Muskogee, Okl., and M. K. Cruce, of Oklahoma City, Okl., on the brief), for all other appellees.

A. J. Ward, of Tulsa, Okl., Creek National Atty., for Martha Jackson.

Charles A. Houts, of St. Louis, Mo. (W. W. Pryor and W. N. Stokes, both of Wewoka, Okl., Charles A. Dickson and George M. Swift, both of Okmulgee, Okl., Conrad H. Syme and J. W. Beller, both of Washington, D. C., and Owen C. Becker, on the brief), pro se.

Before LEWIS, Circuit Judge, and TRIEBER and POLLOCK, District Judges.

LEWIS, Circuit Judge. This is McKinney's appeal brought from an order denying him the right to intervene in the pending cause as guardian of Martha Jackson, a full blood Creek Indian. The litigation to which he sought to become a party in his claimed representative capacity was of long standing, and had its inception in a bill brought by the United States to cancel an allotment made by the Dawes Commission to Barney Tholocco, a citizen by blood of the Creek Tribe. See United States v. Bessie Wildcat et al., 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024. That suit was begun on November 1, 1913. Before that a like suit had been brought by the United States in February, 1911, against the unknown heirs of Tholocco, and in July, 1911, a decree cancelling the allotment, ordering that the 160 acres be restored to the Creek Na-

tion, and that it be sold on advertisement, was entered pro confesso. In June, 1913, J. Coody Johnson, an attorney at law, entered into a written contract with Saber Jackson as guardian of Martha Jackson, by which Jackson employed Johnson to manage, conduct and prosecute a suit in behalf of Martha Jackson as the sole heir of Barney Tholocco for the recovery of the 160-acre allotment. If Johnson should succeed in establishing the sole heirship of Martha, it was agreed that he should have an oil and gas lease on the land; if he failed, he would get nothing for his services. In August, 1913, Jackson as guardian gave to Johnson the oil and gas lease, which was approved by the probate court. Thereafter Johnson succeeded in getting the pro confesso decree set aside; whereupon that suit was voluntarily dismissed and the United States at once filed its bill in this cause and lost its case on final hearing. 244 U. S., supra. Martha Jackson, a minor, and Saber Jackson as her guardian and next friend, were made defendants in this suit. It was charged that she and fifteen others named, who were made defendants, were the sole heirs of Barney Tholocco. J. Coody Johnson and Black Panther Oil & Gas Company were also made defendants. Johnson had assigned his oil and gas lease to that company and was interested in it. Pending the appeal, and before the final determination of the cause against the United States, a large number of other persons had come in by intervention on the claim that they were heirs of Barney Tholocco, and before that question was finally passed on by the trial court there were almost two hundred Indians who set up that relationship. The only issue in the case after the bill was finally dismissed as to the United States, on February 11, 1918, under mandate, was the question as to who was the heir or heirs of Barney Tholocco. Pending the appeal oil and gas were discovered in the vicinity of the tract in litigation. It was realized that the extraction of those minerals from adjoining lands would drain the allotment, and at the request of all parties to the cause the district court appointed a receiver and directed him to give an oil and gas lease on the allotment pending the controversy. With the approval of the court he gave a lease to the Black Panther Oil & Gas Company, which required that company to pay to the receiver one-fourth of the amount or value of the gross production which it might make and obtain under the lease, and as consideration therefor the lessee should have the other three-fourths. The land proved to be of great value in the oil that could be produced from it, the one-fourth of which that had been paid over to the receiver by the lessee at the time the trial court made its final determination of heirship, amounted to more than $1,000,000. In the late winter of 1898 and 1899 smallpox prevailed in the Creek Nation. The Federal authorities provided camps for the detention and treatment of those who were infected. It appears that Barney Tholocco and his entire family were treated in one of these camps. He had two sons and a daughter. His son John was married and had two children. Barney and all of his children, and his two grandchildren, died from the scourge within a short space of time; the only survivor being Annie, wife of his son John. Annie, who died later, married Saber Jackson, and Martha is the only child of that marriage. It was a question as to whether the

other son was married, and if so, did his wife survive him. The dates of the respective deaths of Barney Tholocco and his children and grandchildren were contested questions between those claiming as heirs. It was realized by all who asserted heirship that it was impossible to obtain certain and definite proof of these dates, and there was chance of casting the lines of descent in many different ways. The trial court in its opinion finally brought them down under the proof to five different classes of heirs. Martha admittedly was not of the blood of the common source. Her case at best was a doubtful one, both in fact and law, and the multitude of claimants put upon her and those representing her a great, if not impossible, burden to establish that she was the sole heir.

Saber Jackson, who was the guardian of Martha and named as such in the original bill of complaint, was removed by an order of the probate court in which he was appointed, and Lafayette Walker appointed in his stead. Later Walker was removed and R. W. Parmenter was appointed in his stead, and he, after his appointment and throughout the trial, appeared in the cause as the legal representative of Martha. In July, 1917, Parmenter as guardian, in apparent compliance with the State statutes and permissible Congressional Acts, obtained the proper orders from the probate court of Seminole county, which had appointed him, authorizing him to sell the interest of Martha Jackson in the allotment, and in the accumulated royalties, for $12,000 paid down, plus 25 per cent. of the share of the royalties to which she might finally become entitled by the decree of the court in the pending controversy, subject to certain charges, but in no event to be less than $25,000 additional. The probate court found that the interest of Martha Jackson in the property was indefinite and uncertain, that there were then about seventy-three other persons claiming to be the sole heirs and only owners of the property, that Martha's father was unable to support, maintain and educate her, that she did not have sufficient income for that purpose, and that it was necessary to sell her interest in the allotment and the impounded royalties in order to obtain funds to support, maintain and educate her. The guardian's deed, on the terms stated, was approved by the court, and the $12,000 therefor paid over by Thomas Kelly, the purchaser. At the same time, and as part of the same transaction, Kelly entered into a contract with the guardian, by which he agreed to prosecute the establishment of Martha's claim in the allotment, for the purpose of obtaining for her the largest interest possible as an heir thereto, and in the impounded royalties, and to pay to her 25 per cent. of those royalties to which she might become entitled, either by decree or compromise of the suit, and that the minimum sum so to be paid should not be less than $25,000 net, and to give a bond in the sum of $25,000 for the performance of his agreement. The guardian's deed assigned to Kelly the impounded royalties on the terms noted. One of the objections raised by McKinney is that the probate proceedings just noted were not in compliance with the State statute, which requires that the full consideration on the sale of a minor's real estate shall be paid down. But the accumulated royalties were not real estate; and while the proceedings in probate coupled together the $12,-

000 which was paid down and the contingent amount that Martha would receive out of the impounded royalties, as consideration, yet it is apparent that they were dealt with separately, the $12,000 being taken as consideration for her interest in the land, and the amount which she should receive out of the royalties was secured by Kelly's contract with the guardian and his bond to be given for its performance. The Congressional Act referred to above is the Act of May 27, 1908 (35 Stat. 312), section 9 thereof in part reading:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

Kelly was acting in the purchase for three individuals who were largely interested in the Black Panther company, to-wit: James Brazell, O. O. Owens, and J. Coody Johnson. Lafayette Walker then held the position of U. S. Probate Attorney, and he appealed to the district court of the State from the order in probate directing and approving the sale and conveyance to Kelly. We take it that Walker was the appointee of the secretary of the interior, and made such under Section 6 of the Act of May 27, 1908. It may be that that section contemplated only the interest of allottees (adults or minors), but there is ground to claim that it included also the interest of minor heirs of allottees. The Act makes it the duty of such a representative of the secretary to safeguard those interests and to take such steps, civil or criminal, as will preserve the property. It also requires him to make full and complete reports to the secretary. The jurisdiction of the probate court to deal with the impounded royalties was questioned. This court later, in U. S. v. Hinkle (C. C. A.) 261 Fed. 518, following Parker v. Richard, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. Ed. 954, held that that power rested solely with the secretary of the interior. Pending the appeal taken by Walker, a contract was entered into on May 11, 1918, between Kelly and the Black Panther company, on the one side, and R. W. Parmenter as guardian of Martha Jackson, on the other side, in which the terms of the purchase by Kelly were recited, and it was agreed that if Martha Jackson should be adjudged, either by the court or by settlement between the parties in the cause, to be the owner of the allotment of Barney Tholocco, that there should be paid to her $111,678.74, in addition to the $12,000 which had been paid, and that she should receive an additional sum equal to 25 per cent. of one-eighth of the proceeds derived from the sale of oil and gas from March 31, 1918, up to and including the determination of her interest, said 25 per cent. of said one-eighth to be subject to any claim for expenses in the administration of the receivership and overpaid royalties by the lessee of the receiver that might be allowed by the District Court, and that after her interest in the allotment was finally determined, nothing further should be paid to her. Kelly and the Black Panther company further agreed that they would

"immediately, faithfully and diligently undertake to purchase at their own cost and expense all claims adverse to Martha Jackson, and that all claims

which they may purchase, or have purchased, or contracted to purchase, * * * will be merged with the claim of Martha Jackson, and should any claim which has been, or may be purchased, or contracted to be purchased by them, the said Thomas Kelly and Black Panther Oil & Gas Company will agree in behalf of said claimants to a decree adjudging Martha Jackson the owner of said allotment, or should the decree be entered in favor of any such claimant, it is agreed that such claim or claims shall inure to the benefit of Martha Jackson in determining her rights under the said order, decree and contract of July 9, 1917." (The order, decree and contract approved in probate for the sale of Martha's interest to Kelly.) "Thomas Kelly and Black Panther Oil & Gas Company further agree that as against such claims as they are unable to purchase they will at their own expense diligently and faithfully aid and assist the representatives of Martha Jackson in establishing and maintaining her claim of ownership to said allotment."

This contract was approved by the Creek National Attorney. Before it was executed the superintendent of the Five Civilized Tribes, the Creek National Attorney, and Lafayette Walker, Probate Attorney, joined in a report to the Commissioner of Indian Affairs in which they recommended that the offer in the contract in settlement of Martha Jackson's interests be accepted. The Commissioner assented. The contract required a bond on the part of Kelly and the Black Panther company in the sum of $125,000 for its faithful execution. That bond was given and approved by the Judge of the U. S. District Court in which the controversy was then pending. After this contract was executed the appeal taken by Walker from the order of the probate court to the State district court was dismissed. The Black Panther company at once took up the execution of this contract on its part. The trial judge says in his opinion that the collateral heirs made strenuous efforts to defeat the Jackson claim and that the Black Panther company had obtained conveyance from all but one of them. That company asserts that it paid out more than $400,000 in settlement of claims adverse to the interests of Martha Jackson after entering into the contract, and that it turned to her benefit claims that it had theretofore purchased for large sums. After a lengthy trial final decree was entered June 17, 1919, in which the court found that Martha Jackson was on or before the 9th day of July, 1917 (being the day on which the probate court approved the sale to Kelly), the lawful owner and entitled to the possession of the 160 acres of land included in the Barney Tholocco allotment (subject, however, to the curtesy interest of Saber Jackson), and "to all royalties and income arising from said property and impounded in the hands of the receiver of this court." The decree then finds that on July 9, 1917, a guardian's deed conveying the land to Thomas Kelly was made and approved by the probate court, and that said court had jurisdiction and power to approve the same. The decree recites the contract of May 11, 1918, between Kelly and Black Panther Company of the one part, and R. W. Parmenter as guardian, of the other part, reference to which has already been made. It finds that on the 11th day of January, 1919, Kelly transferred and conveyed the property which he had acquired from Martha Jackson to Brazell, Owens, and J. Coody Johnson, and that they thereupon became the owners of the same and are entitled to the possession thereof, together with all royalties impounded and to be impounded in the hands of the receiver of

the court, subject to the amounts adjudged to be due Martha Jackson. The decree finds that a large number of defendants and interveners, about 180, naming them, have no right, title or interest whatever in and to the property, nor to the moneys and royalties derived from the same; and it thereupon ordered, adjudged and decreed James Brazell, O. O. Owens, and J. Coody Johnson to be the lawful owners and entitled to the possession of the property, together with all the royalties therefrom, and fixed the respective amounts due each, and that they were the owners of and entitled to the possession of all the moneys impounded and to be impounded in the hands of the receiver, subject to the claim of Martha Jackson for the sum of $111,670.74, "plus 25 per cent. of one-eighth of the proceeds derived from said lands between the 31st day of March, 1918, and this date," subject to one-eighth of the expenses and charges later set out in the decree. Other provisions of the decree need not be noted.

Martha Jackson reached her majority on May 10, 1919. On the preceding day the probate court of Seminole county, in a proceeding instituted for that purpose, found that Martha Jackson was an incompetent, being incapable of attending to her property and estate, and appointed R. W. Parmenter, her guardian during her minority, as guardian of both her person and estate, on account of her incompetency.

On June 17, 1919, the day the final decree was entered, and more than a month after the district judge had filed his opinion in the cause, W. E. McKinney presented to the court a petition of intervention by him as guardian of said Martha Jackson, an incompetent. She was at that time, and at all times during the preceding two years, represented in the cause by R. W. Parmenter as her guardian. McKinney in his petition of intervention attacked and challenged about everything that had theretofore been done in the cause on behalf of Martha, as unlawfully done, except the finding of the court that Martha Jackson was the owner of the allotment. He complained of the removal of Saber Jackson as her guardian and the appointment of Walker in his stead, of the removal of Walker and the appointment of Parmenter, of the sale in probate to Kelly as having been unlawfully made, of the contract of May 11, 1918, between Kelly, the Black Panther Oil & Gas Company, and Parmenter as guardian. He charged that the appointment of Parmenter as guardian of Martha Jackson as an incompetent was illegal and void, for reasons which he assigned, and alleged that he, McKinney, was appointed the guardian of Martha Jackson as an incompetent by the county (probate) court of Okfuskee county, Okl., and that that court was the only court that had jurisdiction to make such an appointment, and he asked that he be permitted to intervene as the guardian of Martha and that the court declare that all the transactions of which he complained, and the deeds, contracts and instruments to which he referred, dealing with the interests of Martha, that had theretofore been entered into by Parmenter in her behalf, be adjudged void and of no effect. The Black Panther company filed written objections to McKinney's petition of intervention, and among other things set up as part of it copy of an agreement made between McKinney as guardian of Martha Jackson, incompetent, and George M. Swift, an attorney

at law, on May 19, 1919, which was the day of McKinney's appointment, wherein McKinney purported as guardian of Martha Jackson to employ Swift as his attorney to bring the necessary suits to avoid and set aside the deeds and contracts referred to in McKinney's petition; and in consideration of the services thus to be performed by Swift, McKinney as guardian agreed that Swift should have "one-half of all property or money which may be recovered by him in any suit or suits filed by him, whether received upon any settlement or compromise, or upon judgment," and appointed Swift as his attorney with full power to settle, compromise and receipt for all money or property which might be recovered, either upon settlement or compromise or judgment, and to the royalties; and assigned, conveyed and set over to Swift an undivided half-interest in all sums or property to be recovered by him, and undertook to give to Swift and associate counsel a first lien upon the same. The court denied McKinney's application for leave to intervene. This appeal is from that order. For several reasons we think the court did not err.

[1] 1. On February 25, 1920, Parmenter commenced an original proceeding in the Supreme Court of Oklahoma as guardian for Martha Jackson, against McKinney and the judge of the county court of Okfuskee county, who undertook to make the appointment of McKinney as guardian, wherein he recited the facts touching his appointment as her guardian on May 9, 1919, by the county court of Seminole county, and embodied therein a copy of the entire record in the matter, and prayed that the writ of prohibition might issue commanding the respondents to desist and refrain from further proceedings in the matter of said guardianship of Martha Jackson. The court rendered a unanimous opinion on March 29, 1921, and denied a rehearing on September 13, 1921. In its opinion it held: (a) When the county court of Seminole county took jurisdiction, the same was coextensive with the state, and excluded the jurisdiction of the county court of every other county; (b) that the matter set up in the response, attacking the validity of the order appointing Parmenter, constituted a collateral attack upon the action of the county court of Seminole county and was not permissible; and (c) that the county court of Okfuskee county was without jurisdiction to act in the premises. See 200 Pac. 683. In response to this counsel for McKinney present here certified copies of proceedings later brought in the county court of Seminole county to obtain an order removing Parmenter, and also a petition filed in the Supreme Court January 20, 1922, in which an order recalling the writ of prohibition was prayed, and it is said that the writ will be or has been recalled and that the litigation between McKinney and Parmenter has not reached final determination. But we have no doubt of the soundness of the principles declared by the Oklahoma Supreme Court. Neither of them has a personal interest in this controversy; it was Martha's interest that was being dealt with. Parmenter appeared and was recognized by the court below in a representative capacity only, as Martha's guardian, and is estopped to deny or question that he appeared in that capacity.

[2] 2. This is a suit in equity. To let McKinney in on his claim that Martha had not been represented by anyone who had the right to appear for her, that Parmenter, under the pretense that he was her guardian and had gained the privilege of acting as such, had neglected to protect her rights, had permitted and been a party to a disposal of her estate for a wholly inadequate consideration, and that because thereof she was entitled to have all of those acts and transactions reviewed and adjudged void and to a decree that all of the royalties, subject to her father's curtesy therein, belong to her, is under the facts not asking for equity but inequity, unless coupled therewith there be an offer to compensate Parmenter, J. Coody Johnson, Thomas Kelly, and Black Panther Oil & Gas Company for their services in her behalf, and to pay back or account to them for all sums that had been paid out by them in establishing an interest in her to the allotment. Moreover, considering the interest of Martha at the time these transactions were being carried out, the uncertainty of establishing her claim to an interest in the allotment, the fact that she was without available means to prosecute that claim, and that she was confronted with a multitude in opposition, with many of whom it was necessary to make settlement at great cost in the aggregate for the protection of Martha's interest, convinces us that Parmenter's action was wisely taken and was greatly to the benefit of his ward; and that what he did should be commended and not condemned.

[3] 3. Furthermore, after the decree had been entered negotiations were brought about with the Secretary of the Interior as to the interest of Martha Jackson in the subject of the suit, and especially as to the royalties, which resulted in a contract of date October 22, 1921, as a supplement to the contract of May 11, 1918. The secretary had not expressly approved that contract. The contract of May 11, 1918, as thus supplemented, had the express written approval of the Secretary of the Interior. It modified the prior contract which had been approved by the trial court, by providing that Martha Jackson should receive out of the royalties reserved and in the hands of the receiver $308,000 in addition to the $12,000 that she had received for the sale of the land, and that that sum should be in full satisfaction of all claims whatsoever heretofore asserted and which may hereafter be asserted by or on behalf of the said Martha Jackson against the Black Panther Oil & Gas Company, James Brazell, O. O. Owens and J. Coody Johnson, and that that sum should go to Martha Jackson free from all charges for costs of litigation and administration of the property, and free from any claim which the Black Panther company or other parties to the contract might have or assert. It was further agreed that the contract of May 11, 1918, should in all particulars remain in full force and effect, except as thus modified, and that when it should be approved by the Secretary of the Interior it should be used as a basis for a stipulation between the parties providing for a modification of the decree entered on June 17, 1919. It also received the approval of the Creek National Attorney, the Special Supervisor of Indian Service and of the Probate Judge of Seminole county. This, we think, operated as a final and complete adjustment and settlement of the claims of

Martha Jackson, and that in the settlement she was represented by everyone who had lawful authority to speak and act in her behalf. For these reasons the order denying intervention to McKinney will be affirmed.

[4] After Swift made his contract with McKinney of date May 19, 1919, by which McKinney agreed to allow him one-half of all he might recover or receive in behalf of Martha Jackson, Swift employed Charles A. Houts and several other attorneys, who now appear with him in this cause. They filed briefs for the purpose of sustaining McKinney's appeal, but after that had been done McKinney discharged Swift, and now the counsel whom Swift employed as his associates represent that they gave valuable services in procuring the supplementary contract of October 22, 1921, and they ask that this court fix the value of their services and direct that whatever may be allowed them be paid out of the $308,000, or that in event this court remands the cause to the District Court for the purpose of reforming the decree in accordance with the supplementary contract, that the District Court be directed to fix and provide for the payment of a reasonable amount to them for their services out of said sum. Their employment terminated when Swift was discharged by McKinney, and McKinney, as we view the facts, had no authority to employ counsel and bind the estate of Martha Jackson therefor. But of more importance on the subject are the terms of contract in relation to the payment of that sum to Martha Jackson, which have already been noted, and in addition thereto, the approval of the Secretary of the Interior of that supplementary contract expressly provides that his approval is given "on the condition, however, that the sum of $308,000 provided therein to be paid shall carry with it the interest paid the receiver on said amount from date of approval hereof to date of final distribution, and that said principal sum and interest shall be paid to the superintendent for the Five Civilized Tribes for the use and benefit of Martha Jackson, to be held and controlled by said superintendent as are other restricted individual Indian moneys." The motion of Houts and others for allowance for their services out of said funds must, therefore, be denied.

After McKinney discharged Swift as his counsel he employed other counsel, who have appeared here in his behalf, and they have made several motions in the cause. Those motions will all be denied.

On execution and approval of the contract of October 22, 1921, all parties interested in the cause under the terms of the decree filed a motion in this court asking that this court reform the decree in accordance with the terms of the supplementary contract of October 22, 1921, or that it remand the case to the district court for that purpose. That motion will be sustained and the cause remanded to the District Court with directions that it change and modify the decree so as to comply with the terms of that contract, and in no other respect, and that it direct the immediate payment of said $308,000, and any interest that may have accrued thereon, to the superintendent for the Five Civilized Tribes, in accordance with the approval of said contract by the Secretary of the Interior.

SALEY v. BLACK PANTHER OIL & GAS CO. et

(Circuit Court of Appeals, Eighth Circuit. March 25, 1922.)

No. 5963.

Courts ⇐278—Federal court held to have jurisdiction, after dismissal as to government, the property involved being in hands of receiver.

Where the government filed a bill in federal District Court to cancel an allotment made to an Indian, and on the death of the Indian various persons intervened and claimed to be his heirs, and a receiver was appointed to take care of the property, and thereafter the United States was dismissed from the cause, jurisdiction in the court continued until title to the property and the fund should be finally adjudicated and distributed to those entitled to receive the same, though it thereby determined controversies that arose wholly between citizens of the same state.

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

Bill by the United States to cancel an allotment made to Barney Tholocco, a citizen by blood of the Creek Tribe, in which the Black Panther Oil & Gas Company and another became interested. From an adverse decree, Saley, a Seminole, roll No. 74, appeals. Affirmed.

D. A. Richardson, of Oklahoma City, Okl., Leon C. Phillips, of Okemah, Okl., and E. R. Jones and E. H. Foster, both of Muskogee, Okl., for appellant.

Charles B. Stuart, of Oklahoma City, Okl. (Joseph C. Stone, of Muskogee, Okl., M. K. Cruce, of Oklahoma City, Okl., C. Guy Cutlip, of Wewoka, Okl., and A. J. Ward, of Tulsa, Okl., Creek National Atty., on the brief), for appellees.

Sid White, of Okemah, Okl., filed motion to suppress parts of brief of appellees.

Before LEWIS, Circuit Judge, and TRIEBER and POLLOCK, District Judges.

LEWIS, Circuit Judge. Appellant was permitted to intervene as a party in this cause after trial and decree between the original defendants and other interveners. The decree as between them was entered June 17, 1919, after a lengthy trial which began in the preceding December. The issues and nature of the controversy may be obtained from the opinion this day rendered in McKinney v. Black Panther Oil & Gas Co. et al., 280 Fed. 486, and need not be restated here. Appellant's motion asking that she be permitted to come in was not filed and presented until May, 1920. In that motion, which was sustained, and in appellant's petition thereafter filed, on which issue was joined with her, she alleged that she is an Indian of half Creek and half Seminole blood and is enrolled as Seminole No. 74, that she asserts her claim to the lands (Barney Tholocco's allotment) and moneys in the cause now in the hands of the receiver appointed by the court in April, 1914, as the only child and sole heir of Barney Tholocco, born of his marriage with Keniah, a Seminole woman, that the title descend-

ed to her in accordance with the laws of the Creek Nation of 1880, that the decree adjudging Martha Jackson as the sole heir of Barney Tholocco had been obtained through a fraudulent conspiracy, that she had been informed that her enrollment as a Seminole prevented her inheritance from her father, who was a citizen of the Creek Nation, and that she did not know until it was too late to intervene and participate in the trial that the right to inherit from her father was not restricted to members of his tribe, and that she had no notice of the hearing and no opportunity to assert her claim at that time and to controvert the claim of Martha Jackson as his sole heir; and she prayed that she be adjudged to be the sole heir-at-law of Barney Tholocco and as such owner of the 160-acre allotment and all of the rents, royalties and profits arising therefrom and impounded in the hands of the receiver of the court, and that the claims of Martha Jackson and the other defendants be decreed to be clouds upon her title and removed as such. After a lengthy trial her petition was dismissed, and she brings this appeal.

Appellant moves here for a reversal, and that the cause be remanded, on the ground that the district court was without jurisdiction in the cause, on the claim that when the United States, the original and only plaintiffs, were dismissed from the cause (United States v. Wildcat, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024), the jurisdiction of the trial court was at an end, for the reason that there was no diversity of citizenship between defendants and interveners, nor among themselves, nor a federal question involved. But it appears that when Saley came in, all of the property to which she made claim, the allotment and the impounded royalties, was held by the court in receivership and had been so held continuously by consent of all the parties since April, 1914. It further appears that final decree against the United States was not entered in the cause until February 11, 1918. There was conceded jurisdiction up to that time, and prior to that time many interveners had been let in, and they, with the original defendants, were engaged among themselves in a common controversy, each seeking to have the court adjudge that he was entitled to the allotment and the impounded royalties. The property and fund could not be taken out of the court and from its possession except by those who were entitled thereto, and in consequence it was the duty of the court to adjudicate these conflicting interests before it could discharge its lawful duty in delivering the property over to the true heir or heirs of Barney Tholocco. We have no doubt that inasmuch as there was original jurisdiction over the cause, the property, the claims of the original defendants, and of the claims of the interveners who thereafter came in, that jurisdiction continued until title to the property and the fund should be finally adjudicated and distributed to those who might be adjudged entitled to receive the same. Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 156 C. C. A. 448; McDougal v. Black Panther Oil & Gas Co. (C. C. A.) 273 Fed. 113; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Morgan's Co. v. Texas Central Railway, 137 U. S. 171, 201, 11 Sup. Ct. 61, 34 L. Ed. 625; Carey et al. v. Houston & T. C. Ry. Co. (C. C.)

52 Fed. 671; Farmers' Loan & Trust Co. v. Houston T. C. Ry. Co. (C. C.) 44 Fed. 115. After the original plaintiffs were out of the cause under the final decree of February 11, 1918, the court had the authority and power to make all orders and decrees with respect to the claims and rights preferred against the property in its hands, both of the original defendants and of the interveners, and between themselves, even though it thereby determined controversies that arose wholly between citizens of the same state. This authority is usually termed the incidental or ancillary jurisdiction of the court.

The defendants beneficially interested in the decree that had been rendered in June, 1919, filed an answer to Saley's petition, denying that she was the daughter of or an heir of Barney Tholocco, alleging that she was estopped by her laches from coming into the cause at that time, that she had long had knowledge of its pendency, that the trial had been long continued and at great cost, that many witnesses had been brought from a distance, that Saley, in the settlement of the estate of one Chepan Tahladege, also known as Chepan Tholocco, a Creek citizen, had made claim under oath to a part of his estate as his daughter, and prayed that the question as to whether Saley was the daughter of Barney Tholocco be tried first and determined before the prior decree should be opened. The testimony taken is voluminous. The district judge found that Saley is not the daughter of Barney Tholocco, but that she is in fact the daughter of Chepan Tahladege, that her claim is fraudulent and that she has no right, title or interest in the property involved in the action. A decree was accordingly entered by which she is forever barred and enjoined from asserting any right or title thereto. We have read the testimony, and agree fully with the conclusions of the district judge. It establishes beyond question, in our minds, that Saley was the daughter of Chepan Tahladege, sometimes called Chepan Tholocco, and his wife Keniah. Keniah was never married to Barney Tholocco and never lived with him as his wife. Many Indians who were acquainted with the two men so testified.

It is assigned as error that the court overruled in part a motion to strike parts of the answer, and that the court admitted incompetent evidence. Conceding the objections well taken, it appears to us to be wholly immaterial, and does not prejudicially affect the rights of the appellant on the one issue in the case.

Counsel who were not in the trial and who now claim to represent Saber Jackson, Martha Jackson, and one W. E. McKinney, have filed here a motion to strike the name of the Creek National Attorney from the brief filed in behalf of the defendants, and to suppress parts of that brief which speak in the interest of their alleged clients. We need go no further than to say that their motion is denied.

The judgment is affirmed.

MURRAY CO. v. MORGAN et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1911.

1. Pleading ⊂⊃92—Defense of breach of warranty and counterclaim for deceit may be joined.

When growing out of the same transaction, deceit and breach of warranty are not inconsistent, so that defendant, in an action on notes given for the purchase price of machinery, can join with his defense of breach of warranty a counterclaim for deceit.

2. Sales ⊂⊃285(3)—Notice machine did not perform well is sufficient notice of breach of warranty.

Where the warranty of a machine was in general terms, that it was made of good material and would perform well if properly operated, a notice that machine did not perform well was sufficient compliance with the requirement that the notice state wherein it failed to conform to the warranty.

3. Sales ⊂⊃288(2)—Provision that use for 10 days without notice of defects shall be conclusive evidence of fulfillment of warranty is valid.

In a contract for the sale of machine with warranty of satisfactory performance, a provision that use for any 10 days without notice of failure to conform to warranty shall be conclusive evidence of the fulfillment of the warranty was valid.

4. Sales ⊂⊃285(3)—After one notice of breach of warranty, buyer may wait reasonable time for repairs.

Where buyer of machine gave notice to seller, within 10 days after it was put into operation, that it did not conform to the warranty, the buyer could wait a reasonable time after giving such notice for the seller to make proper adjustments in the machine to remedy the difficulty, as it had a right to do under the contract, and the operation of the machine during that time without giving additional notices did not defeat the buyer's right to claim breach of warranty under the clause that operation of the machine for any 10 days without notice should be conclusive evidence of fulfillment of the warranty.

5. Sales ⊂⊃285(4)—Provision that assistance by seller does not excuse failure to give notice does not apply to attempt to remedy defects under warranty.

A provision that, if the seller shall, at the request of the buyer, render assistance in operating the machinery, that fact shall not excuse the failure of the buyer to perform the conditions of the warranty, applies to a voluntary assistance on the part of the seller, and does not prevent the attempt by the seller to make the machine conform to the warranty, after complaint by the buyer, from being a waiver of defects in the notice of breach of warranty.

6. Sales ⊂⊃441(1)—Evidence held to warrant inference of sufficient notice of breach of warranty or of waiver thereof.

Evidence that, the day after the buyers put the machine in operation, they telegraphed to the seller to send an engineman at once, to which the seller replied by promising to send a man, who thereafter came, with subsequent correspondence between the parties, and later attempts to make the machine satisfactory, *held* to warrant the jury in finding that the telegram and the subsequent correspondence were sufficient notice of breach of warranty, or that the requirement for such notice had been waived by the seller.

7. Sales ⊂⊃441(4)—Evidence that cotton gin, which did not produce marketable product, was worthless, is not incredible.

Testimony by defendants, who had considerable experience in ginning cotton, after describing the results secured by the use of the machine sold

by plaintiff, that the gins and feeders were worthless, is not incredible, since a machine which fails to produce a standard product may be not only worthless, but a great detriment, to one engaged in the business of ginning for the public.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry H. Watkins, Judge.

Action by the Murray Company against S. A. Morgan and another, to recover the amount of four notes given for the purchase price of machinery, in which the defendants alleged a breach of warranty and filed a counterclaim for deceit. Judgment for the plaintiff for a part only of the amount claimed, and plaintiff brings error. Affirmed.

Ernest F. Cochran, of Anderson S. C. (W. D. Ellis, Jr., of Atlanta, Ga., and J. W. Quattlebaum, of Anderson S. C., on the brief), for plaintiff in error.

T. Frank Watkins, of Anderson, S. C. (Samuel L. Prince, of Anderson, S. C., on the brief), for defendants in error.

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge.

WOODS, Circuit Judge. In this action on four notes, aggregating $10,297.97 and interest, the validity of which was admitted, the jury found a verdict for only $4,985.18. The notes were given for balance of the purchase price of machinery for a ginning plant—two for the balance on the engine and two for the balance on the gins and attachments. Separate contracts were made for the engine and the gins, but they were practically cotemporaneous and one transaction. The warranty, identical in both papers, was as follows:

"Said machinery is warranted to be of good material, and to perform well, if properly operated by competent persons. Upon starting, if the purchaser at any time within 10 days is unable to make same operate well, telegraph or written notice stating wherein it fails to conform to the warranty is to be given by the purchaser to the Murray Company, at Atlanta, Ga. (and not verbally to any of its traveling men), and reasonable time shall be given the Murray Company to remedy the defect, the purchaser rendering all necessary and friendly assistance; and, in case trouble be caused from a clearly defined original defect in the machinery itself, the Murray Company reserves the right to replace any defective part or parts, without charge, but such defective part or parts shall not condemn the machine to which it belongs. If on trial the machine cannot be made to fulfill the warranty, and the fault is in the machine itself, the amount of the purchase price of same is to be credited on the notes pro rata, or the money paid thereon refunded pro rata; the purchaser in such case not to have nor make any claim for damages of any nature or character whatsoever against the Murray Company by reason of the failure of said machine to fulfill the warranty, but the pro rata diminution of purchase price aforesaid to be the sole and only element of damage for breach of this warranty. Failure of any article named herein to comply with this aforesaid warranty shall in no way affect this contract, nor the notes and chattel mortgage and trust deed given in accordance therewith as to the other articles named therein. Failure to make such trial, or to give such notice, shall be conclusive evidence of the fulfillment of the warranty. If the Murray Company shall, at the request of the purchaser, render assistance of any kind in operating said machine, or any part thereof, or in remedying any defects at any time, said assistance shall in no case be deemed an acknowledgment on its part of a breach by it of this warranty, or a waiver

of, or excuse for, any failure of the purchaser to fully keep and perform the conditions of this warranty."

The defendants set up as a defense breach of warranty, and as a counterclaim alleged false and fraudulent representation:

"That the Murray Company had installed in Anderson county, S. C., and in neighboring counties a number of ginnery systems or outfits similar to that offered defendants and that all of said outfits were performing well, had always performed well and were giving perfect satisfaction to the purchasers."

[1] We think the demurrer to the counterclaim was properly overruled. When growing out of the same transaction, deceit and breach of warranty are not inconsistent causes of action, and may be joined. The gist of the action in such case is usually the breach of the warranty. But obviously cases may arise where the damages from the deceit may be greater than from the breach of the express warranty. Shippen v. Bowen, 122 U. S. 575, 578, 7 Sup. Ct. 1283, 30 L. Ed. 1172; Schuchardt v. Allen, 1 Wall. 359, 368, 17 L. Ed. 642; Kimber v. Young, 137 Fed. 744, 747, 70 C. C. A. 178. It follows that the defendants may join the defense of breach of warranty with counterclaim for deceit. Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; Railroad v. Smith, 21 Wall. 261, 22 L. Ed. 513. Since the counterclaim for deceit was before the court testimony in support of it was properly admitted.

But the defendants did not claim rescission, and the alleged deceit as to the unsatisfactory work of other like machinery was of no consequence if the machinery sold the defendants met the warranty. Under the evidence the counterclaim for deceit faded away, leaving as the material issue the claim for damages for breach of warranty. The District Judge, therefore, properly limited the defendants' recovery to damages for breach of the warranty.

The plaintiff asked for a directed verdict for the full amount claimed because the defendants had not met the two conditions required by the contract to make the warranty available: First, they had not in the notices given stated wherein the machinery failed to conform to the warranty; and, second, they had not given notice of the defect alleged every 10 days while the machinery was in use.

[2] The machinery was warranted in general terms "to be of good material and to perform well if properly operated by competent persons." The contract required the notice of the purchaser to state "wherein it fails to conform to the warranty." Notice that the machinery did not perform well was notice wherein it did not conform to the warranty that it would perform well. The contract did not require that the purchaser should ascertain and notify the seller why the machinery did not conform to the warranty. The case in this respect is distinguished from the cases cited by plaintiff's counsel, holding that where the contract required notice "wherein the machine was faulty," or "of the specific defect," or like requirement, a notice that the machinery was not working satisfactorily was insufficient. 50 L. R. A. (N. S.) note, p. 788.

[3, 4] The contract provision, that "use for any 10 days without notice shall be conclusive evidence of the fulfillment of the warranty,"

was valid. Case Threshing Machine Co. v. Dyches, 108 S. C. 412, 418, 94 S. E. 1051; International Harvester Co. v. Law, 105 S. C. 520, 90 S. E. 186. But this does not mean that, after one notice is given by the purchaser and acknowledged by the seller, the purchaser must continue to bombard the seller with a new notice to the same effect every 10 days. Construing this provision in connection with that which allows the seller reasonable time after notice to remedy the defect, the fair construction is that the purchaser cannot use the machinery any 10 days without giving notice that it fails to perform well; but after he has given the notice the seller, as the contract provides, has a reasonable time to respond, and no further notice is required within that time. Surely no additional notice is required after the seller has responded to the notice and undertaken to make good the warranty in compliance with the purchaser's notice or demand for his legal right under the contract.

[5] But it is said that, under another provision of the warranty, nothing that the seller does in response to the notice can relieve the purchasers from the obligation to repeat the notice every 10 days, although the seller may be engaged at the very time in the effort to make the machinery perform well in response to a notice already given. The provision relied on is the following:

"If the Murray Company shall, at the request of the purchaser, render assistance of any kind in operating said machinery, or any part thereof, or in remedying any defects at any time, said assistance shall in no case be deemed an acknowledgment on its part of a breach by it of the warranty, or a waiver of, or excuse for, any failure of the purchaser to fully keep and perform the conditions of this warranty."

The mere assistance "in operating said machinery, or any part thereof, or in remedying any defects at any time" "at the request of the purchaser," here mentioned, means a voluntary act of assistance on the part of the seller, and is a very different thing from the legal obligation assumed in the warranty by the seller to itself remedy the defect on the specific notice required of the purchaser. Observing this distinction, it seems clear that although the mere gratuitous accommodation of assistance to the seller at his request in operating the machine or remedying a defect does not constitute waiver of the written notice required to bring into existence the legal obligation of the seller to remedy any defect, yet the undertaking by the seller to discharge its own express legal obligation—not to assist the purchaser but to itself remedy the defect—in response to an irregular or insufficient notice is evidence of waiver of the irregularity or insufficiency of the notice. Lorenz v. Hart-Parr Co., 146 Wis. 261, 131 N. W. 446, 50 L. R. A. (N. S.) 796, note 797. In the light of this construction of the contract, defendants' evidence below recited justified the inference that the purchasers had given the required notice of the breach of the warranty, or, if they had not, that the seller had waived the insufficiency.

[6] Defendants began to run the machinery on October 1, 1920. On October 2d they telegraphed the plaintiff, "Send engine man at once." The jury might well find that the plaintiff understood from this that the engine was not "performing well." Plaintiff's answer implied accept-

ance of the notice as sufficient and a promise to remedy the defect. On October 7th the defendants wrote a letter saying they were having quite a lot of trouble, complaining of the belts, and stating that if the gins could not be made to work satisfactorily they did not want them. On the 8th plaintiff telegraphed that two belts had been sent. About the same time the agent of plaintiff who sold the machinery appeared at defendants' ginnery, and, according to the testimony of the defendant Morgan, said he would wire the company and have a good gin man to come and straighten the defendants out. On the 27th Jessen and Woodward came. The jury might well infer that their coming was in response to the telegram of October 2d and the letter of October 7th, and in pursuance of plaintiff's answers to the telegram and letter. Plaintiff was by the contract entitled to a reasonable time to respond to these notices before another 10 days began to run. The jury might well infer that the defendants were justified in waiting on the plaintiff until October 27th.

Woodward did not leave until October 29th, and a new period of 10 days would not commence until that time. After Woodward left. defendants operated the machinery until November 3d, less than 10 days from October 29th, and then wrote another complaint of failure of the gins to perform well, and of consumption of too much fuel by the engines. Two days afterwards, November 5th, plaintiff wrote promising to send an expert oil man to make necessary adjustments. Again another 10 days did not begin to run until another agent of plaintiff, Millizor, came on November 23d. After that defendants ran the plant only on December 1st, 2d, 3d, 4th, 10th, 17th, 18th, 24th, 30th, and 31st. But on the 31st—before the expiration of the tenth day of use from the time Millizor left—Delk, another agent sent by plaintiff, came to remedy the defects. December 31st and January 1st could not be counted against the defendants because the plaintiff, through Delk, was then participating in running the machinery and trying to put it in order.

This summary of the testimony shows that the jury might well infer: First, that the notices were not sent by defendants or received by plaintiff as mere requests for assistance, but were in the nature of demands that the Murray Company should comply with its legal obligation to make the machinery perform well; second, that the defendants did comply with the requirement that they should not use the machine for any 10 days without notice to the plaintiff within the meaning of the contract; and, third, that even if the notices were not in time, or were irregular from any other cause, the plaintiff waived the irregularities by acting upon the notices. It follows that the District Judge was right in his construction of the contract, and in refusing to direct a verdict for lack of notice by the defendants.

[7] The testimony as to damages in all cases like this must of necessity lack accuracy. But both defendants, having considerable experience with ginning, after describing the results to the cotton of the use of the gins, testified the gins and feeders were worthless. We cannot say this was incredible, for a gin that does not gin clean, and in other respects fails to produce a standard result, may be not only

worthless, but actually a great detriment, to one engaged in the business of ginning for the public.

We have discussed all of the 44 assignments that seem to be of consequence, and find no error.

Affirmed.

MURRAY CO. v. ASHLEY.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1912.

1. **Sales ⟸285(3)—Notice of breach of warranty held sufficient.**
   Where the machine sold was warranted to perform well, and the buyer was required to give notice stating wherein the machine failed to conform to the warranty, a telegram, requesting the seller to send a man to look over the engine and gin, which were not satisfactory now, was sufficient notice.

2. **Sales ⟸286—Seller cannot complain buyer waited unreasonable time for seller's performance of promise.**
   Where the sale contract required the buyer to give the seller an opportunity to remove defects, so as to make the machine conform to the warranty, and the seller, after notice from the buyer the machine was not satisfactory, promised to send a man to adjust it, the seller cannot complain that the buyer thereafter waited an unreasonable time for the seller to perform his promise.

3. **Sales ⟸285(4)—Statement seller would do nothing more waives requirement of future notice of breach of warranty.**
   A statement by the seller, after several attempts to make the machine conform to warranty, that it would do nothing further, was a waiver of future notices that the machine did not conform to warranty, required by the contract.

4. **Sales ⟸445(5)—Evidence held to take to the jury questions whether notice of breach was given or was waived.**
   In action on notes given for the purchase price of machines, evidence *held* sufficient to take to the jury the issues whether the buyer had given notice of the breach of warranty, as required by the contract, and whether the seller had waived such notice.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Henry H. Watkins, Judge.

Action by the Murray Company against Joe M. H. Ashley. Judgment for the plaintiff for part only of amount sued for, and plaintiff brings error. Affirmed.

Ernest F. Cochran, of Anderson, S. C. (W. D. Ellis, Jr., of Atlanta, Ga., and J. W. Quattlebaum, of Anderson, S. C., on the brief), for plaintiff in error.

T. Frank Watkins, of Anderson, S. C. (G. B. Greene and C. B. Earle, both of Anderson, S. C., on the brief), for defendant in error.

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge.

WOODS, Circuit Judge. In this action on promissory notes given for the balance of purchase money for machinery, the legal questions

are the same as in Murray Co. v. S. A. Morgan and W. L. Bond, 280 Fed. 499, this day decided. The contracts are identical. On the issue of failure to give the notice required to make the warranty effective, the facts are somewhat different.

[1] The defendant began to use the machinery on October 8th. On October 13th—less than 10 days thereafter—the defendant sent this telegram to the plaintiff:

"Send a man to look over engine and gin. Not satisfactory now."

This was sufficient notice of failure to comply with the general warranty that the machinery should "perform well," and was a statement "wherein it failed to conform to the warranty." The plaintiff answered the telegram on the same day:

"Have wired Woodward, care L. H. Bagwell Piedmont see you at once."

Woodward arrived on October 17th and worked on the machinery until October 27th. It is apparent that the 10 days period did not run against the defendant after the plaintiff answered his telegram until October 27th, when its work was completed.

[2] The plaintiff went to Atlanta on November 1st, less than 10 days after Woodward had completed his work, and complained in person to one Vass in the company's office of defects in the machinery. Vass promised to send a man to repair the defects complained of, but this promise was not performed. The acceptance by the plaintiff at its general office of this verbal complaint and the verbal promise of Vass, apparently acting for plaintiff, to act on it, was evidence of waiver of the requirement that complaint should be made by telegram or letter. The 10 days did not again begin to run against the defendant until the plaintiff had had a reasonable time to perform this promise. It did not lie in the mouth of the plaintiff to complain that the defendant waited an unreasonable time for it to comply with its promise.

It appears from defendant's testimony that he did nothing more until November 29th, when he again complained in person at the Atlanta office. It was a question for the jury to determine whether the defendant had waited an unreasonable time for the plaintiff to respond without making further complaint.

[3] When, on November 29th, the plaintiff in its office in Atlanta told the defendant that it would do nothing further, this was in effect a notice to the defendant that he need make no further complaints, that they would be disregarded, and put an end to the condition that running the machinery for 10 days without complaint would work a forfeiture of his rights under the warranty.

[4] This evidence makes the questions for the jury, whether the defendant had complied with the contract in giving notices and using the machinery, or, if not, whether plaintiff had waived the requirement as to notice and use. The District Judge was correct, therefore, in the submission of these questions to the jury.

Affirmed.

KIRK et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1922.)

No. 5612.

1. Criminal law ⟸1169(1)—Admission of immaterial evidence held harmless.
In prosecution for violation of regulations concerning the distillation of liquors prior to repeal thereof by National Prohibition Act, tit. 2, § 35, testimony as to execution of defendants' appearance bonds *held* harmless, where not followed by other evidence; testimony therefore becoming immaterial.

2. Witnesses ⟸266—Denial of full and fair cross-examination is error.
Denial of a full and fair cross-examination is error.

3. Criminal law ⟸1186(4)—Examination of witnesses and interference in cross-examination not ground for reversal where not prejudicing substantial rights.
The examination of witnesses by the trial judge and interference in the cross-examination of witnesses *held* not ground for reversal under Judicial Code, § 269 (Comp. St. Ann. Supp. 1919, § 1246), where the substantial rights of the defendant were not infringed.

4. Internal revenue ⟸47—Failure to submit theory of defense held ground for reversal.
In prosecution for violation of regulations concerning the distillation of liquors prior to repeal by National Prohibition Act, tit. 2, § 35, in which the defense claimed that the circumstantial indicia on the land on which it was claimed that distilling operations had been conducted arose from domestic and stock-feeding purposes, the failure to submit such theory *held* ground for reversal.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Robert L. Williams, Judge.

W. M. Kirk and others were convicted of violating regulations concerning the distillation of liquors, and they bring error. Reversed, and new trial granted.

S. M. Rutherford, of Muskogee, Okl., for plaintiffs in error.

John T. Harley, Asst. U. S. Atty., of Coalgate, Okl. (C. W. Miller, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK, Circuit Judge, and COTTERAL and JOHNSON, District Judges.

COTTERAL, District Judge. The plaintiffs in error were convicted of violating regulations concerning the distillation of liquors, as imposed by the internal revenue statutes, which were in force in September, 1919, when the offenses were laid and to which the evidence conformed, and were not repealed by the National Prohibition Act until the following January. Section 35, tit. 2, 41 Stat. 305, 317. Ketchum v. U. S. (C. C. A.) 270 Fed. 416; U. S. v. Yuginovich, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043 (June 1, 1921).

As there was no claim of compliance with the regulations, the issue presented to the jury was therefore whether the defendants had engaged in the production of whisky. Four officers testified to certain discoveries on the land of defendant Craig, indicative of recent distilling operations. The indictment was dismissed as to Hammons, who testi-

fied for the government to an arrangement with the defendants on trial for making the whisky, the execution of the enterprise, and the subsequent dismantling and secretion of the apparatus employed. He appears to have made a confession and a retraction, and at the time of trial was a state convict. There was denial by the defendants of the whisky making and explanation that the articles found on the land had been used for innocent and legitimate purposes.

The grounds assigned as a basis for reversal are: (1) The admission of incompetent evidence; (2) undue interference by the trial judge with the examination of witnesses; and (3) error in giving and refusing instructions to the jury.

[1] 1. To sustain the first assignment, portions of the testimony are set out, comprising more than five pages of the record. The testimony of the officers is assailed as consisting of speculation and deductions, for example, their reference to the discovery of a "furnace"; but this was not denied, and the defendants claimed it was "the wash place of the family." The physical facts were given, and among them a showing of rocks torn down and of fire, and they were sufficiently descriptive to leave the matter fully to the jury. The objection to kindred subjects was purely technical and without merit. The commissioner testified to the execution of defendant's appearance bonds, which was not followed up by other evidence, and thus became immaterial; but it was in no way harmful to the defendants. The defense was not permitted to introduce the signature of Hammons upon his bond, without the entire instrument, for comparison with that on the retraction, but this ruling was later corrected by the court. These instances are illustrative. Chiefly, the other objections have not been discussed, and no error appears in disposing of them.

[2, 3] 2. The next specification is that the trial judge took over the examination of witnesses for the government and by interference prevented the cross-examination of witnesses. The record discloses that he interrogated the witnesses to an unusual extent. But his authority in this respect when exercised in a non-prejudicial manner, and subject to the same exceptions as if conducted by counsel, cannot be questioned. 38 Cyc. 1316; 26 R. C. L. 1925, 1926. We have been unable to discover any resulting prejudice to the defendants from the inquiries made in this case. Cases are relied upon wherein the fair limitations of inquiry were exceeded, but we find them either inapplicable, or not authoritative in the federal courts. One of those cited is Johnson v. U. S. (C. C. A.) 270 Fed. 168, wherein it was said that the opinion of the trial judge was concededly indicated by his inquiries, and this alone "would not be enought to hold the trial unfair, because prejudicial to the defendants"; but it was followed by a one-sided charge to the jury. There were interruptions of counsel while cross-examining witnesses. Undoubtedly, a denial of a full and fair cross-examination is error. Harrold v. Oklahoma Territory, 169 Fed. 47, 94 C. C. A. 415, 17 Ann. Cas. 868. But for the most part it seems to have been eventually accorded, or at least not curtailed, beyond the discretion of the court. Id. We are not persuaded that the substantial rights of the defendants were infringed by the court either in conducting or restrict-

ing the examination of the witnesses, and this assignment of error cannot be sustained. Section 269, Judicial Code (Comp. St. Ann. Supp. 1919, § 1246).

3. There has been no discussion of the instructions which were refused, and we pass them without notice. The complaint of those given is that they did not fairly state the defense, were argumentative, and destructive of the defendants' testimony. The general rules of law applicable to the case were elaborately and accurately defined in the charge, and various objections have been argued, which are not well taken. But we are convinced that error intervened in material respects. The charge is, of course, not open to criticism, because it reflected the opinion of the court as to the facts, as this was permissible, provided it was made clear that the jury must find them, which was done. There was no direct opinion, but it was clearly inferable from the charge upon the evidence, which was largely in the form of questions. We can only regard the charge in that connection as an argumentative presentation from the standpoint of the prosecution, well calculated to influence a result adverse to the defendants, and as practically ignoring the defense, except in the way of denials.

We think the exception by counsel "to the court failing to state clearly the theory of the defense" should be upheld. Oppenheim v. U. S., 241 Fed. 625, 154 C. C. A. 383. It was essential for the government to establish that distilling operations had been conducted on the land of Craig. The charge was persuasive that such was the fact. But there was omission to directly or substantially submit the claim of the defense that the circumstantial indicia on the land arose from domestic and stock-feeding purposes. The defendants were entitled to this, as it was a specific question upon the testimony for decision by the jury. Northern Cent. Coal Co. v. Hughes, 224 Fed. 57, 139 C. C. A. 619.

For these reasons, we conclude the judgment as to each of them must be reversed, and a new trial granted.

It is so ordered.

HOOK, Circuit Judge, presided at the hearing of this case, but died before a final conclusion was reached and this opinion was prepared.

W. E. HEYSER LUMBER CO. v. MAYTON LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1924.

Sales ⊜101, 174—Default of buyer excuses nondelivery; right to rescind not waived, as to future installments, by acceptance of past-due installments.

A buyer of lumber to be delivered in installments, each installment to be paid for within 30 days after shipment, which was in default for several payments, cannot maintain an action against the seller for breach of the contract in refusing to make further shipments, nor was acceptance of payment by the seller thereafter a waiver of the right to rescind the contract as to future deliveries.

⊜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 West Virginia, at Parkersburg; William E. Baker, Judge.

Action at law by the W. E. Heyser Lumber Company against the Mayton Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Francis P. Moats, of Parkersburg, W. Va. (Geo. W. Johnson, of Parkersburg, W. Va., on the brief), for plaintiff in error.

J. C. McWhorter, of Buckhannon, W. Va. (Young & McWhorter, of Buckhannon, W. Va., on the brief), for defendant in error.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

KNAPP, Circuit Judge. In the court below the W. E. Heyser Lumber Company, plaintiff in error, was plaintiff, and the Mayton Lumber Company defendant; they will be so designated in this opinion. The action is for breach of contract, and the material facts appear to be these:

Early in June, 1916, defendant sold to plaintiff 300,000 feet of 6/4 hard maple, to be delivered on board cars at Pickens, W. Va., and shipped as ordered by plaintiff when 60 to 90 days dry. Defendant asserts, and the trial court held, that this contract was rescinded or superseded by a second contract, made in the latter part of August, by which defendant sold to plaintiff 500,000 feet of 8/4 hard maple and five cars of soft maple, at specified prices, and with the same conditions respecting deliveries and shipments as provided in the first contract. It is enough to say here that the cancellation of the June contract, or its merger in the August agreement, was clearly established by the testimony, and the latter therefore presents the only question that needs to be considered.

Plaintiff admits, or at least does not deny, that under the August contract deliveries were promptly made from time to time as ordered until a total of about 209,000 feet of hard maple had been shipped, of which the last carload was delivered on the 10th of November; that payment was due in each case "in 30 days after the date of the invoice"; that payment for the November shipment and previous shipments became due on or before the 10th of December; that an aggregate of more than $8,300 was then due and remained unpaid; that plaintiff also owed at that time a past-due debt of some $3,000 to the Sun Lumber Company, an associate concern having the same president and practically the same ownership as defendant; and that because of this default of payment defendant refused to make further deliveries.

Without adding to this review of the testimony we need only say that careful examination confirms the summary of the case by the learned trial judge, as follows:

"In this case it is undisputed that the plaintiff company did receive and accept several installments of the lumber under the 500,000-foot 8/4 contract; that it did not pay therefor as required by the terms of the contract; that it finally did settle the past-due indebtedness, but before doing so sought to make the continuation of the contract a condition precedent to the payment thereof; but defendant did not agree to such condition, and finally refused

to continue the contract or make further shipments and deliveries thereunder."

And the following was stated to be the applicable rule of law:

"A buyer of goods under a commercial contract to pay for each successive installment within a fixed period after delivery, who suffers one or more of such payments to be in default, and fails to respond to repeated requests and demands on the part of the seller to make such payments, cannot maintain an action against the seller for an alleged breach of the contract in failing to make future deliveries. The buyer in such case is in default, and the right of the seller to rescind the contract is by law held to be undeniable. The legal obligation upon the buyer is to pay such debt due for goods so delivered and accepted by him upon demand and without condition attached to such payment. In such case the seller may accept payment of overdue payments for the delivered installments without being held by law to have waived his right to cancel the contract for future deliveries. The past-due installments are due him for the value therefrom received by the buyer, and the seller can only be held to have waived his right to cancel by an express agreement upon his part to do so."

A verdict for defendant was accordingly directed, and the case comes here on writ of error.

We are of opinion that the ruling just quoted is sustained by the decided weight of modern authority. A few citations will suffice. In R. C. L. § 559, where numerous decisions are collated, the governing principle is stated as follows:

"Where a contract of sale provides for deliveries in installments and the payment of the price of each installment as delivered, or within a stated time thereafter, and before the delivery of the following installments is due default in payment is made, the seller may rescind the contract."

In Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045, the court says:

"A buyer of goods under a contract to pay for each successive installment within 60 days after delivery, who fails repeatedly to make such payments within the required time, cannot maintain an action against the seller for an alleged breach of the contract in failing to make further deliveries. The default of the buyer gives the seller the right to rescind the contract."

In the syllabus of Hull Coal & Coke Co. v. Empire Coal & Coke Co., decided by this court, 113 Fed. 256, 51 C. C. A. 213, it is said:

"Where a buyer in a contract for weekly shipments of coke for a fixed period failed to pay on the 20th of the month for the coke received during the preceding month, as required by the terms of the contract, the seller might repudiate the contract; the latter not being in default."

The same rule obtains where the buyer of goods to be shipped in installments refuses acceptance of belated shipments, because not made within the time provided in the contract, and the seller sues to recover damages. Such a case is Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, in which the subject is discussed at length and the leading American and English decisions carefully analyzed and distinguished. The conclusion of the court is stated in these words (115 U. S. 205, 6 Sup. Ct. 15, 29 L. Ed. 366):

"The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action."

In our judgment this covers the instant case. When defendant refused to make further deliveries, plaintiff was in default; the contract on its part had been broken, not merely in a technical sense, due to inadvertence or excusable neglect, but in a substantial and important respect, and under circumstances which cast some doubt upon its continuing solvency. Moreover, plaintiff was apparently aware that it was not entitled to demand performance by defendant, for it sought a promise that shipments would be renewed if payment was made of the amount in arrears, and it was only after failure to obtain such a promise that its indebtedness was discharged. This being so, it seems clear that the acceptance by defendant of past-due payments was not a waiver of its right to rescind. As is said in Ohio Valley Buggy Co. v. Anderson Forging Co., supra:

"In such a case the seller of the goods, by accepting overdue payments for installments delivered, does not waive the right to rescind the contract as to remaining installments, or to interpose, in an action by the buyer for breach of the contract, the defense that payments were not made when due."

See, also, Tiedeman on Sales, § 210, in which the point is fully discussed and numerous cases cited.

Affirmed.

YOHN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 194.

1. **Commerce ⊂=33—Goods moving between points in same state through another state constitute "interstate shipment," within larceny statute.**

A shipment originating in one state and consigned to a point in the same state, but moving in its course through another state, constitutes an "interstate shipment," within the meaning of Act Feb. 13, 1913, § 1 (Comp. St. § 8603), providing for punishment of larceny of goods in interstate commerce.

2. **Commerce ⊂=16—"Intrastate commerce" defined.**

"Intrastate commerce" is that commerce which is, during its whole course of transportation, within the jurisdiction of a single state.

[Ed. Note.—For other definitions, see Words and Phrases, Intrastate Commerce.]

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

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

See, also, 275 Fed. 232.

Stanton & McDonald, of New York City (John T. Clancy, of New York City, of counsel), for plaintiff in error.

William Hayward, U. S. Atty., of New York City (Garrett W. Cotter, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. The defendant below has been convicted under an indictment which charged him and two others with the larceny from a railroad car belonging to the New York Central Railroad Company of five cases of cheese, which were moving in interstate commerce over the line of the West Shore Railroad from Massena Springs, in the state of New York, through the state of New Jersey, to New York City. His codefendants were acquitted.

The indictment was filed on April 20, 1921. The trial began on May 6th. For reasons which do not appear the trial was adjourned on May 10th to May 16th, and a verdict of guilty was returned on May 18th. On May 23d the defendant was sentenced to three years' imprisonment in the United States penitentiary at Atlanta, Ga. A writ of error was sued out on August 5th, and the defendant was released on bail in the sum of $5,000 pending the final determination of the case in this court.

[1] At the trial his counsel moved to quash the indictment on the ground that it showed upon its face a state and not an interstate shipment. The motion was denied. After verdict his counsel moved in arrest of judgment, on the ground that the court had no jurisdiction, as the indictment disclosed on its face no offense against the United States, as it showed an intrastate and not an interstate shipment. The motion was denied. The indictment is founded upon the Act of February 13, 1913, which reads in part as follows:

"Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent, in either case, to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen, * * * shall in each case be fined not more than $5,000 or imprisoned not more than 10 years, or both." 37 Stat. 670 (Comp. St. § 8603).

The sole question which can be considered is whether a shipment originating in one state and consigned to a point in the same state, but moving in its course through another state is interstate commerce within the meaning of the statute.

[2] It is contended on defendant's behalf that the shipment was not of an interstate character, because the point of origin and the point of destination were in the same state. The contention is untenable. Intrastate commerce is that commerce which is during its whole course of transportation within the jurisdiction of a single state. Commerce which originates in a state, passes into another, and then returns to the first, is interstate, as it has gone beyond the state in which it originated, and then passed back again into it, and so has become subject to different jurisdictions in the course of its transportation. Neither state is able to protect it during the whole period of its transportation, and this fact makes federal control practically necessary, as well as legally possible.

The identical question was presented to the Court of Appeals for the Third Circuit in United States v. Moynihan, 258 Fed. 529, 169 C.

C. A. 469. In that case the shipment originated in New York City, and was to be transported to Buffalo, N. Y. It was routed through the states of New Jersey and Pennsylvania. The court held the shipment interstate. After setting forth the facts relating to the origin and destination of the shipment, and its passing from the state of origin through other states to its destination within the state of origin, the court said:

"It follows that the bale of silk was actually moving as an interstate shipment, and was the class of commerce Congress had power to protect from depredation in transit."

The defendant relies upon Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672. The decision in that case was that for purposes of taxation such a shipment as the one here involved might be regarded as within the state's control. But, as the court pointed out in Hanley v. Kansas City Southern Railway Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, what was said in the Lehigh Valley Case was carefully confined to purposes of taxation.

Judgment affirmed.

MARTIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 25, 1922.)

No. 1938.

Post office ⊂=49—Evidence held to support conviction for stealing mail matter.

Evidence *held* to sustain convictions for stealing from the mails and for knowingly having the stolen property in possession.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Criminal prosecution by the United States against Maggie E. Martin and Thomas H. Martin. Judgments of conviction, and defendants bring error. Affirmed.

H. M. Smith, Jr., of Richmond, Va., for plaintiffs in error.

Paul W. Kear, U. S. Atty., of Norfolk, Va. (Lester S. Parsons, Asst. U. S. Atty., of Norfolk, Va., on the brief), for the United States.

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

WOODS, Circuit Judge. Defendant Thomas H. Martin was convicted on five counts of the indictment charging him separately with stealing, abstracting, and removing from the mails one cameo brooch, two silver pickle forks, and three pillow tops. His mother, Maggie E. Martin, was convicted on an indictment charging her with the unlawful and felonious possession of the same articles with knowledge that they were stolen. The two cases were tried together by consent. Error is assigned in the refusal of the District Court to direct acquittals in both cases for lack of evidence, and to order a new trial on the ground that the evidence was not sufficient to support the verdicts.

The evidence against the defendants in brief was this: Young Martin, who was 19 years of age, was a mail messenger in the autumn and winter of 1919–1920. His duty was to carry mail pouches to Hilton post office from a point on the railroad 1,000 feet distant, and parcel post sacks from North Newport News, a distance of half a mile. He lived in the house with his father and mother near North Newport News station. The front room of the house had been lately used as a railroad ticket office. A number of boarders had access to it. Mrs. Martin had been postmistress at North Newport News from 1909 to 1914. She and her husband, as well as Thomas H. Martin, handled the parcel post mail. The custom was to take the mail sacks from the place where they were thrown off the train to the front room of the Martin house, and thence, later on, in an automobile to the post office. Thomas H. Martin was in control of the mail, and responsible for it until he delivered it to the post office. The postmaster testified there was no reason for not carrying the mail directly to the post office.

From the fact that mail bags had been cut there, the postal officers suspected that losses of mail on the route had occurred at Hilton. They placed decoy articles in the mail and went to North Newport News for observation. In the afternoon Thomas H. Martin delivered to the post office one of the sacks that were under observation. On examination it was discovered that a lot of perfume and a package containing three $1 bills placed in the sack by the officers were missing. In answer to their inquiry, young Martin told the officers he had delivered all the pouches and sacks received from the train. Under the authority of a search warrant, the officers searched the house, and found in the front room about a dozen sacks of mail, some of them having been put off the day before. Thomas H. Martin's improbable explanation of his untrue statement that he had delivered all the sacks and pouches was that a colored boy had handed him the sacks from the house, and he supposed he had them all. Search of Mrs. Martin's room upstairs disclosed a cameo brooch stolen from the mail, stuck in the back of a pair of old trousers. Mrs. Martin claimed that this brooch had been left her by her mother. There was evidence tending to show that this statement was untrue. The two stolen pickle forks and three stolen pillow tops were found up in the chimney of Mrs. Martin's room.

Thus it appears that the court and jury, had, as evidence of guilt of Mrs. Martin, not only the possession of the stolen goods in very unusual places, as if for concealment, but her false statement as to the source from which they came, and the absence of any explanation of her possession, except that other persons sometimes passed through her room. This was evidence from which the jury were justifiable in inferring her guilt.

Against Thomas H. Martin was this proof: His custody of the mail sacks and pouches; the stealing of articles from them while in his possession, in the house where he lived with his mother; his false statements to the officers; the taking of the perfume and the money from the sack in which it had been placed by the officers, and the absence of any testimony tending to suggest the taking by any other person. Both the defendants were on the stand, and undertook to explain the

evidence against them. It was for the jury to determine whether the evidence, taken in connection with the probability of their explanations and their manner on the stand, warranted the conviction.

Affirmed.

CORDLEY v. RICHARDSON CORPORATION.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 213.

Patents ⊂=328—1,054,677, for water cooler, held void for lack of invention.

The Cordley patent, No. 1,054,677, for improvements in cooler for liquids, *held* void for lack of invention.

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

Suit in equity by Henry G. Cordley against the Richardson Corporation. Decree for defendant, and complainant appeals. Affirmed. For opinion below, see 278 Fed. 683.

W. K. Richardson, Harrison F. Lyman, and Hector M. Holmes, all of Boston, Mass., for appellant.

Duell, Warfield & Duell, of New York City (F. P. Warfield, H. S. Duell, and L. A. Watson, all of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. We agree with the reasoning and conclusion of Hazel, J., who heard the case below, and think litigation over this patent a rather striking instance of an endeavor to put novelty and commercial success in the place of invention, a point we have recently commented on in Boston, etc., Co. v. Automatic, etc., Co., 276 Fed. 910.

It is quite true that, in deciding the point of invention, which is always a question of fact, courts should "view the subject-matter from the standpoint of the art concerned." Kurtz v. Blatt (D. C.) 263 Fed. 392. But it is this view that is fatal to plaintiff's contention, for the patent teaches the art nothing; it only rearranges old matter in a form probably attractive to the eye and useful for purposes of display.

Decree affirmed, with costs.

UNITED STATES v. ERNEST.

(District Court, D. Montana. April 8, 1922.)

No. 3978.

Witnesses ⊂=304(4)—Privilege or immunity under Prohibition Act limited to witnesses for prosecution.

Under National Prohibition Act, tit. 2, § 30, providing that no person shall be excused from testifying in any suit or proceeding for its violation on the ground that it may tend to incriminate him, but that any person so testifying shall not be subject to prosecution for or on account of any matter in relation to which he may have testified, the immunity granted is limited to witnesses called and used by the prosecution.

Criminal prosecution by the United States against Martin Ernest. Judgment of conviction.

John L. Slattery, U. S. Atty., and Ronald Higgins and W. H. Meigs, Asst. U. S. Attys., all of Helena, Mont., for the United States.

Freeman, Thelen & Frary, of Great Falls, Mont., for defendant.

BOURQUIN, District Judge. This is a trial before the court upon a charge of violation of the National Prohibition Act (41 Stat. 305) in transportation and possession of whisky and gin. The evidence is that of the trial of another defendant and involving the same transaction, wherein this defendant was subpœnaed by plaintiff, and in respect to which he testified upon call by defendant. And it is stipulated that in so far as that circumstance ought to avail him, had he pleaded it in bar, he will be given the benefit of it herein.

Section 30, title 2, of the act, to which defendant appeals, provides that:

"No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this Act; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying."

The broad and general terms of this section would include defendant's case and afford him a complete defense, provided their literal import be accepted to arrive at legislative intent. Various considerations of statutory construction, however, reject this interpretation, and constrain limitation and control of the section's terms to apply to witnesses for the prosecution only.

The prior law authorizes the prosecution to offer immunity to some persons involved in guilty transactions, if they will testify for the government in prosecution of others likewise involved. Always this policy of immunity has been to serve the prosecution and never the defense. Where numbers are involved in an offense, the advantage is with the defense. As a rule offenders hang together, lest otherwise they hang separately.

This renders more difficult the task of the prosecution to prove guilt beyond reasonable doubt, and because thereof is this policy to aid the prosecution to accomplish justice. It has never been found necessary to likewise aid the defense. The defect in this policy is that, if the offer of immunity be declined, the offeree cannot be coerced to testify, and in consequence often prosecutions fail and justice is defeated. The Prohibition Act interfering with immemorial habits, customs, industry, and commerce, it was obvious more than ordinary difficulty would be encountered in enforcing it. This tending to the further advantage of the defense, it was desirable to counteract it by strengthening the prosecution; and to that end the policy of immunity to incriminated persons who might testify for the prosecution was by section 30 ex-

tended to compel them to testify. If there is any immunity statute that applies to witnesses for the defense, it is unknown to the court. That the general terms of the section does, and so revolutionizes this policy theretofore limited to the prosecution, is unreasonable, not necessary, and does violence to the rule that long-established policy is not to be set aside by general statutes not expressly and necessarily requiring it.

Furthermore the act (section 3, tit. 2) declares it is to be liberally construed to attain its object, viz. prevention of use of intoxicating liquor for beverage purposes, and evidently to construe section 30 to extend to witnesses for the defense would tend to defeat this object, tend to absurd results, and to defeat justice. To illustrate: A. and B., jointly accused and tried, each could refrain from testifying for himself, but could subpœna and call the other, both testify as witnesses only, and the case would end in dismissal as to both, a judicial farce. Or of six involved, one known, accused, and tried could subpœna and call the others, and confer upon them an immunity bath. The settled law rejects construction involving absurd and unjust consequences, if any other construction be reasonably possible. The literal import of merely general terms will be controlled and limited to avoid results of that character, and to that end it will be presumed that the Legislature intended exceptions to be inferred. See Holy Trinity Church v. U. S., 143 U. S. 460, 12 Sup. Ct. 511, 36 L. Ed. 226; Suth. Stats. §§ 246, 321; Potter's Dwarris, c. 5; Endlich, Stats. §§ 25, 245, 258, 264.

The presumption, sometimes a violent one, is that the Legislature avoids absurdity and injustice. Defendant's case is not bettered by reason of the fact that the government subpœnaed him, for it did not call him. Called by the defense, he voluntarily testified. His case is not within the statute. From the evidence it appears he is guilty as charged, and such is the finding of the court.

In view of the peculiar circumstances, and that they may have misled him (though without his testimony his guilt is clearly established), the sentence and judgment are that he be fined in the sum of $100, imprisoned in the jail of Cascade county, this state, until the fine is paid or he be otherwise discharged, and costs.

UNITED STATES v. ONE BUICK ROADSTER et al.

(District Court, D. Montana. April 28, 1922.)

No. 972.

1. Customs duties ⟸122—Transportation without permit of bottled export whisky held to authorize finding import and other taxes were due thereon.

The finding in an automobile in this country of bottled "export" American whisky from Canada in transportation without a permit will be taken as sufficient to prove a charge it was being transported with intent to defraud the United States of import and other taxes due thereon.

2. Internal revenue ⟸2—Statute forfeiting vehicle used for transportation of whisky with intent to avoid taxes is not repealed.

Rev. St. § 3450 (Comp. St. § 6352), providing for the forfeiture of vehicles used in the transportation of whisky with intent to defraud the

United States of taxes due thereon, was not repealed by the National Prohibition Act, especially in view of Act Nov. 23, 1921, § 5, declaring all laws in regard to the manufacture and taxation of, and traffic in, intoxicating liquors in force when the National Prohibition Act was adopted, are continued in force.

3. **Internal revenue ⊜46—Automobile taken by trespass or theft is not forfeited for transportation of import whisky without payment of tax.**
Though the terms of Rev. St. § 3450 (Comp. St. § 6352), are sufficiently broad to authorize forfeiture of an automobile in which whisky was being transported with intent to defraud the United States of import and other taxes thereon, even if the automobile had been taken from the owner by trespass or theft, such a forfeiture is not within the purpose of the act, and an intention to make an exception will be implied.

4. **Constitutional law ⊜303—Internal revenue ⊜2—Forfeiture of automobile taken by trespass or theft would violate due process of law.**
The construction of Rev. St. § 3450 (Comp. St. § 6352), as authorizing a forfeiture of an automobile in which whisky was transported, with intent to defraud the United States of import and other taxes due thereon, though possession of the automobile was obtained without the owner's consent by trespass or theft; would deprive the owner of his property without due process of law, and such construction will therefore not be adopted.

Libel by the United States to forfeit one Buick roadster, tools, and accessories, and whisky therein, found in possession of R. A. Nulph and another, and claimed by the Kennedy Motor Company. Libel dismissed, with respect to the automobile, tools, and accessories, and sustained with respect to the whisky.

John L. Slattery, U. S. Atty., and Ronald Higgins and W. H. Meigs, Asst. U. S. Attys., all of Helena, Mont., for the United States.

Murphy & Whitlock and J. H. Toole, all of Missoula, Mont., for libelees.

BOURQUIN, District Judge. Invoking section 3450, R. S. (Comp. St. § 6352), these proceedings to forfeit an auto and whisky, for that the former was used to remove and conceal the latter with intent to defraud the plaintiff of taxes thereon, are brought against the auto and whisky, and also against the motor company as claimant of some interest therein. The latter alone answers that it denies the use and intent aforesaid, that said section is repealed by the Volstead Act (41 Stat. 305), and that any said use was without its privity or consent.

[1] The evidence is that the auto was used to transport bottled "export" American whisky from Canada, and the circumstances persuade that upon the whisky are import and other taxes due and unpaid. For the purposes of this case and in its circumstances, the very existence of this bottled "export" whisky in this country, and in transportation without permit, will be taken as sufficient to prove the charge as laid; and it is so found.

[2] That section 3450, R. S., is not repealed by the Volstead Act, is settled so far as this court is concerned by U. S. v. One Cole Auto (D. C.) 273 Fed. 934, and any contention to the contrary has little to support it, since Act Nov. 23, 1921 (42 Stat. 223, § 5).

In the matter of the unlawful use of the auto, it was by one Nulph,

to whom the motor company had sold it. The price is some $1,800; the terms, $800 before delivery of possession and the balance before passage of title. Upon sale made, and in eight days following, Nulph paid the motor company $573. The motor company, withholding possession for the balance due as aforesaid, with a bailee deposited the car for some minor alteration.

Some five weeks subsequent to the sale, the balance due not having been paid, and the bailee yet having possession, Nulph, without knowledge or consent of either motor company or bailee, secretly entered the latter's premises, took the auto, and it was in removal and concealment of the whisky by him when seized a few days later. The circumstances are corroborative of this evidence, and the preponderance sustains the defense of unlawful user by a trespasser. Goldsmith v. U. S., 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed. 376, is an elaborate discussion of section 3450 and forfeitures, but reserves "opinion as to whether the section can be extended to property stolen from the owner, or otherwise taken from him without his privity or consent."

[3] Necessarily to be determined herein, it is believed the section does not include a thing seized and used by a trespasser or thief, and that the defense is good in law. Section 3450 is a revenue statute, and must receive, not a strict, but a reasonable, construction. Its words taken literally include the thing used by trespasser or thief, but so futile is this to serve the object of protection to revenue, so unreasonable, absurd, and unjust are the consequences that, as its generality permits, it must be presumed Congress intended exceptions to avoid such consequences—a rule of construction as old as reason. See citations in U. S. v. Ernest, 280 Fed. 515.

If the personal penalties by the law visited upon trespasser, thief, and violator of section 3450 will not deter him and protect the revenue, forfeiture of the thing of the trespass, theft, and violation will not accomplish it. The latter is not borne by the guilty person, but falls upon the innocent. It is of government's first duties to protect the individual from the trespasser and the thief. When it fails therein, what principle of conduct, custom, law, or justice will permit it to aggravate its fault and magnify his loss by forfeiture of his property, the thing of the trespass or theft? A case of misuse by a bailee affords no analogy. The bailee has possession with the owner's consent, the trespasser or thief without it, each the antipodes of the other. The owner takes the hazard of his voluntary act, and responds over for his bailee's misuse of the thing.

It is not the owner's act that the thing is taken and misused by trespasser or thief. He cannot effectually guard against the latter, but he can against the former. Forfeiture in the former is not an unreasonable penalty for the owner's action which contributed to it, but in the latter is an unreasonable imposition upon mere inaction, devoid of duty, and upon ownership. It is not status but conduct, that is prescribed, proscribed, and penalized by law.

[4] The fiction that the thing is guilty is but a convenience of procedure, to visit justice by way of forfeiture upon those, perhaps unknown, whose conduct contributed to the thing's unlawful use. Other-

wise, outlawry, the superstitions of deodand and trial and punishment of inanimate things, have disappeared, and it is doubtful if any modern law purports to confiscate lawful property because unlawfully used by trespasser or thief. If section 3450 does, how can it be maintained in view of the due process clause of the Constitution? What is it but a mere arbitrary act of government in violation of that fundamental right to own property, for the security of which society is organized and government maintained? What immemorial practice of government justifies this legislative power? Wherein are public welfare, and rights common to all, served by this invasion of individual right of property? What principle of justice permits it? To support the proponent no answer comes to mind, and until successfully answered it must be held that the literal import aforesaid of section 3450 contravenes the due process clause, to avoid which, its general terms permitting, again it will be presumed that Congress intended exceptions of trespasser and thief.

The libel in respect to the auto and accessories is dismissed, but a certificate of reasonable cause for its seizure will be entered. In respect to the whisky, the usual decree for its forfeiture, confiscation, and sale is ordered entered.

MILLER, Alien Property Custodian, v. CAMP et al.

(District Court, S. D. Florida. April 12, 1922.)

No. 1450.

1. War ⊂=12—Order requiring property conveyed to Alien Property Custodian not a judgment.

An order requiring property to be turned over to the Alien Property Custodian is not a judgment which renders res judicata any question which may be raised in a suit brought under Trading with the Enemy Act Oct. 6, 1917, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½c).

2. War ⊂=33—Right of Alien Property Custodian to hold property not affected by peace resolution.

The joint resolution of July 2, 1921, terminating the war with Germany and Austria-Hungary, did not affect the right of the Alien Property Custodian to take and hold property.

At Law. Action by Thomas W. Miller, Alien Property Custodian, against Clarence Camp and Jack Camp. On petition by defendants to vacate order. Denied.

Damon G. Yerkes, Sp. Asst. U. S. Atty., of Jacksonville, Fla., and Dean Hill Stanley, Sp. Asst. Atty. Gen., for petitioner.

Anderson & Anderson, of Ocala, Fla., for respondents.

CALL, District Judge. On November 18, 1921, this court entered an order, on the petition of the Alien Property Custodian making the rule nisi theretofore issued absolute, and ordering and adjudging that said Alien Property Custodian, as such, have and recover from the respondents a certain amount of money. On November 26th respondents filed their petition to vacate and set aside the order and judgment

entered on the 18th. It being impossible for the court to fix a day for hearing said petition before the commencement of the December term of court, an order was made continuing said matter to such day as it could be heard, in order that no right of respondents should be jeopardized. The matter now comes on for a hearing upon briefs filed by the parties.

There are three principal points urged by the respondents in their petition to vacate the order and judgment. They maintain that the court erred in making the rule nisi absolute. The questions raised by this contention I fully considered on the argument of the matter, and before the order of November 18th was entered, and am now of the same opinion as when the order was made.

[1] They next take exception to the form of the judgment or order requiring them to pay over to the Alien Property Custodian the face of the promissory note and interest from date of demand. It is urged in support of this contention that respondents would be estopped from urging their contention that, while the note specified "dollars," the parties agreed that it should be paid in "marks," in any proceeding which might be brought by them under section 9 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e). This contention is refuted by the record in the case, showing the proceeding in which the order or judgment was entered. In my view, the portion of the order complained of in this behalf is no more than an order requiring the respondents to pay the sum to the Custodian. It is true the words "have and recover" are used in the order, but the use of those words, instead of the words "pay to" such Custodian, do not work an estoppel, or make the question of the kind of currency with which the note was to be paid res judicata, when the right to litigate that and other questions is reserved by section 9 of the act. The method by which the question sought to be raised in respondent's return to the rule is pointed out in the act.

[2] The other contention of respondents is that by the Act of Congress of July 2, 1921 (42 Stat. 105), and the presidential proclamation of November 14, 1921, the right of the Alien Property Custodian to demand and receive the money demanded in his petition had ceased, and after peace between the two countries was proclaimed his right to receive and hold such property terminated. It seems to me that a careful reading of the Act of July 2, 1921, settles this contention. The possession of all enemy-owned property is retained; and this right of possession of such property is recognized by the treaty of the two nations.

The petition to vacate the order and judgment of November 18, 1921, will be denied.

INDIANA FLOORING CO. v. DISTRICT NAT. BANK OF WASHINGTON.

(Court of Appeals of District of Columbia. Submitted March 7, 1922. Decided April 3, 1922.)

No. 3672.

1. **Appeal and error ⟹882(14)—Request to submit question to jury precludes contention evidence was insufficient.**
   Where plaintiff had requested the submission of a particular issue to the jury, it cannot contend on appeal that it was error to submit the issue, because there was no evidence to support a finding for defendant thereon, since the request implied there was conflicting evidence on the subject, and therefore a question for the jury.
2. **Principal and agent ⟹92(2)—Bank not liable for cashing check on agent's authorized indorsement, regardless of its knowledge of authority.**
   Where an agent had express authority to cash checks payable to his principal, the bank is not liable to the principal for paying the checks on the agent's indorsement, regardless of whether it knew of such authority before it paid the checks.
3. **Corporations ⟹432(7)—Resolution revoking authority of bank to cash checks on agent's indorsement is admissible to show agent's prior authority to indorse.**
   A resolution adopted by a corporation, revoking the authority of a bank to cash checks on the indorsement of an agent of the corporation, is admissible against the corporation as evidence that the agent had authority to indorse the checks for the corporation, cashed by him before the adoption of the resolution.

Appeal from the Supreme Court of the District of Columbia.

Action by the Indiana Flooring Company against the District National Bank of Washington. Judgment for defendant, and plaintiff appeals. Affirmed.

C. Clinton James and E. Hilton Jackson, both of Washington, D. C., and Thomas L. Zimmerman, Jr., of New York City, for appellant.

Ralph P. Barnard, Guy H. Johnson, and W. E. Lester, 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 an action for the recovery of the proceeds ($5,579.39) of certain checks payable to the order of the plaintiff, appellant here, and cashed upon the indorsement of its Washington representative, who thereafter converted the proceeds to his own use. Under our view of the case it will be necessary to give only a brief summary of the facts:

Plaintiff, a New York corporation with headquarters in New York City, was engaged in the business of laying hardwood floors. In April of 1915 it established a Washington branch under the management and control of J. G. Chestnut, who testified that he was to receive 50 per cent. of the profits of the local business, in addition to a drawing account, and stand 50 per cent. of the losses. It was admitted that he had the right to draw about $30 weekly and to receive 50 per cent. of profits, but it was denied that he was to share in losses. According to the plaintiff, one of its representatives visited Washington once a

month; according to evidence for defendant, these visits did not occur oftener than four times a year. Chestnut had complete charge of the Washington branch, employed and discharged workmen and employees, fixed terms of payment for work done, accepted or refused credits, made all collections, and received payments in cash, promissory notes, or checks payable to the order of plaintiff or himself. He also indorsed, cashed, or deposited checks, bought merchandise, for which he paid by check or in cash, and alone dealt with local customers. Blank checks signed by an officer of the company, at least 50 at a time, were delivered to him to countersign, fill in the necessary amounts, and cash them at the bank. No checks were sent to New York, although a very large percentage of collections were in the form of checks. It is in evidence that the check books furnished Chestnut by the plaintiff had duplicate stubs, upon which he was supposed to enter the name of the debtor and the different amounts paid. From these check books all ledger posting was done, and a duplicate stub forwarded to New York. Duplicate deposit slips were required to be sent to New York by Chestnut. It is conceded that he had authority to indorse for deposit the checks here involved, but his authority to cash them is challenged.

Within a comparatively short time after Chestnut assumed charge of the Washington branch he commenced cashing checks payable to the plaintiff and appropriating the proceeds, but it was not until March of 1918 that an examination of his books and accounts was made, when his shortage was discovered. On the 26th day of that month a copy of a resolution of the board of directors of the plaintiff company, passed five days earlier, was sent to and received by the defendant. The material part of that resolution is as follows:

"Resolved, that authorization to the District National Bank to accept and pay any moneys on the counter signature or on the indorsement of J. G. Chestnut on any checks, drafts, and so forth, and so forth, of the Indiana Flooring Company, is hereby revoked, to take effect from the date of this meeting. * * *"

At the close of the evidence, and "during the course of the argument on the prayers submitted," one of—

"counsel for the plaintiff said to the court: 'If the court please, it seems to me up to this point there are two propositions that ought concededly to go to the jury: First, if Chestnut had express authority to cash these checks, it makes no difference whether the bank knew it or not because it was up to the plaintiff as to what became of the proceeds. We think that instruction ought to go to the jury. Second, we think that all the circumstances that your honor has hinted at, namely, under the general characterization of negligence in permitting him (Chestnut) to do business in this general or unchecked way, connected with all other circumstances, that would come under the general heading of holding out.'"

Thereupon:

"The court announced that he would submit two questions to the jury, and require them to render their verdict subject to the opinion of the court, and submitted to counsel for the parties the form of verdict subsequently appearing herein, and said: 'I am going to submit these two questions to the jury, or I am going to leave to the jury solely and only the question as to the actual authority.'"

The court then expressed a desire for more time to consider the latter point, "after reading all the evidence in the case," and announced that he would submit "these two questions." Counsel for plaintiff then said: "I would like very much for that to be done, your honor." Accordingly, after a comprehensive charge, the jury were asked to find:

First, whether plaintiff authorized Chestnut "to indorse the checks mentioned in the declaration otherwise than for deposit to the plaintiff's credit with the defendant"; and, second, whether the defendant was "induced by appearances for which the plaintiff was responsible in taking the checks mentioned in the declaration otherwise than for deposit to the plaintiff's credit."

The jury answered both questions in the affirmative, and thereupon the court directed a verdict for the defendant, "to which action of the court, in directing the entry of a verdict for the defendant," the plaintiff excepted. The record further shows that plaintiff also excepted to the refusal of the court to grant certain prayers, to which we will allude later.

Thereafter, in a motion for a new trial, plaintiff contended that there was no evidence to go to the jury, and in overruling that motion the court said:

"There was evidence to sustain the first finding of the jury of express authority to indorse the checks, but I think that there was no evidence, or at least not sufficient evidence, to support the second finding. * * * However, as the verdict is supported by the former finding, it cannot be set aside."

[1] It is first contended that—

"The evidence affirmatively establishes the absence of express authority to cash the checks in question, and therefore there was no issue properly determinable by the jury upon the question of express authority."

As this question was submitted to the jury at plaintiff's request, plaintiff is not now in a position to contend that the court erred in so doing. The request implied that there was conflicting evidence upon the subject, and therefore a question for the jury. It is too late, now that the jury has decided in favor of the defendant, to say that there was no evidence. This we have ruled in an opposite case. Whelan v. Welch, 50 App. D. C. 173, 269 Fed. 689.

Appellant next insists that the court erred in refusing to grant its fifth prayer, to the effect that there was no evidence to go to the jury on the question or principle of estoppel. It was during the discussion of this prayer and others that counsel for appellant requested the court to submit this very question to the jury, so that it results, from what we already have said, that appellant is not in a position to insist upon this assignment.

[2] The refusal of the court to grant appellant's third prayer, to the effect that the defendant bank would be liable unless it should appear that "the plaintiff had acquiesced in and recognized such indorsements as being made by its authority, and that the defendant knew of such acquiescence by the plaintiff prior to cashing the checks in question," also is assigned as error. This prayer likewise was inconsistent with the attitude of counsel at the trial, who then correctly stated the rule as follows:

"If Chestnut had express authority to cash these checks, it makes no difference whether the bank knew it, or, not, because it was up to the plaintiff as to what became of the proceeds."

[3] It is further contended that the court erred in admitting in evidence the resolution of March 21, 1918, which plaintiff sent defendant. This was clearly admissible, for it was direct evidence of plaintiff's understanding as to Chestnut's authority, and plaintiff, if any one, was in a position to know what that authority was.

The jury having found that Chestnut had express authority to cash the checks in question, the direction of a verdict and the entry of judgment for the defendant followed as matter of course, irrespective of the answer of the jury to the second question. It is unnecessary, therefore, to determine whether the court was right or wrong in expressing the view that the evidence did not warrant the second finding of the jury.

We have carefully examined other questions discussed in the brief of appellant, but have found them devoid of merit. The judgment therefore must be affirmed, with costs.

Affirmed.

HIESTON v. NATIONAL CITY BANK OF CHICAGO.

(Court of Appeals of District of Columbia. Submitted February 8, 1922. Decided April 3, 1922.)

No. 3609.

1. **Judgment ⊜822(3)—Cause on which foreign judgment is based cannot be inquired into.**
   The requirement of Const. U. S. art. 4, § 1, that full faith and credit be given to the judgments of the several states, precludes an inquiry into the cause of action on which the foreign judgment was based, except in so far as necessary to ascertain whether the court rendering the judgment had jurisdiction and whether the action was for a penalty.

2. **Judgment ⊜823—Of state court enforced against property of married woman in District of Columbia.**
   Under Const. U. S. art. 4, § 1, providing that "full faith and credit shall be given in each state to the * * * judicial proceedings of every other state," a judgment rendered in another state on a guaranty by a married woman of her husband's indebtedness will be enforced, notwithstanding Code D. C. § 1151, providing that a married woman's property shall not in any way be liable for payment of her husband's debts.

Appeal from the Supreme Court of the District of Columbia.

Action by the National City Bank of Chicago against Grace Hieston. From a judgment for plaintiff, defendant appeals. Affirmed.

Dan Thew Wright and Philip Ershler, both of Washington, D. C., for appellant.

F. D. McKenney, J. S. Flannery, and G. B. Craighill, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Appellant, defendant below, guaranteed the payment of her husband's indebtedness to appellee, a

bank in Chicago, Ill. Subsequently, on default of the husband, the bank sued her and procured judgment in the state of Maryland. The bank instituted this suit in the District of Columbia upon the Maryland judgment for the purpose of subjecting defendant's property in this District to the payment of the debt. From a judgment in favor of plaintiff bank, defendant appealed.

Appellant relies upon a statute of this District which provides:

"All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, by her own skill, labor, or personal exertions, or as proceeds of a judgment at law or decree in equity, or in any other manner, shall be her own property as absolutely as if she were unmarried, and shall be protected from the debts of the husband and shall not in any way be liable for the payment thereof." Code D. C. § 1151.

[1] It is conceded that the judgment is in every respect valid and enforceable in the state of Maryland, but it is urged on behalf of defendant that the cause of action which formed the basis of that judgment may be inquired into to determine whether the judgment may be enforced against the property of the plaintiff in this District. To sustain this contention would mean the denial of full faith and credit to the judicial proceedings resulting in the Maryland judgment.

Chief Justice Marshall, affirming the rule announced in Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411, interpreting the full faith and credit clause of the Constitution (article 4, § 1), and the statute enacted in pursuance thereof (R. S. § 905 [Comp. St. § 1519]), said:

"The doctrine there held was that the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States." Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378.

It is clear that the inhibition of the statute of the District of Columbia could not have been pleaded in the Maryland court, since the guaranty of the wife for the payment of her husband's debts created a valid obligation, not only in Maryland, but in Illinois, where the obligation was incurred. The rule announced in the Hampton Case has been consistently followed by the courts of this country and was quoted with approval in Fauntleroy v. Lum, 210 U. S. 230, 236, 28 Sup. Ct. 641, 52 L. Ed. 1039.

The obligation to accord full faith and credit to a valid judgment, other than for lack of jurisdiction of the person or subject-matter, or for the enforcement of a penalty, is without limitation. As was said by Chief Justice White in Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1:

"The requirement of the Constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. Harding v. Harding, 198 U. S. 317."

Applying this rule to the present case, the courts of the District of Columbia must give the Maryland judgment the same force and effect to which it was entitled in that state; and, being admittedly a valid judgment in that state, it must be accorded the same status in this District.

[1] Counsel for defendant, however, attempts to avoid the logical result of the interpretation placed upon the degree of effect to be given the full faith and credit clause of the Constitution, on the ground that the enforcement of this judgment is in conflict with the statutes and public policy of this District, and cites in support of this position State of Wisconsin v. Pelican Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. In that case a judgment was rendered in favor of the state of Wisconsin against a foreign insurance corporation. An original suit was brought in the Supreme Court upon the judgment. The judgment was obtained in Wisconsin for a fine or penalty imposed by the statutes of the state upon such corporations doing business in the state and failing to make certain returns as required by law. It was held that the jurisdiction to enforce a foreign judgment under the full faith and credit clause was confined to "controversies of a civil nature," and that the suit upon which the judgment was based in that case, was not such an action. The court in its opinion in the Fauntleroy Case, commenting upon this case, said:

"The case was not within the words of article 4, § 1, and, if it had been, still it would not have and could not have decided anything relevant to the question before us. It is true that language was used which has been treated as meaning that the original claim upon which a judgment is based may be looked into further than Chief Justice Marshall supposed. But evidently it meant only to justify the conclusion reached upon the specific point decided, for the proviso was inserted that a court 'cannot go behind the judgment for the purpose of examining into the validity of the claim.' 127 U. S. 293. However, the whole passage was only a dictum, and it is not worth while to spend much time upon it."

[2] The mere fact that the claim of the bank, valid in Maryland, could not have been enforced originally in this District, and that the enforcement of the judgment here abrogates the law and public policy of this jurisdiction, is not sufficient to limit the force of the constitutional declaration that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" (article 4, § 1), nor the act of Congress in pursuance thereof, to the effect that "the records and judicial proceedings of the courts of any state or territory * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken" (Rev. St. § 905 [Comp. St. § 1519]).

This case presents nothing novel. The mere fact that the cause of action in Maryland would not have supported a judgment in this District is beside the case. We may not go behind the Maryland judgment for the purpose of examining into the validity of the claim upon which it was based. Wisconsin v. Pelican Insurance Co., supra. The certified transcript of the Maryland judgment may be examined here to determine whether that court had jurisdiction of the parties and of

the subject-matter. If this investigation discloses complete jurisdiction, the judgment must be accorded the same force and effect it would have by law or usage in the courts of Maryland.

The enforcement of the judgment of a sister state, based upon a claim invalid and unenforceable in the state where enforcement of the judgment is sought, is not new. A judgment in Louisiana against copartners, with service upon only one of the partners, was held enforceable in New Hampshire, though a judgment upon such service would have been void in that state. Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629. A stockholder of a Kansas corporation was sued in Rhode Island upon a Kansas judgment against the corporation. In Kansas the judgment against the corporation ran also against the stockholder, but this was not the law in Rhode Island. The judgment, however, was held enforceable in the courts of Rhode Island. Hancock National Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619. In Fauntleroy v. Lum, supra, an action was brought upon a Missouri judgment in a court of Mississippi, the defendant pleaded that the original cause of action arose in Mississippi upon a gambling transaction in cotton futures, where the controversy was submitted to arbitrators, the illegality of the transaction not being included in the submission, and an award was rendered against the defendant. Defendant being found in Missouri, suit was brought upon the award, and the court, refusing to allow the defendant to show that the transaction was illegal and void under the laws of Mississippi, directed a verdict, leaving to the jury only the question whether the submission and award were made. The Mississippi court refused to enforce the Missouri judgment, and upon appeal to the Supreme Court the judgment was reversed.

It follows, from the foregoing summary of the law, that, with complete jurisdiction of the subject-matter and the parties, a judgment shall be accorded the same faith and credit in every court within the United States as it has by the law and usage of the courts in the state or territory where it was originally rendered; and this is true, though the cause of action upon which the judgment is based is against the law and public policy of the state or territory in which enforcement is sought.

The judgment is affirmed, with costs.

RAYMOND BROS.-CLARK CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Eighth Circuit. May 8, 1922.)

No. 216.

Trade-marks and trade-names and unfair competition ⇐68—Ceasing to purchase from manufacturer, unless sales to competitor cease, is not unfair competition.

A wholesaler has a right to purchase merchandise or refuse to purchase it from any person he chooses, and for any reason, or no reason at all, and to refuse to make further purchases from a manufacturer, unless that manufacturer agrees to cease selling to another wholesaler, who was also engaged in the retail business, without being guilty of unfair methods of competition, contrary to the Federal Trade Commission Act (Comp. St. §§ 8836a–8836k).

Petition to Review Order of the Federal Trade Commission.

Petition by the Raymond Bros.-Clark Company to review an order of the Federal Trade Commission. Petition granted, and order vacated.

Emmett Tinley, of Council Bluffs, Iowa (W. E. Mitchell and Tinley Mitchell, Pryor, Ross & Mitchell, all of Council Bluffs, Iowa, on the brief), for petitioner.

Adrien F. Busick, of Washington, D. C. (W. H. Fuller, of Washington, D. C., on the brief), for respondent.

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

CARLAND, Circuit Judge. This is an original proceeding by petitioner to obtain a review of an order of the Commission whereby petitioner, its officers and agents, were ordered to forever cease and desist from directly or indirectly—

"(1) Hindering or preventing any person, firm, or corporation in or from the purchase of groceries, provisions, or the like commodities direct fom the manufacturers or producers thereof, in interstate commerce, or attempting so to do.

"(2) Hindering or preventing any manufacturer, producer. or dealer in groceries, provisions, and the like commodities in or from the selection of customers in interstate commerce, or attempting so to do.

"(3) Influencing or attempting to influence any manufacturer, producer, or dealer in groceries, provisions, and the like commodities, not to accept as a customer any firm or corporation with which the manufacturer, producer, or dealer. in the exercise of a free judgment, has or may desire to have such relationship."

This order was made in a proceeding commenced by the Commission against petitioner for the alleged violation of the provisions of section 5 of an Act to Create a Federal Trade Commission, approved September 26, 1914 (38 Stat. 717 [Comp. St. § 8836e]), in using an unfair method of competition against the Basket Stores Company, a corporation organized under the laws of Nebraska. Although the charge made against petitioner was with reference to said Basket Stores Company, the order above set forth is as broad as the business world, and in any event would have to be modified, if it were to be sustained in

any particular. The order, however, was made pursuant to findings of fact, made by the Commission, which are as follows:

"(1) Respondent is a corporation organized under and existing by virtue of the laws of the state of Nebraska. Its principal place of business is at Lincoln, Neb. Respondent's business is that of a wholesale grocer, buying groceries, provisions, and the like commodities in wholesale quantities from the manufacturers thereof throughout the United States, which commodities are transported from points outside the state of Nebraska to the warehouse of the respondent at Lincoln, Neb., and are resold and transported to customers in and beyond the state of Nebraska. The business operations of the respondent include sales and deliveries in Nebraska, Colorado, Kansas, Wyoming, South Dakota, and Montana, and its annual volume of business is approximately $2,500,000. In the conduct of its business the respondent is in competition, among others, with the Basket Stores Company.

"(2) The Basket Stores Company is a corporation organized under and existing by virtue of the laws of the state of Nebraska. Its principal place of business is at Omaha, Neb. The Basket Stores Company conducts two lines of business—one, that of a wholesale grocer; and that of retail selling through a chain or organization of retail stores. As a wholesale grocer, the Basket Stores Company maintains a warehouse at Omaha, and a branch warehouse at Lincoln, Neb. It buys groceries, provisions, and the like commodities in wholesale quantities from the manufacturers thereof throughout the United States, which commodities are transported from points outside the state of Nebraska to the warehouses of the Basket Stores Company at Omaha and Lincoln, Neb., and are resold in part and transported to customers within and outside the state of Nebraska. This part of the Basket Stores Company's business is about 10 per cent. of the total. The Basket Stores Company was licensed as a wholesale grocery house by the United States Food Administration. which fact was known to the respondent. The Basket Stores Company also operates a series or chain of retail stores, 72 in number, 4 of which are in Iowa; the remainder being located in Nebraska. There are, at this time, 18 stores operated by the Basket Stores Company in Lincoln. The groceries, provisions, and like commodities distributed through these stores were supplied from the Basket Stores Company's warehouses. About 90 per cent. of the company's business was done through these retail stores. The total annual volume of the Basket Stores Company's business is approximately $2,500,000.

"(3) In the month of September, 1918, a representative of F. A. Snider Preserve Company solicited from the Basket Stores Company's officials, at its head office at Omaha, and obtained an order for commodities produced by the Snider Company, to be shipped to the warehouse of the Basket Stores Company at Lincoln. The Snider Company also secured orders from the respondent and other customers in neighboring communities. The commodities sold in and around Lincoln were placed by the Snider Company in one car, consigned to respondent at Lincoln, making up what is known as a "pool" car, to get the benefit of the freight rate on a car lot shipment. The Snider Company sent to respondent a statement of the car contents, showing the various business houses for which certain specified goods were intended, the Basket Stores Company and its purchase from Snider Company being shown on this statement.

"(4) This pool car, consigned to respondent, reached Lincoln, Neb., on October 10, 1918, and was promptly unloaded, and the contents distributed by respondents. Its own commodities were placed in its warehouse, the commodities belonging to business houses outside of Lincoln were reconsigned to them by local freight, and the other purchasers in Lincoln were notified of the arrival of their goods and promptly obtained the same, except the Basket Stores Company. The commodities belonging to this company were stored in respondent's warehouse. The Basket Stores Company was not notified of the arrival of these goods in Lincoln, or of their presence in respondent's warehouse, and no opportunity to obtain its goods was afforded the Basket Stores Company until November 15, 1918, when respondent notified the Basket Stores Company of the presence of its property.

"(5) The Basket Stores Company was in need of these commodities for its trade, its stock of these goods was low, and the delay in receipt due to the actions and failure of the respondent to extend to the Basket Stores Company the same course of dealing that it used with all the other owners of commodities contained in the pool car was a hindrance and an obstruction to the Basket Stores Company in the conduct of its business, in competition with the respondent and others in the wholesale trade and with its competitors in the retail trade.

"(6) On October 8, 1918, prior to the arrival of the pool car at Lincoln, the respondent having received the statement from F. A. Snider Preserve Company regarding the contents of the car and the distribution to be made thereof, in writing protested to the Snider Company against the sale direct to the Basket Stores Company, and asked for the allowance of the regular jobbers' profit on the sale, as though made through respondent. The Snider Company did not reply to this letter. Subsequent to the arrival of the car at Lincoln, the distribution of its contents to the owners thereof, except as to the Basket Stores Company, and while the goods purchased by that company were in respondent's custody, respondent wrote the Snider Company on October 22, 1918, referring to the unanswered letter, and asking what it was to charge the Snider Company for checking out, unloading, and reshipping the other jobbers' goods. It likewise wrote the Snider Company on the same day with reference to damage to goods in transit. In response to a request from the Snider Company for payment, respondent wrote, on November 16, declining to make payment to the Snider Company for goods purchased from it by the respondent until reply was made by the Snider Company to respondent's letters (of October 8 and 22), and until allowance was made respondent for the jobbers' commission on the sale to the Basket Stores Company. The Snider Company suggested that respondent remit, taking credit for amounts claimed, and explaining fully the reasons therefor. The respondent complied, deducting, among other amounts, the sum of $100 as commission on the sale to the Basket Stores Company. This deduction, among others, the Snider Company refused to allow, and returned the remittance. Whereupon on December 16, respondent wrote the Snider Company, insisting upon the allowance of this commission, protesting against the action of the Snider Company in selling direct to the Basket Stores Company, and threatening the Snider Company with the cessation of respondent's business and return of all the goods produced by the Snider Company then in respondent's stock, if this commission were not allowed, and the Snider Company continued direct sales to the Basket Stores Company.

"(7) Early in January following, the Snider Company sent a representative to Lincoln, who interviewed the president of the respondent in an attempt to obtain a settlement of the controversy, which was not successful. The respondent, in accordance with the statements in its letter of December 16, ceased to purchase from the Snider Company."

The Commission concluded from the above findings of fact that the conduct of petitioner unduly hindered competition between the Basket Stores Company and others similarly engaged in business, and that the intent and purpose of the petitioner was to press the F. A. Snider Company to a selection of customers in restraint of its trade, and to restrict the Basket Stores Company in the purchase of commodities in competition with other buyers. We are of the opinion that the findings of the Commission do not show petitioner to have been guilty of an unfair method of competition, so far as the Basket Stores Company is concerned, or others similarly engaged in business. There is no finding that petitioner combined with any other person or corporation for the purpose of affecting the trade of the Basket Stores Company, or others similarly engaged in business. So far as petitioner itself is concerned, it had the positive and lawful right to select any particular merchan-

dise which it wished to purchase, and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it, or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer, or in this particular instance with the F. A. Snider Preserve Company, for any reason satisfactory to itself or for no reason at all. Any incidental result which might occur by reason of petitioner exercising a lawful right cannot be charged against petitioner as an unfair method of competition. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443; Victor Talking Machine Co. v. Kemeny (C. C. A.) 271 Fed. 810; Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993; Jergens v. Woodbury (D. C.) 271 Fed. 43, 44; Cudahy Co. v. Frey & Sons, 261 Fed. 65, 67, 171 C. C. A. 661; Union Pacific Coal Co. v. U. S., 173 Fed. 737, 97 C. C. A. 578; Dueber Watch-Case Co. v. Howard Watch & Clock Co., 66 Fed. 637, 644, 645, 14 C. C. A. 14; Western Sugar Refinery Co. et al. v. Federal Trade Commission (C. C. A. Ninth Cir., Oct. 10, 1921) 275 Fed. 725; Kinney-Rome Co. v. Federal Trade Commission (C. C. A. Seventh Cir., Sept. 8, 1921) 275 Fed. 665; Standard Oil Co. v. Federal Trade Commission (C. C. A.) 273 Fed. 478, 17 A. L. R. 389; Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; U. S. v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48, 141 C. C. A. 594.

Being of the opinion that the facts found by the Commission do not show an unfair method of competition by petitioner, its petition to revise is granted, and the order of the Commission is vacated and set aside.

LION BONDING & SURETY CO. v. KARATZ.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1922.)

No. 5902.

1. **Courts ⟸328(1)—Value of property involved, and not amount of plaintiff's claim, determines jurisdiction of insolvent corporation.**

   In a suit by a creditor of an insolvent corporation for the appointment of receivers to administer the assets of the corporation for the benefit of the creditors, brought on behalf of all other creditors similarly situated, the value of the corporation's assets, and not the amount of plaintiff's claim, determines the jurisdiction of the United States court.

2. **Courts ⟸280—Federal court must dismiss of its own motion for want of jurisdiction.**

   Even if the objection that the amount in controversy was insufficient to sustain the jurisdiction of the federal court was not raised, it is the duty of the court to dismiss of its own motion, if the cause was not within its jurisdiction.

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

3. Corporations ⟸554—Simple creditor can have appointment of receiver, without securing judgment, if corporation is insolvent.

Where a corporation is hopelessly insolvent, it would be futile to have an execution issued against it, and a simple contract creditor may maintain a suit in equity for the appointment of a receiver without being required first to reduce his claim to judgment and issue execution thereon.

4. Insurance ⟸50—Allegations held to justify appointment of receiver on ex parte application.

Allegations that defendant insurance company was insolvent and unable to pay plaintiff's claim, that it was threatened with litigation on numerous claims by different creditors, and that its assets would be wasted in the course of such litigation, are sufficient to warrant appointment of receivers for the corporation on the ex parte application of the creditor.

5. Receivers ⟸67—Generally have no right to property in another district.

In the absence of a statute, receivers generally have no right to the possession of the property of the insolvent in another state, or, if the appointment is made by national court, of the property in another district.

6. Corporations ⟸560(4)—Receivers, assignee, or state board under state law held to have right to possession wherever property is situated.

When the statute of the state under whose laws a corporation is created vests the title to all property of the corporation in the receivers, assignee, or a state board, they are entitled to possession, wherever the property is situated.

7. Courts ⟸493(3)—Temporary possession of assets of insurance company by the state department does not prevent receivership.

Where the state Department of Trade and Commerce has been ordered by the state district court of Nebraska to take possession of the assets of an insurance company, to conduct its business until such time as it shall appear to the court that the company can be permitted to resume the conduct of its business, under Laws Neb. 1919, c. 190, art. 3, § 4, subds. 1, 2, the temporary custody of the assets thereby given to the state department does not preclude the appointment of receivers for the corporation which was hopelessly insolvent, by the United States District Court in the district of Minnesota.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit by A. H. Karatz against the Lion Bonding & Surety Company. From an order denying defendant's motion to dismiss the complaint and vacate the appointment of receivers, defendant appeals. Affirmed.

Halleck F. Rose, of Omaha, Neb. (Amos Thomas and George W. Pratt, both of Omaha, Neb., and Clarence A. Davis, Atty. Gen. of Nebraska, on the brief), for appellant.

Bruce W. Sanborn, of St. Paul, Minn. (Sanborn, Graves & Ordway, of St. Paul, Minn., on the brief), for appellee.

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

TRIEBER, District Judge. The facts as they appear from the record in the case are:

On May 2, 1921, the appellee filed his complaint in equity in the District Court of the United States for the District of Minnesota, on behalf of himself and all other parties similarly situated, who may de-

sire to make themselves parties, against the appellant, in which it was charged that appellee is a citizen of the state of Minnesota, and appellant an insurance corporation organized under the laws of the state of Nebraska, admitted to do business in the state of Minnesota; that in pursuance to such authority it has written a large amount of liability insurance, and has outstanding in the state policies and obligations as surety exceeding $100,000; that in payment of a loss in the state of Minnesota, for which it became liable in the sum of $2,100 to one of its policy holders, a corporation created under the laws of the state of Minnesota, it gave, on April 19, 1921, a draft in the city of St. Paul, Minn., drawn by its duly authorized agent, on the home office of appellant in the city of Omaha, state of Nebraska, for said sum, which said draft became, by proper indorsement, in due course of business, for a valuable consideration, the property of appellee; that said draft was duly presented to appellant for payment and refused, for the reason that appellant did not have sufficient funds to pay the same. The appellant has a large amount of personal property in the state of Minnesota, of the value of at least $20,000; that it has liabilities amounting to the sum of $377,790, which it is unable to pay, and has been denied the right to continue to do business in the states of Minnesota and Nebraska; that it is insolvent, and there is great danger of the property being wasted and dissipated by litigation ensuing and about to ensue upon the large amount of unpaid claims owing; that various creditors are threatening to sue the company, and collect their claims by executions, attachments, or other legal proceedings, unless the court will take its property into its custody and appoint receivers, for the purpose of converting its assets into money and distributing the same among its creditors; that the object of the action is for the purpose of closing up its business and causing a just and fair distribution of its property among its creditors; that appellant's property, asked to be taken control of by the court, greatly exceeds in value the sum of $3,000, exclusive of interest and costs.

The prayer of the bill is to appoint a receiver of appellant's property, with the usual powers of a receiver, and an injunction, but does not ask that affairs of the corporation be wound up, or that it be dissolved. The complaint was duly verified. Upon presentation of the complaint, the court, on May 2, 1921, granted the prayer of the complaint, appointed receivers, and authorized the plaintiff to apply to any other District Court for ancillary proceedings. The receivers duly qualified. On May 14, 1921, appellant filed a motion to dismiss the complaint, upon two grounds. (1) That plaintiff's claim was only for $2,100 and therefore insufficient to give the court jurisdiction. (2) That plaintiff is only a simple contract creditor on a claim not reduced to judgment, and without having exhausted his remedy at law.

It also filed, at the same time, a motion to discharge the receivers and for a restoration of the property to its custody, or the custody of the Department of Trade and Commerce of the state of Nebraska. The Department has not intervened in the cause and has presented no claim. The grounds relied on in this motion are that the court was without jurisdiction, for the same reasons set out in the motion to dismiss the

complaint, and the additional ground that the defendant is an insurance company, existing under the laws of that state, and the Governor, through the agency of the Department of Trade and Commerce, is vested with power to regulate, supervise, and control the business of insurance, and the corporations engaged in it; that said Department of Trade and Commerce is charged with the duty of examining all insurance companies, and if necessary for the protection of the policy holders to apply to the district court of the county in which the company has its principal office for an order directing the company to show cause why the Department should not take possession of the property, etc., and conduct or close its business, and upon such application the district court is vested with power to decree forthwith that said Department take possession of said property and retain possession thereof until, after a hearing, the court finds that the cause of such order has been removed, and on like application the court may order the liquidation of the business of such company, dissolve it, and enjoin it from transacting business or disposing of the property; that before appellee filed his complaint in this action, viz. on April 12, 1921, in judicial proceedings had in the district court of Douglas county, state of Nebraska, wherein the Department of Trade and Commerce was plaintiff and the appellant herein defendant, that court entered an order directing the Department to take possession of appellant's property, and conduct its business until such time as it shall appear, after a hearing, that the cause of said order had been removed, and also enjoining the company from in any manner interfering with the conduct of the business by the Department, and the usual injunctive orders made in such cases; that pursuant to said order the Department took immediate possession of the assets, books, etc., of the company for the purpose set out in the order and decree of the district court of Douglas county, and has been conducting the business ever since. A transcript of the proceedings in the state district court is filed with the motions as an exhibit. From this exhibit it appears that the allegations in the motion are true. The prayer of the complaint of the Department in that cause is:

"Wherefore this plaintiff, the Department of Trade and Commerce of the state of Nebraska, prays that this court direct the Department of Trade and Commerce to take possession of the property, records, and effects and conduct the business of the defendant corporation, the Lion Bonding & Surety Company, and retain such possession and conduct the business until such time as, after a hearing, it shall appear to the court that the cause of the order directing the Department of Trade and Commerce to take possession has been removed, and that the company can properly resume possession of its property, records, and effects and the conduct of its business, and further prays that an order may issue forthwith from this court, directing the defendant the Lion Bonding & Surety Company to show cause why the Department of Trade and Commerce should not take possession of its property, records, and effects, and conduct its business, and further prays that, pending the return of such order to show cause and a hearing thereon this court may issue an order restraining the defendant the Lion Bonding & Surety Company from the transaction of its business, and from the disposition of any of its property, records, and effects until the further order of this court, and for such other and further relief as may to the court seem just and equitable under the circumstances."

It also shows, in an itemized report filed in the state district court, and which is a part of the exhibit filed in this cause, that the company is wholly insolvent, and that its liabilities, in addition to the loss of the $300,000 capital stock, exceed its assets by $377,790.68.

On May 30, 1921, after a hearing, the motion of appellant to dismiss the complaint and to vacate the appointment of the receivers made on May 2, 1921, was by the court denied, and from this order this appeal is prosecuted under section 129 of the Judicial Code (Comp. St. § 1121).

Prior to the hearing on May 30, 1921, on the 14th day of May, 1921, the appellant presented to this court, which was then in session at St. Paul, a motion under section 56 of the Judicial Code (Comp. St. § 1038) to disapprove the order appointing the receivers, which motion was heard by the court, composed at the time of the lamented Circuit Judge Hook, Judge Neblett, and the writer of this opinion. The grounds on which this motion was based were in effect the same as those set out in the assignment of errors on this appeal. The court denied the motion on May 31, 1921, all the judges concurring.

The assignments of error are:

I. "The court erred in making and entering the order appointing receivers of the property of the Lion Bonding & Surety Company upon the application and bill of complaint of complainant, in that the bill of complaint showed on its face that the said court was without jurisdiction of the subject-matter of said suit, because the sum or amount in controversy therein is limited to $2,100, and does not equal or exceed, exclusive of interest and costs, the sum or amount of $3,000."

II. "The court erred in making and entering the order appointing receivers of the property of the Lion Bonding & Surety Company, in that the bill of complaint of complainant showed on its face that the court was without power thereon to grant the equitable relief of appointment of receivers; the plaintiff claiming such equitable relief only as a simple contract creditor, without having reduced his claim to judgment, without having exercised or exhausted his remedy at law, and without presenting any specific lien upon or property interest of any sort in any of the said property of said Lion Bonding & Surety Company."

III. "The court erred in making and entering said order appointing receivers of all of the property of the Lion Bonding & Surety Company upon an ex parte application, and without notice to or knowledge of said defendant corporation; there being shown no imperative necessity or emergency for such judicial action without notice."

IV. "The said court erred in making and entering the order appointing said receivers of the property of said corporation, in that the said suit is one of a local nature, and the object and purpose of said bill, as therein stated, 'of closing up the business of said defendant,' could only be granted and exercised by the courts of the state or district in which said corporation was created and wherein it is domiciled, namely, the state and district of Nebraska, and for that purpose the power of said court for the district of Minnesota is secondary and ancillary only, and the primary jurisdiction to close up the business of the corporation within the territory of the state by which the corporation was created resides in the courts exercising territorial jurisdiction therein."

[1] Had the District Court jurisdiction of the cause, the plaintiff's claim not being in excess of $3,000, although the funds to be taken charge of and administered for the benefit of the company's creditors amounted to several hundred thousand dollars; the action being, not only for the benefit of the plaintiff, but all creditors of the company similarly situated?

This contention was ably presented by counsel at the former hearing on the motion to disapprove the appointment of the receivers and denied. The same contention was made in Dill v. Supreme Lodge of Knights of Honor (D. C.) 226 Fed. 807, and Cummings v. Supreme Council of Royal Arcanum (D. C.) 247 Fed. 992. The jurisdiction of the court in those cases was invoked by certificate holders of the defendants, fraternal insurance corporations, none of the certificates in either case exceeding $3,000, but in each the jurisdiction was sustained. In the Knights of Honor Case it was expressly raised, the writer of this opinion having presided in that case, although the opinion, which was delivered orally at the conclusion of the hearing, does not mention it.

[2] But, even had it not been raised, the courts of the United States being courts of limited jurisdiction, it would have been the duty of the court to dismiss the cause of its own motion, if not within its jurisdiction, even if the parties had by express consent sought to waive it. Minnesota v. Northern Security Co., 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870; C., B. & Q. Ry. v. Willard, 220 U. S. 413, 419, 31 Sup. Ct. 460, 55 L. Ed. 521; Chicago, R. I. & Pac. Ry. Co. v. State of Nebraska, 251 Fed. 279, 163 C. C. A. 435 (8th Ct.); New York Life Ins. Co. v. Johnson, 255 Fed. 985, 167 C. C. A. 250 (8th Ct.). In the Royal Arcanum Case the court dismissed the bill on the merits, which, of course, it neither would or could have done, if without jurisdiction to entertain the action. The record in that case, which the court examined, shows that the plaintiffs were holders of certificates of insurance, none of which exceeded $3,000, and the liability of the defendant association on these certificates was only contingent, being payable on the death of the member, while in good standing.

We concur in the conclusion of Judge Booth in his memorandum of opinion that—

"The bond (evidently the property and books intended) sought to be taken possession of and distributed in the receivership on behalf of the plaintiff and other creditors, in my judgment, is the amount involved, for the purpose of determining the jurisdictional question."

[3] II. The second assignment of error, that the plaintiff is not entitled to the equitable relief of appointment of receivers, as he is only a simple contract creditor, without having reduced his claim to a judgment and exhausted his remedy at law, is equally without merit. The facts alleged in the complaint, and which are admitted, are that the company is wholly insolvent, and its property in danger of loss and dissipation by reason of seizures under execution and attachments, and waste, to the great loss of the creditors, justified the action of the District Court to appoint receivers, without the necessity of useless proceedings at law. Williams v. Adler-Goldman Comm. Co., 227 Fed. 374, 142 C. C. A. 70 (8th Ct.), affirming (D. C.) 211 Fed. 530, and authorities cited in the opinions of this case. As said in Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004, on like contentions:

"Neither law nor equity requires a meaningless form. 'Bona, sed impossibilia, non cogit lex.' It has been decided that, where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite for equitable interference."

[4] III. The allegations in the verified complaint show beyond question such an imperative necessity or emergency as required a court of equity to appoint receivers on an ex parte application. If the facts charged, and upon which the receivers were appointed, had been put in issue by denials on the motion to discharge the receivers, and had not been sustained by competent evidence, the court would undoubtedly have discharged them. The defendant, in its motion to discharge the receivers, denied none of the allegations in the complaint. All the defendant relied on in its motion were the grounds set out in the assignment of errors now relied on for a reversal of the order of the District Court.

IV. The fourth assignment raises the important question whether, in view of the proceedings had in the district court of Douglas county, state of Nebraska, in the action instituted by the Department of Trade and Commerce of that state against this defendant, prior to the institution of this cause in the court below, and the order of that court, deprived the court below of jurisdiction to appoint the receivers, and for this reason it should have granted the motion of defendant to discharge them and restore its property to the defendant or custody of the Department of Trade and Commerce of the State of Nebraska.

[5] That, in the absence of a statute vesting the title to the property of an insolvent in the receivers upon their appointment, such appointments give a receiver no right to the possession of the property of the insolvent in another state, or, if the appointment is made by a national court of the property, in another district, is well settled. The leading cases of the Supreme Court on that rule of law are Booth v. Clark, 17 How. (58 U. S.) 322, 15 L. Ed. 164, and Great Western Mining Co. v. Harris, 198 U. S. 561, 575, 25 Sup. Ct. 770, 49 L. Ed. 1163, followed ever since, not only by all national, but all, courts. In Rose's Notes to Booth v. Clark, the authorities are collected, showing how uniform the decisions of the courts are on that question. The latest case reaffirming this principle is Sterrett v. Second Nat. Bank, 248 U. S. 73, 39 Sup. Ct. 27, 63 L. Ed. 135, affirming 246 Fed. 753, 159 C. C. A. 55, 3 A. L. R. 256.

[6] But when the statutes of the state under whose law as the corporation is created vest the title to all property of the defendant in the receivers, assignee, or a state board, they are entitled to the possession, wherever the property is situated. In Relfe v. Rundle, 103 U. S. 222, 226, 26 L. Ed. 337, it was held that, as the Insurance Commissioner of the state of Missouri was by the laws of that state vested with the title of all the property and assets of insolvent insurance corporations created by that state, the Insurance Commissioner can maintain suits in the courts of any state and recover the property, although in possession of a receiver appointed by a court of a foreign state. In Bernheimer v. Converse, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163, and Converse v. Hamilton, 224 U. S. 243, 260, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292, the same conclusions were reached under a statute of the state of Minnesota, vesting in a receiver of an insolvent corporation the absolute title to all its property, with power to sue in any court, including those of a foreign jurisdiction. And

this rule of law is recognized by the Supreme Court of Nebraska. Kinsler v. Casualty Co., 103 Neb. 382, 172 N. W. 33.

Counsel for appellant contend that under the laws of the state of Nebraska the title to all the property of an insolvent insurance company, created by the laws of that state, no matter where situated, vests in the Department of Trade and Commerce, when, upon an application to a district court of the county in which the principal office of the company is located, the court, by its order, places the property in the possession of that Department, and therefore this action is within the rulings in Relfe v. Rundle, supra, and the Converse Cases. The statute relied on is the act of 1919. Laws of Nebraska 1919, p. 573 et seq. The provisions of that act, on which counsel rely, are in section 4, art. 3, of that act and are as follows:

"1. Whenever any domestic company is insolvent, * * * or is found, after an examination, to be in such condition that its further transaction of business would be hazardous to its policy holders, or to its creditors, or to its stockholders, or to the public; or has willfully violated its articles of incorporation or association or any law of this state, or whenever any trustee, director, manager or officer thereof has refused to be examined under oath touching its affairs, the Department of Trade and Commerce may apply to the district court, or any judge thereof, in the county or judicial district in which the principal office of such company is located, for an order directing such company to show cause why the Department of Trade and Commerce should not take possession of its property, records and effects and conduct or close its business, and for such other relief as the nature of the case and the interest of its policy holders, creditors, stockholders or the public may require.

"2. On such application, or at any time thereafter, such court or judge may, in his discretion, issue an order restraining such company from the transaction of its business, or disposition of its property, records, and effects until the further order of the court. On the return of such order to show cause and after a full hearing, the court shall either deny the application or direct the Department of Trade and Commerce forthwith to take possession * * * and conduct the business until on the application of the Department of Trade and Commerce, or of such company, it shall, after a like hearing, appear to the court that the cause of such order directing the Department of Trade and Commerce to take possession has been removed, and that the company can properly resume possession of its property, records and effects, and the conduct of the business.

"3. If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, such liquidation shall be made by and under the direction of the Department of Trade and Commerce, which may deal with the property, records, effects and business of such company in the name of the Department of Trade and Commerce, or in the name of the company, as the court may direct, *and it shall be vested by operation of law with title to all the property*, effects, contracts and rights of action of such company as of the date of the order so directing it to liquidate. * * *"

[7] Had the Department proceeded in its action in the district court of Douglas county under subsection 3 of section 4 of the act, and the court had made an order in conformity with such an application, the contention of counsel could probably be sustained, a question not before us and therefore not passed on; but, as shown by the transcript of the proceedings in that court filed by appellant, which is a part of the record in this case, the petition of the Department was under subsection 1, and the order of the district court of the state in conformity with subsection 2, which on the petition presented to it was the only

relief prayed, and therefore the only relief the court could grant. The order of the court, which is in strict compliance with the prayer of the bill and the statute, is:

"It is therefore ordered, adjudged, and decreed that the plaintiff herein, the Department of Trade and Commerce of the state of Nebraska, shall and is hereby ordered to take possession forthwith of the property, records, and effects and conduct the business of the defendant company, the Lion Bonding & Surety Company, and retain such possession and conduct the business of said company until such time as, after a hearing, it shall appear to the court that the cause of this order has been removed, and that the company can properly resume possession of its property, records, and effects, and the conduct of its business; and it is further ordered, adjudged, and decreed that the defendant company, its officers, directors, stockholders, and employees be and are hereby enjoined and restrained from in any manner interfering with the said Department of Trade and Commerce of the state of Nebraska in the carrying out of this order and in the taking possession of the property, records, and effects, and in the conduct of the business of the defendant company, the Lion Bonding & Surety Company."

There is nothing in this order vesting the title to the property of the company in the Department, nor did the Department ask it in its petition. Under that order the Department could neither claim possession of any property of the company out of the state of Nebraska, nor maintain an action for its recovery in any court other than one of or in the state of Nebraska. As the company was admittedly insolvent, had large property interests in the state of Minnesota, within the jurisdiction of the court below, was unable to pay its debts then due, its assets and property in imminent danger of being dissipated by reason of these conditions, the court, upon the application presented by the plaintiff's complaint, exercised proper discretion in appointing the receivers, and denying the motion of the defendant company to discharge them.

The decree is affirmed. Let the mandate in this case go forthwith.

HERTZ et al. v. LION BONDING & SURETY CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1922.)

No. 5950.

Courts ⇐493(3)—Receivers entitled to property of insurance company, as against state department having temporary possession.

The receivers appointed by the United States District Court for Minnesota, for an insurance company organized under the laws of Nebraska, have exclusive right to the possession of all the assets of the corporation, notwithstanding a prior order by a Nebraska court temporarily vesting possession of such assets in the state department of trade and commerce, to conduct the affairs of the corporation until it can show the court it is again proper to permit the corporation to conduct its own business, under the well-settled rule that the court first obtaining jurisdiction in a proceeding to administer the property of an insolvent corporation has priority over other courts attempting to take such possession thereafter.

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

Suit by A. J. Hertz and others, as receivers, against Lion Bonding & Surety Company and others, to compel the delivery of all assets of the defendant corporation to the receivers. From a decree dismissing the suit, complainants appeal. Reversed, with directions to reinstate the bill, and issue the injunction as prayed.

Bruce W. Sanborn, of St. Paul, Minn. (Sanborn, Graves & Ordway, of St. Paul, Minn., on the brief), for appellants.

Halleck F. Rose, of Omaha, Neb. (Amos Thomas and George W. Pratt, both of Omaha, Neb., and Clarence A. Davis, Atty. Gen., on the brief), for appellees.

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

TRIEBER, District Judge. This cause arose out of the proceedings in No. 5902, Lion Bonding & Surety Co. v. A. H. Karatz, 280 Fed. 532, in which the opinion is filed this day. After the refusal of this court to disapprove the appointment of the receivers, and the denial by the District Court for the District of Minnesota of the defendant's motion to dismiss the complaint in that action, the appellants, hereafter referred to as the plaintiffs, in pursuance of the authority granted to them by the court, which appointed them, filed this action in the court below, praying that it be adjudged by the decree of the court that, as against the defendants in this cause, the plaintiffs, receivers appointed by the District Court of Minnesota, have priority of right and the exclusive right to the possession of all the assets of the defendant Lion Bonding & Surety Company, its books and records, and that the defendant have no right to their possession and for an injunction in the usual form. In addition to the Bonding Company, the officers of the company, the Department of Trade and Commerce of the state of Nebraska, Amos Thomas personally and as the agent and representative of that Department, and W. B. Young, the chief of the Bureau of Insurance of the state of Nebraska are defendants.

The complaint, after setting out the proceedings in the District Court for the District of Minnesota, resulting in the appointment of the plaintiffs as receivers of the property and assets of the bonding company, and their qualifications as such receivers, which are fully set forth in our opinion in No. 5902, Lion Bonding & Surety Co. v. A. H. Karatz, 280 Fed. 532, filed this day, and to which reference is made for the facts leading to the appointment of the receivers, alleges that, before their appointment as such receivers, on April 12, 1921, the defendant the Department of Trade and Commerce, referred to herein as the Department, had filed in the district court of Douglas county, state of Nebraska, its verified petition, praying for an order directing it to take possession of the records, property, etc., of the said bonding company, which had, in the conduct of its business, violated the laws of the state, and conduct its business until such time as, after a hearing, it shall appear to the court that the cause of the order directing the Department to take possession has been removed, and that the company can properly resume possession of the property, records, etc., and conduct its business; that said district court of Douglas county, upon the pres-

entation of the petition, made an order in conformity with the prayer of the petition, whereupon said Department of Trade and Commerce took into its possession the books of the company, its cash, securities, and other assets, for the purposes set out in the order of that court, and designated the defendant Thomas as its agent and representative to act for it; that, after the appointment of plaintiffs as receivers by the District Court of the United States for the District of Minnesota, the defendant company, under the provisions of section 56 of the Judicial Code (Comp. St. § 1038), applied to the United States Circuit Court of Appeals for the Eighth Circuit to disapprove the appointment of said receivers, which was by said court denied; that the sole right of possession in said Department under said order of the district court of Douglas county, Neb., was the right granted by the order of said court to the temporary possession of the property by the company for the conduct of its business; that on May 28, 1921, the Department filed in the district court of Douglas county its further petition, praying for an order authorizing the winding up and liquidation of the business of the company, which was by said court granted and defendants are proceeding to liquidate said assets. Exhibits of the proceedings in the state and national courts are filed with and made a part of the complaint, and also affidavits to sustain the allegations.

The defendants filed motions to dismiss, which are in effect identical with the grounds upon which the appeal in No. 5902 was prosecuted. They also pleaded the order of the district court of Douglas county, made and entered on April 12, 1921. The motion to dismiss was by the court sustained, and a final decree dismissing the action entered. From this decree this appeal is prosecuted. The only question not passed on in the opinion in No. 5902 was the power of the court below to grant the relief asked by the plaintiffs, by reason of the possession by the Department of the company's property, books, etc., under the order of the district court of Douglas county, made on April 12, 1921.

We held in No. 5902 that the possession by the Department was only for a temporary purpose. As the District Court of the United States for the District of Minnesota obtained jurisdiction and the right to control by its receivers of the company's assets before the state court had been asked or granted the order to wind up and liquidate the business of the bonding company and vest title to the property in the Department, its right to the possession by its receivers is superior to that of the state court. It follows that the receivers appointed by it are entitled to possession of the company's records and assets as against the Department of Trade and Commerce. The law is well settled that the court first obtaining jurisdiction in a proceeding to administer the property of an insolvent corporation has priority over other courts, attempting to take such possession thereafter. Farmers' Loan & Trust Co. v. Lake Street Elev. R. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Wabash R. Co. v. Adelbert College, 209 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379; Palmer v. Texas, 212 U. S. 118, 129, 29 Sup. Ct. 230, 53 L. Ed. 435; McKinney v. Landon, 209 Fed. 300, 126 C. C. A. 226; Havner v. Hegnes, 269 Fed. 537 (C. C. A. 8th Ct.).

The complaint states a good cause of action, and the court below

erred in sustaining defendant's motion to dismiss it. The decree is accordingly reversed, with directions to the court below to set aside its order dismissing plaintiffs' bill, to reinstate such bill, and to issue an injunction in favor of the appellants and against the appellees, restraining them and each of them from removing, secreting, or disposing of the moneys, books, papers, records, assets, property, accounts, or choses in action of or derived from the Lion Bonding & Surety Company, and from doing any other act in relation thereto, except to hold the custody thereof subject to the further order of the United States District Court for the District of Minnesota, Fourth Division.

Let the mandate in this case go forthwith.

BEECROFT & BLACKMAN, Inc., v. ROONEY (LONG FURNITURE CO., Intervener).

(Circuit Court of Appeals, Second Circuit. March 27, 1922.)

No. 164.

1. **Patents ⇐328—1,244,944, for cabinet for talking machines, held void for lack of invention.**

The Beecroft patent, No. 1,244,944, for cabinet for talking machines, *held* void for lack of invention.

2. **Patents ⇐17—Accepted skill of calling not patentable.**

The accepted skill of a calling is not patentable.

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

Suit in equity by Beecroft & Blackman, Inc., against Lawrence J. Rooney, doing business as the Lawrence J. Rooney Company, with the Long Furniture Company intervening. Decree for complainant, and defendant and intervener appeal. Reversed.

For opinion below, see 268 Fed. 545.

E. G. Siggers, of Washington, D. C., and James H. Griffin, of New York City, for appellants.

W. H. C. Clarke, of New York City (F. P. Warfield and H. S. Duell, both of New York City, of counsel), for respondent.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. The appellee sued for infringement of letters patent No. 1,244,944, granted to Clement Beecroft, covering a cabinet for talking machines. The appellee owns the patent by assignment. The defenses interposed are that the patent is invalid for want of patentable invention; also that the prior art and prior uses anticipated appellee's alleged invention.

[1] There were two types of phonograph cabinets on the market when the appellee filed the application and was awarded the patent in suit. One embodies a small casing or box, which is known as a portable machine or instrument. The casing incloses merely the sound-producing device, and is disassociated from any music record cabinet.

This type of instrument is usually supported on a table, or it may be supported without attachment on the music record cabinet. The other type embodies a casing for housing the sound-producing devices, which casing is attached to and supported on the music record cabinet. The latter type is much larger than the former, and is referred to in the trade as a built-in or floor type of machine. It is more expensive than the former. The first type, when placed on top of a cabinet, does not have the appearance of a unitary or built-in structure. The patent in suit has to do with a molding so associated with a music cabinet and portable phonograph as to convey the appearance of continuity between the phonograph and its supporting cabinet, producing the appearance of a built-in or floor type machine. It is a molding built at the joinder of both, so as to give the effect of one structure. The phonograph companies were selling portable and built-in machines. They did not sell, as a rule, the music cabinets for use with the portable machines. Music cabinets, either with plain tops or having a molding secured on the tops, were made and sold by independent manufacturers to the jobbers and retailers, who could sell the portable machines and music cabinets to the retail purchasers. As the portable machine itself and the associated music cabinet can be sold at from $10 to $15 less than the built-in type of machine, it afforded an opportunity to manufacturers of the separate music cabinets, and also the retailer, to sell the cabinets.

For several years before the appearance of the appellee's device, portable machines were on the market, and were provided with a base molding, the lower portion of which had vertical or upright sides. It was in this state of the art that the problem was presented of providing molding on music cabinets of such character and size that the molding on the portable machine may be placed within, and the co-operating molding be constructed so that the portable machine may be rested. The effect of the continuity between the molding on the portable machine and the music cabinet was secured, thereby producing the effect of a unitary or integral structure. In 1915 the Victor Phonograph Company put on the market a portable machine having a different conformation of base molding from that which it had previously employed and which is referred to above. The bottom of the molding did not have vertical or upright sides, but inclined sides and protruding feet or legs extending outwardly from the four corners of the casing. The bottom of the molding did not extend so far downward as the feet or legs and thereby left an open space on each side of the casing between the legs. With these protruding feet, it was manifestly not feasible to seat the portable box on top of the cabinet or within the co-operating molding on it in the manner heretofore described and in use in the prior portable cabinets. It was to avoid this open space that the trade was interested.

The problem presented was to provide a molding on the music cabinet which would overcome the disadvantage of the open space and still produce the effect of a unitary or built-in type of machine. By the drawings and specifications of the patent in suit, such a structure was obtained by providing on top of the music cabinet, three inward-

ly inclined cleats of sufficient height to cover the molding of the front and two sides of the portable phonograph. The phonograph may be slid from the back into position on top of the music box. This having been done, a fourth cleat is secured to the music cabinet for covering up the molding on back of the portable machine, thereby concealing the base of the portable machine and producing the effect of a unitary structure.

There are two claims in suit, which are as follows:

"1. A cabinet for a talking machine having a top on which the casing of the machine is adapted to be supported, an inclosure rising from said top, and formed of cleats which are adapted to engage the sides of the base, certain of the cleats being fixed to said top and another cleat forming a gate for entrance into the space of the inclosure, and means for holding the gate in closed position and permitting its opening.

"2. A cabinet for a talking machine having a top on which the casing of the machine is adapted to be supported, cleats rising from said top forming an inclosure for the sides of the base of said machine and adapted to interlock therewith, one of said cleats being separate from the other cleats and movable, forming a gate for the insertion of said base into the space of said inclosure; the inner sides of the cleats overhanging, so as to form interlocking joints with said base."

The Long Furniture Company is the manufacturer of the cabinet. The appellant Rooney is a retail dealer. The record is clear that the idea of using a molding between the base of the talking machine and the top of the music box cabinet is old. The idea of making them have the appearance of a unitary structure was old. It was old to join two elements, such as a substructure or base and a superstructure or top, and this by an intermediate flange or molding, which so interfits or harmonizes with the sub or super structure as to produce the effect of an integral construction. Illustrations may be found in the patents to Kirchner, No. 179,203, application filed December 27, 1875, granted June 27, 1876; patent to Snow, No. 414,177, filed February 18, 1889, granted October 29, 1889; patent to Bostick, No. 454,251, filed March 7, 1891, granted June 16, 1891; patent to Toohey, No. 482,285, filed February 3, 1892, granted September 6, 1892. The Vaughn patent, No. 1,136,600, filed March 25, 1914, granted April 20, 1915, shows a table top secured thereto forming guideways for the reception of an article, and a cleat forming a gate between the cleats for the same purpose of letting portable articles slide in the back, as is done in the case of this portable music box.

In this state of the art, we do not think that what the patentee did amounted to patentable invention. He produced an old result—that is, obtaining a structure having the appearance of a built-in machine—by employing well-known mechanical expedients commonly used to effect the same results in various analogous arts. The problem, at most, involved the shaping of the molding to meet a particular exigency or situation. It cannot be regarded as an invention which is entitled to the protection of the patent laws. It required no invention to make a molding and so shape it as to accommodate the protruding feet as they rested upon the top of the cabinet box. It involved a simple mechanical problem of cutting and sawing molding substantially in a manner that had heretofore been done in the prior art or use, so

as to produce a housing to receive a portable machine with the legs of particular shape and comparatively simple. The appellant's The Long Furniture Company's prior use was known to the patentee, and we have no doubt that the solution of the problem will become very obvious to any skilled woodworker. It is a matter of common and general knowledge that woodworkers can and do habitually make moldings to round corners and accommodate curves and obstructions which may appear in the line. To shape corners and curves and combine formations, with separate parts joined to fit in and over objects or space, does not require inventive thought.

[2] The device is a simple one. To allow the appellee to prevail with his patent would be to lower the standard required for invention, which is constantly being raised. It needs no citation of authorities to support the doctrine that the accepted skill of a calling is not patentable, and the mere covering up or concealing of one form of molding rather than another does not involve invention. The case is controlled by the rule announced in similar cases. See Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Yale Lock v. Greenleaf, 117 U. S. 554, 6 Sup. Ct. 846, 29 L. Ed. 952; Capital Metal Co. v. Kinnear, 87 Fed. 333, 31 C. C. A. 3; Hillard v. Remington Typewriter Co., 186 Fed. 334, 108 C. C. A. 534; Underwood Co. v. Victor Co., 188 Fed. 82.

The decree is reversed.

UNITED STATES ex rel. and to Use of BILLS et al. v. PERKINS et al.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1922.)

No. 5750.

1. **Bankruptcy ⟸373—Trustee's surety held liable for acts of trustee in maliciously defeating lien claim of holders of bankrupt's note, whether acts were solely for benefit of bankrupt's estate or in part for personal advantage.**

   If trustee in bankruptcy, for the wrongful purpose of destroying the lien of holders of bankrupt's note secured by deed of trust on land, obtained possession of bankrupt's note secured by prior deed of trust on the same land, knowing it had been paid, and caused land to be sold under such prior deed of trust, and, after purchasing land at such sale, caused it to be sold at a trustee's sale, and, under collusive agreement with purchaser, purchaser quieted title in action by process calculated to escape actual knowledge by holders of such other note, the trustee's surety was liable to such holders, regardless of whether trustee acted solely for the benefit of the bankrupt's estate, or in part for personal advantage under color of his office.

2. **Officers ⟸129—Sureties on official bonds liable for negligence or malfeasance of principal in performance of acts done virtute officii.**

   Sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done virtute officii.

3. **Officers ⟸129, 135—Condition of bond providing only for faithful discharge of official duties broken by mere negligence, without corruption, in the performance of a ministerial duty.**

   Where official bond provides only for the faithful discharge by the principal of his official duties, the condition is broken by the mere negligence, without corruption, of the principal in the performance of a

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ministerial duty, which performance does not involve the exercise of discretion, and, where the duty which has not been faithfully discharged was owing to the person injured, such person may sue on the bond.

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

Suit by the United States, at the relation and to the use of Frank L. Bills and H. L. Ewing, a partnership, etc., against Joseph R. Perkins, trustee in bankruptcy of the estate of William C. Kaune, bankrupt, and another. Judgment of dismissal, and plaintiffs bring error. Reversed and remanded.

Clyde Gary, of St. Louis, Mo. (Frederick L. Cornwell and John T. Hicks, both of St. Louis, Mo., on the brief), for plaintiffs in error.

Jacob M. Lashly, of St. Louis, Mo. (Robert A. Holland, Jr., and Thomas G. Rutledge, both of St. Louis, Mo., on the brief), for defendants in error.

Before SANBORN and LEWIS, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. This suit was brought in the name of the United States and at the relation and to the use of plaintiffs in error, a copartnership doing business under the firm name and style of Frank L. Bills & Co. against Joseph R. Perkins, trustee in bankruptcy of the estate of William C. Kaune, bankrupt, and the Bankers' Surety Company, a corporation, and surety upon the bond of said trustee, to recover damages upon the trustee's bond for alleged malfeasance of the trustee in the administration of said estate. The damages laid exceed the penal sum nominated in the bond.

William C. Kaune was adjudged a bankrupt on the 13th day of February, 1911, and on the same day the defendant Perkins was duly elected and appointed as trustee, and qualified as such. He gave bond in the sum of $5,000, with the defendant Bankers' Surety Company as surety thereon. The amended petition below alleges that on or about the 5th day of October, 1910, the said Kaune was indebted to Bills & Co., for money advanced and loaned, in the sum of $6,541.81, for which a promissory note was given, secured by trust deed upon certain real estate therein described; that on the 28th day of April, 1911, the said trustee instituted in the District Court for the Easern District of Missouri an action wherein he sought to have canceled and adjudged void the note to plaintiffs in error, hereinabove referred to, and the deed of trust securing the same, alleging that the same were given with the intent to hinder, delay, and defraud creditors. On the same day a temporary restraining order was granted. Thereafter no further order of court concerning said temporary restraining order was made until the 2d day of October, 1917, when said cause came on to be heard. The court dismissed complainant's bill for failure of proof, and the temporary restraining order was dissolved.

The petition further alleges that theretofore, on the 26th day of September, 1910, said Kaune had executed to the Bank of Ironton, of Ironton, Mo., a promissory note in the sum of $2,000, secured by

deed of trust upon the same property, to which reference has been made, which was accordingly a first lien thereon, but that said note had been fully paid and discharged before said petition in bankruptcy was filed; the deed of trust, however, was not released of record; that the said Perkins wrongfully obtained possession of said note with knowledge that it had been paid, and caused the then acting sheriff of the county in which said lands are situated to sell under the deed of trust purporting to secure said $2,000 note, and at said sale said trustee became the purchaser; that thereafter the said trustee, wrongfully designing and contriving to deprive plaintiffs in error of what had then become a first and preferred lien on said land, and to injure them and deprive them of their lawful rights, did procure and cause to be issued by the referee in bankruptcy, having jurisdiction of said bankrupt estate, an order authorizing such trustee to sell the title and interest of the bankrupt in said land, the same being the interest acquired under and by virtue of the adjudication and of the trustee's sale aforesaid; that pursuant to said order said trustee, further designing and contriving to deprive plaintiffs in error of their lien, did execute and deliver to one Faris a pretended deed of conveyance for said land, and further did contrive with said Faris, and did advise, aid, and procure said Faris to institute in the proper state court an action to quiet the alleged and pretended title of Faris to said land, and did thereby cause and procure to be rendered by said court a final decree quieting said title in Faris.

Plaintiffs in error further allege that all said proceedings were unknown to them until the 2d day of October, 1917, when the restraining order against them was dissolved. It is further alleged that defendant Perkins, as such trustee, with the wrongful intent and purpose aforesaid, and to effectuate the same, did delay the determination of the issues involved in the injunction suit against plaintiffs in error, and caused said restraining order to be continued in operation and effect until after the rendition of the decree quieting said title in Faris; that by reason of the premises, and by reason of the constructive service in the state court, which is made binding upon them by statute, their security upon the land in question has been entirely lost; that the trustee acted under color of his said office as trustee, and for the wrongful purpose of depriving plaintiffs in error of their lawful rights; that they have been damaged accordingly, at least to the full amount of the debt secured; and pray judgment in the sum of $5,000, the full penalty of the bond.

The surety company alone was served with process, and interposed its demurrer to the amended petition, the material substance of which has been stated. The principal ground of the demurrer was that the petition does not state facts sufficient to constitute any cause of action against these defendants. It was also urged that there is a defect of parties plaintiff, and that relators are not proper plaintiffs, not being creditors with a provable claim, which has been allowed, or may be allowed, in said estate, and are therefore not entitled to distribution or participation. This demurrer was sustained by the trial court, and,

relators declining to plead further, judgment was rendered accordingly.

The action of the trial court would be justified, if it should appear that the trustee, on behalf of the estate, had acquired said first mortgage note, and had foreclosed the deed of trust securing it, in good faith for the purpose the better of clearing title and of rendering the disposition of the property more advantageous for and beneficial to the bankrupt estate, provided, further, that all his acts were intended for the benefit of the estate without collusion, and with no unlawful purpose directly or indirectly of depriving the relators of their legal rights by conduct tantamount to fraud and deceit.

[1] But the relators in their pleadings, while the same are, perhaps, not drawn with desirable precision and completeness of averment, sufficiently charge that the acts of the trustee complained of were committed in pursuance of a malicious purpose to defeat the lien claim of relators irrespective of its validity, and of the outcome of the suit challenging their title in which the restraining order was issued; that the note secured by the first deed of trust had been paid and discharged, and that that deed was no longer in force; that with knowledge of this the trustee contrived to get possession of the $2,000 note, and to make the sale under order of the bankruptcy court for the purpose of cutting out relators' lien upon the face of the proceedings; that then, to consummate this unlawful purpose, made in collusion with the purchaser, Faris, he procured the quieting of the title in an action and by a process well calculated to escape actual knowledge on the part of the relators. This charges conduct on the part of the trustee violative of his duty as an impartial trust officer toward all persons interested in the estate, including relators, and whether his acts were solely for the benefit of the bankrupt estate, or in part for personal advantage, but done as an officer of the bankruptcy court, and under color of his office, is immaterial so far as the issues here presented are concerned.

[2, 3] Sureties on official bonds are liable for negligence or malfeasance of their principal in the performance of acts which are done virtute officii. The bond providing only for the faithful discharge of the principal of his official duties, the condition of the bond is considered to have been broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does involve the exercise of discretion, and, where the duty which has not been faithfully discharged was owing to the person injured, such person may sue on the bond. By the weight of authority, acts done by color of office are regarded as acts for which sureties on official are liable. 29 Cyc. 1455, 1456, and cases cited. The acts here complained of fall within this category, and particularly so in view of the charge that they were done with wrongful intent and purpose.

The case should be reversed and remanded, for a trial in which the exact situation may be developed, and through which the question of liability under the facts may be more concretely presented. It may be that the pleadings will need revision, and it may be, of course, that the evidence will not support the substantive allegations on critical

points; but neither the trustee nor his surety should escape liability for conduct such as is here charged, if the charge made is established by the evidence.

LUMIERE v. ROBERTSON-COLE DISTRIBUTING CORPORATION.

(Circuit Court of Appeals, Second Circuit. March 27, 1922.)

No. 190.

1. **Copyrights ⟸20—Under ordinary employment photographer has no proprietary right in photographs made.**
   The usual contract between a photographer and his customer is one of employment. The production of the photograph is work done for the customer, not for the photographer, and the sitter is entitled to all proprietary rights therein.
2. **Copyrights ⟸20—Person procuring and paying for photograph has right of copyright.**
   Where a photographer takes photographs of a person who goes or is sent to him in the usual course, and is paid for the photographs and for his services in taking the same, the right of copyright is in the sitter or in the person sending the sitter to be photographed, and not in the photographer; but photographer is entitled to copyright where he solicits sitter to come to his studio and takes photographs gratuitously for his own benefit and at his own expense.
3. **Copyrights ⟸36—Photographs purchased from photographer held free from subsequent copyright obtained by him.**
   A defendant, which procured photographs of a person to be taken and paid the photographer for copies delivered, holds the same free from any copyright which the photographer may subsequently obtain thereon.
4. **Literary property ⟸5—Photographer has no exclusive right in pictures made, but not copyrighted.**
   Where no valid copyright has been obtained, a photographer has no exclusive right in the product of his artistic skill.

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

Suit in equity by Samuel Lumiere against the Robertson-Cole Distributing Corporation. Decree for defendant, and complainant appeals. Affirmed.

Almy, Van Gordon & Evans, of New York City (Don R. Almy, of New York City, of counsel), for appellant.

De Witt & Mulqueen, of New York City (Benjamin P. De Witt, of New York City, of counsel), for appellee.

Before ROGERS and MANTON, Circuit Judges, and KNOX, District Judge.

MANTON, Circuit Judge. In this action for infringement of copyright, these facts are established. The appellant is a photographer. The Robertson-Cole Company was a producer of motion pictures, and employed Carpentier, a pugilist, to appear as an actor in motion pictures. The appellee is a distributor of motion pictures. One Adolfi was employed by the Robertson-Cole Company to direct the taking of the motion pictures in which this pugilist was to appear. The contract

of employment was in the name of the Territorial Sales Corporation. Robertson-Cole Company guaranteed the contract to Carpentier. Adolfi was, for all practical purposes, in the employ of the Robertson-Cole Company. The contract itself was guaranteed by the Robertson-Cole Company. Cole, a member of this firm, was president of the Territorial Sales Company and the partnership owned all the corporation stock. Adolfi's authority permitted him to engage Carpentier. One Letendre was associated with, or interested, at least, as an agent of, the appellant. He and Adolfi made the contract for taking the pictures of Carpentier. The evidence satisfactorily shows that the pictures of Carpentier in question were taken on behalf of the Robertson-Cole Company to be used by it for the purpose of advertising the motion pictures. It appears that Adolfi's business was known to both the appellant and Letendre when it was arranged to take the picture at the appellant's studio, and it is declared that Adolfi made it plain that the Robertson-Cole Company would pay for the pictures.

Before making the appointment with the appellant to take the pictures, Adolfi went to the office of the Robertson-Cole Company and there talked with the appellant on the telephone, and made an appointment to bring Carpentier to appellant's studio. When this was done, Carpentier was accompanied by his manager and an interpreter, for he did not speak English. Before going to the studio, Adolfi went to the Biltmore Hotel in New York, where the pugilist and his manager were staying, and where desirable costumes were selected in which to have the pugilist photographed. These were taken to appellant's studio and were used in the poses and pictures taken. Such costumes appeared on the pugilist in the pictures which were exhibited later. It was apparent that the photographic work was for motion picture purposes. When the appellant's agent, Letendre, desired to have Carpentier sign a letter giving the appellant the copyright privilege for the photographs, instead of presenting this letter to Carpentier or his manager, who were both present at the time, it was presented to Adolfi, which is a significant fact that the appellant regarded Adolfi as the person in charge of the enterprise. After the photographs were taken, the finished prints were sent to the Robertson-Cole Company, although at that time no arrangement had been made as to price for the work. The Robertson-Cole Company paid the sum of $809.50 for 3,190 copies of the finished photographs. It is thus apparent that the Robertson-Cole Company bought the photographs and paid the customary price therefor. It also appears that $57 were paid for developing negatives of photographs, which were later used by the Robertson-Cole Company.

This testimony disproves the claim of the appellant that the photographs were taken at his expense. There is in the record an admission by the appellant that the photographs belong to the Robertson-Cole Company. The pugilist's manager understood that the pictures were taken for the Robinson-Cole Company. He did not understand that the appellant secured a copyright. After Adolfi left the studio, the appellant and his agent prepared another letter for Carpentier to sign, and on April 3d they went to Baltimore, and there endeavored to induce the pugilist's manager to sign this letter authorizing the ap-

pellant to copyright the pictures. Such a letter was signed, but it is not clear that the pugilist or his manager, neither of whom could speak English, had knowledge of the contents or the effect of the letter.

The testimony of the appellant and his agent, Letendre, in endeavoring to maintain his claim that he, by consent of Carpentier, took the pictures at his expense with the right to copyright the same, is unsatisfactory. In the affidavit submitted on an application for a preliminary injunction, Lumiere maintained that he received no compensation for taking the photographs. On the trial, he admitted receiving $866.50, including $57 for services for retouching. Letendre, in an affidavit, said that he told Adolfi that the Robertson-Cole Distributing Corporation (the appellee) could use the photographs, but must reproduce the copyright mark of the appellant. On the trial, he denied that the name of the Robertson-Cole Distributing Corporation was mentioned in his talk with Adolfi and said that Adolfi denied expressly that Letendre mentioned copyright to him. In the affidavit, appellant said he entered into an express agreement with the pugilist whereby the appellant was to take photographs and copyright the same. On the trial, it appeared that neither had ever seen or been in communication with Carpentier or his manager before they came to the studio to have the photographs taken. In the affidavit, the appellant said he solicited the pugilist at cost and expense. On the trial it appears that he neither directly nor indirectly spent anything to get Carpentier to come to the appellant's studio. In the affidavit, it is said that the consent in writing to copyright the photographs was obtained by the appellant from the pugilist's manager. On the trial, it was testified that no consent to copyright was given by the pugilist's manager, that the word "copyright" was not mentioned to Descamp in the French language. The letter was obtained from the pugilist's manager several days after the pictures had been actually taken.

While the testimony in the case is in severe conflict, the foregoing statement, we believe, constitutes the facts. The relief sought by the appellant is that the appellee be restrained by injunction from offering for sale or otherwise distributing copies of the photographs of Carpentier in various poses and that damages suffered for alleged wrongful publication be awarded to the appellant.

[1] On these facts, the appellant is not entitled to the relief which he seeks. The usual contract between a photographer and his customer is one of employment. The production of the photograph is work done for the customer, not for the photographer, and the sitter is entitled to all proprietory rights therein. The work is done for the person procuring it to be done and the negative, so far as it is a picture, or capable of producing pictures of that person and all photographs so made from it, belong to the person. Neither the artists nor any one else has any right to make pictures from the negative or to copy the photographs, if not otherwise published, for any one else. Press Pub. Co. v. Falk (C. C.) 59 Fed. 324; Altman v. New Haven Union Co. (D. C.) 254 Fed. 113; Lumiere v. Pathé (C. C. A.) 275 Fed. 428.

[2] This court announced the above doctrine as against this very appellant. Lumiere v. Pathé, supra. Where a photographer takes

photographs of a person, who goes or is sent to the photographer in the usual course, the photographer is paid for the photographs and his services in taking the photographs, the right of copyright is in the sitter, or in the person sending the sitter to be photographed, and it is not in the photographer. Moore v. Rugg, 44 Minn. 28, 46 N. W. 141, 9 L. R. A. 58, 20 Am. St. Rep. 539; White v. Dreyfoos, 156 App. Div. 762, 142 N. Y. Supp. 37. But where a photographer solicits persons to come to his studio and takes photographs gratuitously, for his benefit and at his expense, the right to copyright is in him. Lumiere v. Pathé, supra.

[3, 4] Announcing, as we do, that the pictures of Carpentier were taken at the instance of the Robertson-Cole Company, and for pay received by the appellant from the Robertson-Cole Company, the proprietary right, and, under the agreement above mentioned with Carpentier, the right to copyright the same, resided in the Robertson-Cole Company. Boucas v. Cooke et al., L. R. 2 K. B. 227. The photographs which were delivered to the Robertson-Cole Company belong to it, for they were paid for. They are free from any copyrights which the appellant may have obtained in having issued to him the copyright grant. Section 1 of the Copyright Act (Comp. St. § 9517) provides that "any person entitled thereto upon complying with the provisions of this act," etc., is entitled to a copyright. Where no valid copyright has been obtained, the producer has no exclusive right in the production of his artistic skill. Bamforth v. Douglass (C. C.) 158 Fed. 355. It follows that the decree below must be affirmed.

Decree affirmed.

THE ST. JOHNS N. F.

(Circuit Court of Appeals, Second Circuit. March 27, 1922.)

No. 218.

1. **Shipping ⇐110—Shipper held to have exercised option to ship under deck.**
   Where a freight contract provided for shipment on or under deck, it gave the shipowner the option to determine where the cargo should be shipped, and the issuance of a clean bill of lading, which designates a stowage under deck, is an indication by the shipowner of its election to stow under deck, and binds the shipowner by its terms.

2. **Shipping ⇐123—Ship is liable for jettisoning cargo carried on deck without authority.**
   A ship, which carried on deck a cargo which was required by the bill of lading to be carried under deck, is liable to the cargo owner for loss occasioned by jettisoning the cargo which would not have been necessary, if it was carried under deck, since the bill of lading must be deemed the only contract between the owner and the ship.

3. **Shipping ⇐132(5)—Evidence held to show consignee did not consent to carriage on deck.**
   Evidence that the consignee was a different corporation from the shipper, and that on receiving a clean bill of lading it paid a draft attached thereto and insured the property as carried under deck, shows that the consignee did not assent to stowage on deck, so that the provision of the bill of lading is controlling, and should be read as an absolute obligation to load under deck.

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4. Shipping ⟸140—Deviation as to manner of carrying cargo prevents reliance on limitations in bill of lading.

A deviation from the manner of carrying the cargo as provided in the bill of lading has the same effect as a deviation from the route, and prevents the carrier from relying upon any limitations on its liability contained in the bill of lading, since by such bill of lading the carrier has prevented the owner from protecting himself by insurance against loss of the goods while being carried contrary to the terms of the bill.

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

Libel by the S. A. Companhia Geral Commercial do Rio de Janeiro against the schooner St. Johns N. F., of which the St. Johns N. F. Shipping Corporation was claimant. Decree for libelant, and claimant appeals. Affirmed.

Certiorari granted 257 U. S. —, 42 Sup. Ct. 587, 66 L. Ed. —. See, also, 272 Fed. 673.

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

Crowell & Rouse, of New York City (E. Curtis Rouse, of New York City, of counsel), for appellee.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. This appeal is from a final decree awarding damages for the loss of 800 barrels of rosin shipped from New York, consigned to Rio de Janeiro on the schooner St. Johns N. F. in June, 1918. An answer was filed, to which exceptions were interposed on the ground that the answer did not state a defense to the cause of action alleged in the libel. The exceptions were sustained, resulting in a decree for the appellee.

On June 6, 1918, Job & Co., as agents for the schooner St. Johns N. F., entered into a written freight contract with the General Commercial Company, Limited, through its agents, to carry on board the schooner St. Johns N. F. then at the port of New York 800 barrels of rosin "on or under deck" to the port of Rio de Janeiro at the agreed freight of $3 per long ton prepaid. The rosin was loaded on deck, boxed down and planked. A clean bill of lading, dated June 12, 1918, was issued and contained no reference to deck stowage or relieving clauses therefor, or any clause referring to prior freight engagement. On June 19th, the schooner sailed. She was properly manned and equipped and seaworthy in all respects, but before arrival at her port, the deck cargo broke adrift in a hurricane, and it was necessary to jettison the rosin. The invoice cost of the cargo in New York at the time of shipment was $21,037.02, and general marine insurance of the shipment was procured in the sum of $23,200. Upon failure to receive the cargo, the appellee was unable to collect the insurance by reason of the disclaimer of liability by the insurance company because there was a failure to disclose the stowage of the shipment on deck, which risk was not covered by the policy issued. A recovery has been allowed for the market value, with interest, of the rosin at Rio de Janeiro. The freight

contract permitted a stowage on or under deck at the ship's option. The first question presented is whether the ship was bound by a clean bill of lading, to give under deck stowage, and is liable for the loss due to failure to stow under deck. It is conceded that the loss was due to jettisoning the cargo when it broke loose in the storm. All other cargo was under deck and none of it was lost or damaged. The vessel was not stranded or in collision, and there was no general average. The freight contract was made several days before the bill of lading, and does not contract, by its terms, as to details of shipment. It was a reservation for space and gave to the ship the privilege of exercising an option as to what space should be furnished, whether on or under deck.

[1] Having issued a bill of lading subsequently, it must be deemed that the bill of lading expresses the decision as to what space would be allowed. The bill of lading, because it is silent as to where the cargo was to be stored, does not vary the freight contract. It is argued, on behalf of the appellant, that the contract of shipment did not merge with the bill of lading and that the freight contract controls. It is claimed that by the terms of the freight contract the ship's option may be exercised so as to load on or under deck; but, when it makes its choice, the shipment and the contract are nevertheless made subject to the terms of the bill of lading. A clean bill of lading has long been held to designate a stowage under deck, and the issuance of it is an indication by the shipowner of its election to stow under deck. The Delaware, 14 Wall. (81 U. S.) 579, 20 L. Ed. 779; The Sarnia (C. C. A.) 278 Fed. 459, decided December 14, 1921. In the latter case, this court held that, unless there is an express written agreement to the contrary—or a custom to the contrary is proven—a clean bill of lading obligates the shipowner to stow the cargo under deck. The bill of lading cannot be said to be at variance with the contract of affreightment. The latter provided for stowage at the election of the shipowner, and, having exercised its option by issuing a clean bill of lading, the ship is bound by the terms of the bill of lading, whatever may be the remedies of the shipowners as against other parties. This view has found support in the British courts. The Royal Exchange Shipping Co. v. Dixon (1886) 12 A. C. 11.

[2] When goods are carried on deck contrary to the obligation to carry under deck, they are carried at the risk of the shipowner in case of loss through jettisoning. The Kirkhill, 99 Fed. 575, 39 C. C. A. 658; New Orleans (C. C.) 26 Fed. 44. The bill of lading must be deemed the only contract between the libelant and the ship. The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; Leduc & Co. v. Ward, 16 Aspinall, Maritime L. C. 290.

[3] When the case was here before, it was directed that no mandate issue until further order of the court and the parties were permitted to take further testimony in this court. 272 Fed. 673. The testimony taken in this court was directed toward the relationship between the shipper and the appellee, and the appellee's ownership of the goods and the lack of knowledge of the shipper of actual deck stowage. This testimony reveals that the shipper and the appellee are two

separate corporations; neither held stock in the other or shares its profits or losses. The merchandise was shipped, the documents forwarded, and the draft paid by the appellee. The shipment was covered by full marine coverage for under deck stowage and this was vitiated by the deck stowage. The testimony satisfactorily establishes the appellee's claim that it lacked knowledge or notice from the ship owner of the actual place of stowage. It therefore cannot be convincingly asserted that there was an assent to deck stowage. In this respect the case differs from Lawrence v. Minturn, 17 How. (58 U. S.) 100, 15 L. Ed. 58. We must therefore consider that the bill of lading is controlling, and should be read as an absolute direction and obligation to load under deck. Here the shipper relied upon such stowage, for it obtained its insurance against deck risks. In Herr v. Tweedie Trading Co., 181 Fed. 483, 104 C. C. A. 231, the question was presented whether there was a merger of the freight contract with the bill of lading. The decision was based upon the ground that there was no conflict between the bill of lading and the contract, and the principal question decided was a conflict between the written and printed clauses in the bill of lading itself. The court decided that all three clauses were in harmony. Such question is not presented on this appeal, and the decision in the Herr Case does not support the claim of the appellant that there was a merger here of the contract and the bill of lading. Whether or not the appellee be charged with knowledge of the negotiations between the broker and ship manager is not important, for the reason that the same negotiations resulted in the freight contract and thereafter the shipowner exercised its election by issuing a clean bill of lading.

[4] The appellee has been awarded a decree for the market value of rosin at Rio de Janeiro on the day on which the vessel reached her destination. This is proper. The cargo was laden on deck contrary to the requirements of the clean bill of lading issued therefor, and by reason thereof the bill of lading and all its clauses were wiped out, and the ship cannot claim the benefits of any limitations therein contained. The Sarnia, supra. To so stow the cargo was a deviation which changed the character of the voyage so essentially that the shipowner who has deviated cannot claim the benefits of the terms of the bill of lading. It vitiates and avoids the contract of carriage. Lawrence v. Minturn, 17 How. (58 U. S.) 100, 15 L. Ed. 58; Constable v. Natl. S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; Pacific Coast Co. v. Yukon Co., 155 Fed. 29, 83 C. C. A. 625. The same rule prevails in England. Royal Exchange Shipping Co. v. Dixon, supra. The reason therefor is that the exemption clauses and limitation in the bill of lading are for the benefit of the carrier who has control of the shipments after its delivery to him. By his bill of lading he declares the manner and place of carriage. The shipper, having this notice, understands the reasons attendant upon the character of the transportation, and accepts the limitations and dangers. Freight rates are fixed accordingly. The shipper protects himself accordingly with insurance. When the carrier voluntarily varies from the method or place of carriage contracted for, he leaves the shipper with unknown risks against

which he has not insured and he cannot recover on the insurance which he obtains. The shipowner is in the same position as in the case of deviation in route. Globe Navigation Co. v. Russ Lumber Co. (D. C.) 167 Fed. 228. The limitation of liability being eliminated, the appellant became subject to the general rule of damages, which, in the case of nondelivery, is the market value of the goods, less the landing charges at the time and place the shipment should have arrived. Downing v. Outerbridge, 79 Fed. 931, 25 C. C. A. 244; So. Pac. Ry. Co. v. Reagin, 228 Fed. 14, 142 C. C. A. 470. Since it is stipulated that the market price of the shipment of rosin at Rio de Janeiro on the day the schooner arrived was $40,908.20, the decree for that amount, with interest, was proper.

Decree affirmed.

PIGEON RIVER RY. CO. et al. v. CHAMPION FIBRE CO.

(Circuit Court of Appeals, Fourth Circuit. March 21, 1922.)

No. 1919.

1. **Railroads ⟸154—Guaranty of bonds of another company puts bondholder on inquiry as to relation between companies.**

   One who took bonds issued by one railroad company on which was indorsed a guaranty of their payment by another company is put on inquiry as to the relations between the companies which would reveal that the property of the company issuing the bonds had been leased to the company guaranteeing their payment.

2. **Corporations ⟸180—Corporation owning all the stock of another held not entitled to complain of the management thereof with two other corporations under contract to which it was a party.**

   Where a corporation owning all the stock and bonds of another corporation participated in a contract intrusting the management of the latter and two other corporations as branches of a common business to an individual and another corporation controlled by him, owning a majority of of the stock in each, it cannot complain that this method of doing business is carried out, and must submit to mistakes of judgment, and may complain only if it can show that they sacrificed the interest of the corporation whose stock and bonds it controlled to their own.

3. **Corporations ⟸180—Corporation and individual given management of several corporations in which they owned the majority of stock held bound to give notice to minority directors of proposed transaction out of the ordinary.**

   Where the management of several corporations is intrusted to an individual and a corporation controlled by him, owning a majority of the stock in each, but the minority stockholders were represented on the board of directors of the principal company, they were bound to give the minority directors notice of any action proposed to be taken by the board of directors out of the ordinary course of business, so as to give them an opportunity to object to the action and to protect their interests if such were taken over their objection.

4. **Corporations ⟸474—Minority stockholders held to have acquiesced in plan of majority to pledge of bonds.**

   Where the minority stockholders of affiliated corporations had been notified of the meeting of the directors of the various corporations at which it was proposed to arrange for a loan, and had been informed after the meeting, which they did not attend, that it was decided to pledge the bonds of one company as collateral to secure its debt for a much

smaller amount to another company, so as to permit the pledgee to use the bonds in borrowing money for the furtherance of the enterprise, and the minority interests made no objection to the plan but permitted the majority to sell the bonds for the purpose indicated with their indorsement which subsequently required them to take up the bonds, the minority stockholders had acquiesced in the transaction and could not thereafter object that the pledge of the bonds for that purpose was unauthorized.

5. **Corporations ⟸474—Pledgee who is also trustee owes beneficiaries duty to give actual notice of sale.**

Where the pledgee of corporate bonds was also a trustee for the stockholders of the corporation, it owed to its beneficiaries the duty to give actual notice of a proposed sale of the bonds under the pledge and a purchase of the bonds by it for inadequate price is invalid, though the publication of legal notice as required by the contract was made.

6. **Railroads ⟸152—Trustee under mortgage not necessary party to suit to determine validity of pledge of bonds.**

The trustee under a mortgage given by a railroad company to secure its bonds is not a necessary party to a suit between the stockholders of the company to determine the validity of a pledge of the bonds by the company to another corporation controlled by the majority stockholders.

7. **Corporations ⟸474—Tender of debt unnecessary to a suit attacking right of trustee to bonds either as owner or pledgee.**

Where the minority stockholders of a corporation attacked the right of the majority to bonds of the corporation purchased by them at a sale under a pledge, both on the ground that the original pledge of the bonds of the corporation controlled by the defendants was unauthorized and because the subsequent sale under the pledge to the defendants was void, a tender of payment of the debt due defendants and secured by the pledge was not necessary.

Waddill, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville; James E. Boyd and Edwin Y. Webb, Judges.

Suit in equity by the Champion Fibre Company against the Pigeon River Railway Company and another. Decree for complainant, and defendants appeal. Reversed in part, and affirmed in part.

Sidney S. Alderman and William P. Bynum, both of Greensboro, N. C. (Fred H. Ely, of Philadelphia, Pa., on the brief), for appellants.

Julius C. Martin and Thomas S. Rollins, both of Asheville, N. C. (Martin, Rollins & Wright, of Asheville, N. C., on the brief), for appellee.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. On March 6, 1913, the Pigeon River Railway Company made three notes to Champion Lumber Company, each for $39,981.51, due May 1, 1915, 1916, and 1917, and delivered as collateral its mortgage bonds aggregating $570,000. Champion Lumber Company pledged these notes as part collateral to secure its notes of same date to David G. Wilson, trustee, aggregating $328,921.67.

The notes of Champion Lumber Company were sold—all of them except notes to the amount of about $3,000 with and by means of the indorsement of the corporation Wm. Whitmer & Sons. The Champion

Lumber Company having failed to pay its notes at maturity, Wm. Whitmer & Sons paid all of them, including those not indorsed by that corporation, and became the owner. As owner of the Champion Lumber Company's notes it took over the notes of the Pigeon River Railway Company to Champion Lumber Company and the $570,000 of bonds of Pigeon River Railway Company deposited by Champion Lumber Company as collateral to its notes.

The Pigeon River Railway Company also failed to pay its notes. On February 7, 1917, James G. Campbell, president of Wm. Whitmer & Sons, Inc., notified Wilson, trustee, that notes of Pigeon River Railway Company were unpaid, and demanded sale of the $570,000 of bonds of Pigeon River Railway Company held by Whitmer & Sons as collateral. On the same day Wilson, trustee, demanded of James G. Campbell, president of Pigeon River Railway Company, payment of its two notes then due, and gave notice that on failure to pay he would sell its bonds for $570,000 deposited as collateral. Accordingly the bonds were sold in the city of Philadelphia, after published notice, at public auction, to Wm. Whitmer & Sons for $2,500.

The Champion Fibre Company attacks the delivery of the $570,000 of bonds of Pigeon River Railway Company as collateral for its notes to Champion Lumber Company, the repledge of the bonds to Wilson, trustee, and the sale made by him to Wm. Whitmer & Sons. The interest of the Champion Fibre Company arises out of its ownership of $180,000 of bonds of Pigeon River Railway Company of the same issue as the $570,000 bonds purchased by Wm. Whitmer & Sons. The mortgage property securing these bonds will fall far short of paying the aggregate issue of $750,000. If it be held that the $570,000 of bonds were improperly issued from the treasury of the Pigeon River Railway Company, the plaintiff's $180,000 of bonds would probably be paid; but, if the $570,000 bonds were properly issued to Champion Fibre Company as collateral and are now the property of Whitmer & Sons, the distribution of the proceeds of any sale of the property of Pigeon River Railway Company between Wm. Whitmer & Sons and the Champion Fibre Company, in the proportion of $570,000 to $180,000, would leave a large proportion of the plaintiff's debt unpaid.

The District Court held the hypothecation of the bonds of Pigeon River Railway Company to Champion Lumber Company, their rehypothecation to Wilson, trustee, and the sale by Wilson, trustee, to Wm. Whitmer & Sons, invalid; and, applying the rule that equality is equity, decreed as an equitable result that Whitmer & Sons was entitled, as of March 6, 1913, to $120,000 of the bonds for its debt in round numbers of $120,000 of that date—because the Champion Fibre Company had accepted $180,000 of bonds for its debt of $180,000, in pursuance of its agreement of December 21, 1910. Wm. Whitmer & Sons, Inc., appeals.

From the mass of evidence, documentary and oral, a statement of the vital facts in their proper relation will make plain the right legal conclusions. On December 21, 1910, J. D. Lacey and Charles I. James owned and controlled all the stock and bonds of Pigeon River Lumber Company and of the Tennessee & North Carolina Railroad

Company. The property of the Pigeon River Lumber Company consisted chiefly of a large tract of timber known as the Crestmont tract and a sawmill thereon. The T. & N. C. R. R. Company was used chiefly to carry the mill product to the Knoxville Branch of the Southern Railway. The Champion Fibre Company owned a large tract of timber known as the Sunburst tract, and owned and controlled all of the stock and bonds of the Pigeon River Railway Company. The Pigeon River Railway Company was partially graded, and when completed was to be used mainly to carry the timber from the Sunburst tract to the Murphy Branch of the Southern Railway. Robert F. Whitmer, A. B. Leach & Co., Clark L. Poole & Co. and De Vitt Tremble & Co., owned and controlled all the stock of the Parsons Lumber Company and of Wm. Whitmer & Sons and of the Appalachian Railway Company. On December 21, 1910, the parties above named entered into a contract looking to the formation of a new corporation—afterwards chartered under the name of Champion Lumber Company—and to the acquisition by it of the tracts of timber and sawmills, and all the property of the Pigeon River Lumber Company, and to the control of the T. & N. C. R. R. Company and Pigeon River Railway Company. The contract is complex and reference is omitted to its provisions and the action taken under it, except such as are essential to an understanding of the questions involved.

In accordance with this contract the Champion Fibre Company received for its property above mentioned 2,100 shares of the preferred and 9,500 shares of the common stock of the Champion Lumber Company, $400,000 in cash, and $180,000 of the mortgage bonds of the Pigeon Railway Company. These bonds of the Pigeon River Railway Company were taken in payment of $180,000 expended by the Champion Fibre Company on the partial construction of the road. Robert F. Whitmer and his associates, A. B. Leach & Co. and others, were to take under the agreement 18,500 shares of the stock of the Champion Lumber Company. Leach & Co. and others were to furnish the money necessary to settle with the plaintiff and others as agreed, taking therefor the mortgage bonds of the new company at 90 per cent. of par. It is important to observe that the contract clearly contemplated that R. F. Whitmer, who controlled the corporation, Wm. Whitmer & Sons, should have the controlling interest in the Champion Lumber Company, Pigeon River Railway Company and T. & N. C. Railroad Company, and that he should manage these corporations. Accordingly, on the organization of the Champion Lumber Company, Whitmer & Sons had 18,462 shares out of a total of 30,000, while the Champion Fibre Company had 9,498. As trustees for the stockholders of the Champion Lumber Company, R. F. Whitmer held 394 of the 400 shares of Pigeon River Railway Company, and 2,288 of the 3,061 shares of the T. & N. C. Railroad Company. It is thus apparent that R. F. Whitmer and Wm. Whitmer & Sons, Inc., actually acquired legitimate control of the three corporations. In this control and management they represented their own beneficial ownership of about two-thirds interest in the three corporations, and in a trust relation the interest of the Champion Fibre Company.

Whitmer & Sons appears to have had full faith in the new corporation, Champion Lumber Company, and advanced large sums to it from time to time, aggregating in the whole about $2,000,000. All this was lost except 4 per cent. paid to the unsecured creditors in the ultimate bankruptcy of the Champion Lumber Company in 1916.

In the early part of 1913 the financial difficulties of the Champion Lumber Company were giving concern. At that time and afterwards R. F. Whitmer and Wm. Whitmer & Sons were undoubtedly in control of both railroad corporations as well as of the Champion Lumber Company, in the manner above indicated. We think, therefore, Whitmer and Whitmer & Sons must be held, throughout all subsequent transactions, to the full responsibility of the utmost good faith as trustees for all persons interested in the several corporations. The Champion Fibre Company was represented, however, by three directors on the board of the Champion Lumber Company; and obviously neither R. F. Whitmer nor Wm. Whitmer & Sons can be held responsible to the Champion Fibre Company for any neglect of duty or failure to act with diligence by these directors representing it.

The Pigeon River Railway Company had been leased on January 1, 1913, to the T. & N. C. Railroad Company for 30 years. There is nothing in the record to show that the lease was not legal, or that it was not made in good faith, or that any effort was made to conceal its existence. From December 21, 1910, to March 6, 1913, the Champion Lumber Company had expended on the construction of the Pigeon River Railway about $120,000. The mortgage of the Pigeon River Railway Company, executed on January 1, 1913, provided that its issue of $750,000 of bonds should "be used and sold for the purpose of completing, finishing, improving, or operating the railroad of the Railway Company and paying indebtedness incurred in constructing, completing, improving or operating its railroad." The stockholders of the Pigeon River Railway Company, at their meeting of October 26, 1912, which authorized the execution of the mortgage and bonds, passed a resolution:

"That the board of directors place the said bonds on the market as soon as may be, selling them for not less than ninety per cent. of their face value net to the company, or in the discretion of the board of directors, to hypothecate said bonds as collateral for loans to the company or both."

The bonds were indorsed by guaranty of the lessee, the T. & N. C. Railroad Company. This guaranty was authorized at a meeting of the directors of the T. & N. C. R. R. Company, but it does not appear that the stockholders gave any authority for the guaranty. It seems that the Pigeon River Railway was operated by the T. & N. C. Railroad Company at a profit, but that, in its general operation, the T. & N. C. Railroad Company became indebted to the Champion Lumber Company $55,868.75.

[1] The plaintiff alleges that it had no notice of this lease. Absence of notice to plaintiff, however, would only indirectly affect the issue here involved, as a circumstance bearing on the charge of laches of the plaintiff. The indorsement of the $180,000 of bonds held by plaintiff with the guaranty of the T. & N. C. Railroad Company was suffi-

cient we think to put plaintiff on inquiry as to the relation of the two railway companies. Generally such an indorsement indicates a lease. This and other circumstances, together with the lack of any testimony on behalf of plaintiff denying notice of the lease, negatives the inference that the plaintiff did not have notice.

The Champion Lumber Company was in urgent need of funds for the prosecution of its business and could not borrow on its own credit. In this situation Whitmer & Sons undertook to raise the funds necessary for the conduct of the business of the Champion Lumber Company by the corporate action expressed in the contract of Champion Lumber Company, Pigeon River Railway Company, and T. & N. C. Railroad Company, dated March 6, 1913, called the "collateral trust agreement." It provided that the Champion Lumber Company should issue its notes to a trustee for $330,000 in the aggregate; that the T. & N. C. Railroad Company should give its notes to the Champion Lumber Company for $195,000—which included the amount of its indebtedness to Champion Lumber Company and further advances to be made—and deposit as collateral its first mortgage bonds to the amount of $154,000; that the Pigeon River Railway Company should give its notes to the Champion Lumber Company for $140,000, secured by first mortgage bonds of $570,000; and that the Champion Lumber Company should have the right to repledge these notes and collateral as security for its notes for $330,000. This action was authorized at meetings of the directors of the several corporations held in pursuance of notice to all directors. It was contemplated, though not expressed in the trust agreement or in the meeting of the directors of any of the corporations, that the Champion Lumber Company should raise the money on its notes by each stockholder taking notes equal to 11 per cent. of his stock. Champion Fibre Company failed to take its share of the notes, and the result was that Whitmer & Sons raised the money for the Champion Lumber Company by indorsing its notes secured as above recited, and when they fell due was obliged to take them up.

There seems to be no denial that the Pigeon River Railway Company had the legal right, under the mortgage and the resolution of its board of directors, to pledge in good faith, as collateral for a bona fide debt incurred for construction, any of the $570,000 of bonds in the treasury after $180,000 of the bonds had been turned over to the Champion Fibre Company.

The question of the insolvency of the Pigeon River Railway Company on March 6, 1913, when the pledge was made, may not be free from difficulty; but we agree with the District Court that on that date the assets were not equal to its total liabilities of $300,000, and that there was no prospect of paying its debt of $120,000 to the Champion Lumber Company from earnings in the course of its business. Yet it was a going concern, and its value to its creditors depended on the continued operation of the Champion Lumber Company—from which it secured nearly all of its business. It was therefore of the utmost importance that the Pigeon River Railway Company should give the Champion Lumber Company such security for its debt as would enable that corporation to raise money to relieve its embarrassment and

continue business, in the interest of plaintiff as well as of Wm. Whitmer & Sons; for the Champion Fibre Company had in proportion to its holdings, which were very large at that time, the same interest in the success of the Champion Lumber Company as R. F. Whitmer and Wm. Whitmer & Sons. It seems evident that on March 6, 1913, Whitmer & Sons expected the Champion Lumber Company to continue operations and work out, or it would not have indorsed the notes and raised the money for that purpose. This connoted the expectation of keeping the Pigeon River Railway Company as a going concern, for its operation was necessary to the Champion Lumber Company.

[2] Plaintiff having participated in a contract which provided that R. F. Whitmer and Whitmer & Sons, Inc., should manage the three corporations, in all their necessarily intricate dealings with each other as branches of one common business, cannot complain that this method of business was carried out. It must submit to any mistakes of judgment, and may complain only if it can show that R. F. Whitmer or Whitmer & Sons sacrificed the interest of the Champion Fibre Company to their own.

There is no proof nor intimation of misappropriation by R. F. Whitmer or Whitmer & Sons, nor of malfeasance in the general management of the business of any of the corporations. There is no claim that either of them profited by any of the corporate transactions. It is admitted that the debt of $120,000 to Champion Lumber Company was just. There is no proof that the collateral given by the Pigeon River Railway Company was at the time excessive; the fact that money could not be raised on it without the indorsement of Whitmer & Sons seems to justify the inference that it was not.

It is to be borne in mind that the circumstances under which the Champion Fibre Company took $180,000 of bonds of the Pigeon River Railway Company in satisfaction of its debt for a like amount were very different from the conditions confronting the corporations on March 6, 1913, when Whitmer & Sons indorsed the notes of Champion Lumber Company on the faith of the bonds of Pigeon River Railway Company. Champion Fibre Company voluntarily took $180,000 of bonds as a full equivalent and full payment for its debt of $180,000 at a time when all parties apparently were confident of the success of the enterprise launched by the contract of December 21, 1910. Besides, other larger considerations were important inducements to the Champion Fibre Company for accepting the $180,000 of bonds. But the Champion Lumber Company had never agreed to a similar arrangement. It was entitled to payment in money of its debt of $120,000; it had never agreed and was in no way bound to accept bonds of any amount in payment or as security.

Summarizing, Whitmer & Sons and Champion Fibre Company were in these relations: On the one hand, R. F. Whitmer and Wm. Whitmer & Sons voluntarily entered into a trust relation with the Champion Fibre Company and others interested in the several corporations, requiring of them the utmost good faith in the corporate transactions directed by them. On the other hand, the plaintiff, Champion Fibre Company, voluntarily agreed that Whitmer and Whitmer & Sons

should control the corporations through stockholdings and directors and officers selected by their direction, relying on their judgment and good faith, and on the additional protection of the diligence and influence of three directors representing its interest on the board of directors of the Champion Lumber Company. Champion Fibre Company having agreed to Whitmer and Whitmer & Sons exercising this control over the corporations, it bound itself by the corporate actions taken by the boards of directors of the corporations, acting in good faith within the scope of their legal powers. It had the right, however, to have the three directors representing it on the board of the Champion Lumber Company notified to be present at all meetings of that board. When action was contemplated out of the ordinary routine of corporate management, affecting in a material degree the interests of the Champion Fibre Company, we think it clear that the duty was on Whitmer and Whitmer & Sons to give special notice to these directors of the particular action in view. The contemplated plan of having Champion Lumber Company take $570,000 of bonds of the Pigeon River Railway Company as collateral to a debt of $120,000 was a matter out of the usual routine of corporate management, vitally and particularly affecting the interest of the Champion Fibre Company; and it was therefore entitled to have its representatives on the board, including its own president, specially notified of the plan. It had the right through these directors to object, and, if objections failed, to have opportunity to take legal steps to prevent any unlawful sacrifice of its interest.

[3] Obviously the trust assumed by Whitmer and Whitmer & Sons was a very onerous one, often requiring delicate discrimination between their own interests and the interests of the corporations they were controlling and the interests of the Champion Fibre Company. In making these discriminations it seems very clear that they were entitled to the aid, suggestions, and objections of the Champion Fibre Company through its representatives on the board of directors of the Champion Lumber Company. The Champion Fibre Company through these directors assumed a correlative duty to Whitmer and Whitmer & Sons. Its president and the other directors representing it on the board of the Champion Lumber Company owed the duty to object to any contemplated action, or any action taken, considered by them unduly inimical to the interests of the Champion Fibre Company, or in any way unfair or injudicious. Manifestly the Champion Fibre Company could not sit silent when through its president and representative directors it had knowledge of the action contemplated or already taken in time to have the matter reconsidered. Such silence, in the absence of actual fraud on the part of Whitmer or Whitmer & Sons, is acquiescence and consent which the plaintiff cannot repudiate long after the transaction has become interwoven into the other business transactions of the corporation.

We think it would have been a breach of trust, and at least a constructive fraud, for Whitmer and Whitmer & Sons to have procured the pledge of $570,000 of bonds—a transaction out of the ordinary course of business and materially affecting the interest of the Champion Fibre Company—without notice to or opportunity of the Champion

Fibre Company or its representatives on the board of directors to object. It may be that the transaction would have been invalid on the ground that the Pigeon River Railway Company was insolvent and could not legally make such a preference. But neither of these objections could avail the Champion Fibre Company if it, and its representatives on the board of directors of the Champion Lumber Company, allowed the transaction to proceed to consummation and to the actual advancement of credit and money by Whitmer and Whitmer & Sons when it had opportunity to make timely objection and failed to do so.

The testimony is undisputed that the three directors representing Champion Fibre Company, one of them its president, had timely notice of the meetings of the board of directors of Champion Lumber Company concerning the pledging of bonds of Pigeon River Railway Company to Champion Lumber Company. The notice was in these words:

"Meetings of the Champion Lumber Company, Pigeon River Railway Company and Tennessee & North Carolina R. R. Company directors have been called for Monday, March 3d, at ten o'clock a. m., at the office of Wm. Whitmer & Sons, Philadelphia, Pa.

"At these meetings we expect to arrange details of the loan to the lumber company, and to pass such resolutions by the various companies as may be necessary to carry same into effect.

"It is important that we have as full a meeting as possible, and I trust that you will be able to attend."

None of these directors attended the meeting or made any objection to the loan. If the plaintiff, and its president and the other directors representing it, did not know of the plan to be presented to the board, surely plaintiff should have offered testimony on a point so vital in support of its allegations of fraud and unfair advantage. No such testimony was offered.

[4] On March 11, 1913, three days after the notes and collateral were given to Champion Lumber Company by the Pigeon River Railway, Campbell, vice president of the Champion Lumber Company, wrote a letter to all the stockholders of Champion Lumber Company —including Champion Fibre Company—setting forth in detail the entire transaction. He also at the same time wrote a letter to Thompson, president of the Champion Fibre Company and a director representing it on the board of the Champion Lumber Company, calling his special attention to the matter. In this letter was enclosed a copy of the collateral trust agreement above mentioned, which set out with the most explicit detail the entire plan for the issuing of the notes and the pledging of the collateral, including the $570,000 of bonds of the Pigeon River Railway Company. Champion Lumber Company had not then sold the notes with Whitmer & Sons' indorsement, and it was not too late to abandon the plan of raising money and revoke the corporate act. Still no objection was made by the plaintiff or any one for it. Not only so, but plaintiff offered to the court no word of denial of knowledge of this transaction while it was pending, and no word of explanation of its apparent acquiescence for more than five years afterwards. This silence, then and on the trial, leads to the irresistible inference that the Champion Fibre Company assented to the plan to secure money for the Champion Lumber Company, with the view of promoting its own in-

terest as owner of one-third of the stock of that company. It knew that the notes were about to be issued and the money paid for them into the treasury of the Champion Lumber Company. It was after all this that Whitmer & Sons, without notice of any objection by plaintiff, indorsed the notes and obtained the money for Champion Lumber Company; and eventually took up the notes when Champion Lumber Company defaulted in payment and went into bankruptcy. Under these circumstances it was too late on November 26, 1917, when this action was commenced, for the plaintiff to claim the aid of the court in setting aside the pledge of $570,000 of bonds of the Pigeon River Railway Company, and their repledge to Whitmer & Sons.

The conclusions above stated are in accordance with the principles laid down in the following cases: Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 591–593, 23 L. Ed. 328; Hotel Co. v. Wade, 97 U. S. 13, 22–23, 24 L. Ed. 917; Leavenworth v. Chicago, etc., Ry. Co., 134 U. S. 688, 705–708, 10 Sup. Ct. 708, 33 L. Ed. 1064; Fitzgerald Const. Co. v. Fitzgerald, 137 U. S. 99, 109, 110, 11 Sup. Ct. 36, 34 L. Ed. 608; Sanford Co. v. Howe Co., 157 U. S. 312, 316–320, 15 Sup. Ct. 621, 39 L. Ed. 713; Indianapolis Rolling Mill v. St. Louis Rrd., 120 U. S. 256, 7 Sup. Ct. 542, 30 L. Ed. 639.

[5] The sale of the $570,000 of bonds of Pigeon River Railway Company, at auction in the city of Philadelphia, after public advertisement, and the purchase by Wm. Whitmer & Sons for the very inadequate price of $2,500, stands on an entirely different footing and cannot be sustained for a moment, because plaintiff had no notice of the sale.

Whitmer & Sons, it is true, was pledgee of the bonds, whose claim to them as security plaintiff had by its laches lost the right to dispute. But Whitmer & Sons was none the less trustee, bound to take every precaution to safeguard the rights of the plaintiff and all others interested in the bonds and their sale. Its duty to give plaintiff express notice of the time and place of the sale, a matter so out of the usual course of corporate business, seems too plain for discussion or the citation of authority. The chance that plaintiff would receive notice through ordinary publication of the legal notice was remote. It is no answer to say the advertisement was, according to the contract, legal and gave constructive notice. Whitmer & Sons was charged with the utmost diligence in the protection of plaintiff, and that required express notice.

[6] The trustee under the mortgage of the Pigeon River Railway Company is not a necessary party to this suit and it is not necessary that it should bring the suit, because there is no controversy as to the validity of the mortgage or as to the enforcement of any right or remedy under it. It is an entirely separate controversy, as to the ownership and sale of bonds in which nobody has any interest except the plaintiff, Whitmer & Sons and the Pigeon River Railway Company.

[7] Tender of its debt to Wm. Whitmer & Sons was not necessary as a condition precedent to the suit. The attack of the plaintiff is on Whitmer & Sons' right to the bonds, either as owner or pledgee. Tender of the debt to Whitmer would have destroyed the right to attack the pledge.

A decree will be entered reversing the decree of the District Court holding the pledge of the $570,000 of bonds of the Pigeon River Railway Company and their possession by Whitmer & Sons to be illegal, and affirming the decree in so far as it holds the sale of the bonds at public auction in the city of Philadelphia to be invalid.

WADDILL, Circuit Judge (dissenting). The real contest in this case arises over the issuance, disposition, and hypothecation of an issue of $750,000 of the bonds of the Pigeon River Railway Company, secured by mortgage upon its property. On the 1st day of January, 1913, $180,000 of this issue was taken by the appellee, the Champion Fibre Company in settlement of an indebtedness due to it for expenditures made in the construction of the Pigeon River Railway. At a later date, the residue of the said issue of bonds, amounting to $570,000, was issued and delivered to the Champion Lumber Company as collateral security for the payment of three notes for $39,981.51 each, due by the Pigeon River Railway Company to the Champion Lumber Company, and the Champion Lumber Company was authorized to rehypothecate the said notes and bonds to secure its own indebtedness. Subsequently, the Champion Lumber Company delivered said notes aggregating $119,944.53 due it by the Pigeon River Railway Company and rehypothecated the said $570,000 of bonds as collateral security for an indebtedness of its own, amounting to $328,921.67. The notes of the Champion Lumber Company, with the exception of $3,000, were indorsed by the firm of William Whitmer & Sons, Inc., and the money raised thereon practically all furnished by said William Whitmer & Sons, Inc. The collaterals attached to said notes were delivered to David G. Wilson, trustee. Neither the Pigeon River Railway Company nor the Champion Lumber Company paid the notes at maturity, and William Whitmer & Sons, Inc., took up the same, and subsequently called upon Wilson, trustee, to sell the $570,000 of bonds of the Pigeon River Railway Company so deposited as collateral, and they were accordingly sold to William Whitmer & Sons, Inc., for $2,500, and they now claim to own the same.

The Champion Fibre Company attacks as well the issue as the hypothecation of the $570,000 of bonds by the Pigeon River Railway Company alike for its own indebtedness of $119,944.53, as the attempted hypothecation of said bonds as security for the payment of the debts of the Champion Lumber Company, and the sale of the bonds so hypothecated to William Whitmer & Sons, Inc. The mortgaged property securing the issue of bonds will not probably sell for more than enough to pay the appellee's bonds of $180,000, and if the subsequent $570,000 issue and hypothecation is held valid, the holders of the original bonds would only receive from the proceeds of the sale of the mortgaged property, its pro rata share; in other words, assuming that the mortgaged property would sell for $200,000, the appellee on account of its holdings of $180,000 of the bonds so issued to meet an indebtedness of $180,000, incurred in building the railroad, would receive only $48,000; whereas, on account of the open account indebtedness of the company remaining unpaid, in round figures $120,000, the so-

called issue and attempted hypothecation of the $570,000 of bonds would net to their holders $152,000.

The District Court set aside and declared that all proceedings had in connection with the issue and hypothecation of the $570,000 of said bonds, save to an amount equal to the actual indebtedness of approximately $120,000 due by the Pigeon River Railway Company on the three notes aforesaid, was null and void, for the reason that the relation that William Whitmer & Sons, Inc., bore to all of the properties and companies in question, being in effect the virtual owners of the same, and the dominating and controlling influence in them all, was such that the effort to so hypothecate and dispose of the $570,000 of bonds, operated as a fraud upon the appellee, the Champion Fibre Company, the holder of $180,000 of said bonds, and the court accordingly held that only $120,000 of the $570,000 were lawfully issued and held on account of the transactions aforesaid, and that the remainder of the issue, viz., $450,000, should be canceled. In other words, the lower court held the relationship of William Whitmer & Sons, Inc., by virtue of their ownership in and dominating control of all of said properties, was fiduciary in character, and that the effort to issue and hypothecate in its own interest, an issue of bonds of a company that it controlled and owned, was invalid, in so far as it operated to diminish the security, or destroy the first issue of $180,000 of bonds held by the appellee.

The learned judge of the lower court, in a most comprehensive and elaborate opinion, reviewed the transactions between these several companies from their organizations down to the consummation of the wrong here complained of. One or two excerpts from his opinion and findings will greatly elucidate the subject:

"Indeed, it is patent from the testimony that from their organization, the Tennessee & North Carolina Railroad Company, Pigeon River Railway Company and the Champion Lumber Company were subsidiary corporations of William Whitmer & Sons, and ever since their organization they have been financed by William Whitmer & Sons, and the chief object of these corporations has been to serve and subserve the interests of William Whitmer & Sons, their creators." (Record, p. 460.)

"It should be particularly remembered that when the Whitmer interests bought these $570,000 of bonds at the sale in Philadelphia, Whitmer & Sons owned all of the stock of the Pigeon River Railway Company and all of the stock of the Champion Lumber Company—in other words, they actually owned the two corporations. Indeed, the conclusion is irresistible that from the organization of these two companies Whitmer & Sons dominated and controlled them and a majority of persons on the board of directors of these corporations, who were subservient to, or mere agents of Whitmer & Sons; so, in reality, when the Pigeon River Railway Company pledged its $570,000 of bonds as security for its notes to the Champion Lumber Company, it was really the Whitmer interest dealing with the Whitmer interest; and when the Whitmer interests bought the $570,000 bonds, they were in reality merely buying them from themselves for themselves, and all at the expense of and injury of the plaintiff." (Record, pp. 461, 462.)

"Under these circumstances equity cannot sustain any such financial juggling or corporate dickering when the result is to injure another party."

"I do not find as a fact that there was actual fraud in these various transactions which led to the plaintiff's injury, though there are 'badges' which might properly move a less charitable court to come to a contrary conclusion; but the transactions of the Pigeon River Railway Company, the

Champion Lumber Company and Whitmer & Sons from and including January 1, 1913, March 6, 1913, and April 18, 1917, under all the circumstances, constitute glaring legal or constructive fraud upon the rights of the plaintiff." (Record, p. 463.)

"The court further holds that, as a matter of law, the Pigeon River Railway Company had no authority in law or equity to authorize the Champion Lumber Company to repledge the Pigeon River Railway's notes and bonds to secure the payment of a debt due by the Champion Lumber Company. The stockholders of the Pigeon River Railway Company never authorized such a rehypothecation, and the directors exceeded their authority when they attempted to authorize it." (Record, p. 467.)

The majority opinion is directly contrary to that of the lower court, and validates the issue and the rehypothecation of the $570,000 of bonds as well for the indebtedness of the Pigeon River Railway Company, as that of the Champion Lumber Company, which largely destroys appellee's security. The decision of the District Court does not deprive the appellant, William Whitmer & Sons, Inc., of the entire value of the collateral security, but validates the same to the extent of $120,000, instead of $570,000, which, in the light of all the facts and circumstances, is, in my judgment, all that in equity and good conscience it is entitled to ask for.

It is with reluctance that I differ from my Brethren, but I am firmly convinced that the practical effect of their decision is to reward the wrongdoers, and penalize the innocent in this transaction, and that, too, in the face of the findings of the lower court, with which I am in entire accord, as well on the law as on the facts.

Moreover, if the transactions respecting the issue, hypothecation and sale of the $570,000 of bonds, are not invalidated for the reasons herein stated, then, manifestly, in the light of the decision of the lower court, finding that the Pigeon River Railway Company was insolvent on the date of the alleged hypothecation of said bonds, to wit, the 6th of March, 1913, they should be voided, as constituting an illegal preference in favor of William Whitmer & Sons, Inc., the dominating and controlling influence that directed the affairs of all of said companies, in order to secure the payment of past due obligations of the Pigeon River Railway Company, held in their interest.

ELDER et al. v. WESTERN MINING CO. et al. (two cases.)*

(Circuit Court of Appeals, Eighth Circuit. March 15, 1922.)

Nos. 5632, 5633.

1. Mines and minerals ⊂=105(2)—Stockholders of mining company held estopped to attack validity of lease.

A mining corporation, by its directors, leased its property for 10 years, and by two successive extensions extended the term to 20 years. The lease was not ratified by the stockholders, which was essential to its validity, under Rev. St. Colo. 1908, § 865. Complainants and interveners, who were stockholders, were fully informed of the making of the original lease and its terms, and while they had no actual knowledge that it had not been ratified, nor of the extensions, they had notice of all

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

*Rehearing denied August 11, 1922.

stockholders' meetings, at most of which they were present or represented, and made no inquiry, but for 15 years continued, without objection, to receive and retain dividends, which they knew came from royalties paid by the lessee. They also knew that the lessee was expending large sums in the exploration, improvement, and operation of the mine. *Held*, that they were estopped to thereafter attack the validity of the lease, because not ratified as required by the statute, which is for the sole benefit and protection of stockholders.

2. Courts ⊜313—Intervention by citizens of same state as defendants held not to oust jurisdiction.

Allowance of a petition of intervention, which raises no new issues, will not oust the jurisdiction of a federal court because of the fact that petitioners are citizens of the same state as defendants.

3. Appeal and error ⊜887—Petition for intervention may be granted by appellate court.

Where a petition for intervention has been denied by the trial court, but the rights asserted by petitioners are identical with those of complainants and can be determined on the same record, at the request of petitioners, and without regard to their right of appeal, the appellate court may consider the petition and allow the intervention.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by Rufus C. Elder and Frank E. Mann, executors of the will of George W. Elder, deceased, and Frank E. Mann, against The Western Mining Company and others. Complainants appeal from the decree, and by George R. Elder and Ida D. Elder appeal from an order denying them leave to intervene. Petition to intervene granted, and decree affirmed.

See, also, 237 Fed. 966, 150 C. C. A. 616; 263 Fed. 414.

Robert Dull Elder, of Leadville, Colo., for appellants.

Henry C. Vidal and Henry A. Dubbs, both of Denver, Colo. (John A. Ewing and Frazer Arnold, both of Denver, Colo., on the brief), for appellees.

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

STONE, Circuit Judge. The statutes of Colorado (section 865, R. S. 1908), during the period here involved, as construed by this court (Westerlund v. Black Bear Mining Co., 203 Fed. 599, 121 C. C. A. 627), required ratification by the stockholders of leases of the entire property of a Colorado mining corporation. The Westerlund Case also decided that this provision was for the sole benefit of the stockholders, who could ratify such lease by estoppel, or who could attack its validity.

In January, 1899, the Adams Mining Company, a Colorado corporation engaged in mining, leased all of its property to Samuel D. Nicholson for a term beginning May 14, 1899, and ending January 14, 1909. June 1, 1904, this lease was extended, to end January 1, 1914. December 10, 1910, there was a further extension, to end January 1, 1920. The rights under these instruments passed successively to the A. M. W. Mining Company and to the Western Mining Company. This lease and both extensions were made by the board of directors of

the Adams, without the ratification by the stockholders required by the above statute.

December 3, 1914, Rufus C. Elder and Frank E. Mann, as executors of George W. Elder, deceased, and Frank E. Mann, individually, filed this bill, as stockholders of the Adams, to have the above lease and extensions declared void, because not ratified by the stockholders, and for an accounting from the lessees. The defendants against whom service was secured were Nicholson, the A. M. W., the Western, and certain officials of these two companies and of the Adams. From dismissal of the bill on motion, an appeal was taken to this court, where the bill was deemed sufficient, and the case remanded for trial. Elder v. Western Mining Co., 237 Fed. 966, 150 C. C. A. 616. On remand, the issues were made, and a trial upon the merits had before a master, resulting in findings against complainants. Upon review by the trial court, the findings of the master were substantially sustained, and judgment entered dismissing the bill upon the merits. After the master had filed his report, George R. Elder and Ida D. Elder asked, and were denied, leave to intervene as parties plaintiff. These appeals are by complainants, from dismissal of the bill, and by George R. Elder and Ida D. Elder, from denial of leave to intervene. We shall first consider the main case.

The lack of ratification by the stockholders at the time the lease and extensions were made is admitted, as are also the facts that such lessees have had complete possession during the entire terms thereof, have developed and mined the property, and have extracted large quantities of ore from the mine. The defenses were that the lease and extensions had been ratified by subsequent stockholders' meetings, that they had been ratified by the stockholders through conduct constituting estoppel, and that these particular complainants were estopped by their conduct and laches from avoiding the lease and extensions. The master found that there had been no binding ratification at subsequent stockholders' meetings, but that these complainants were estopped by their conduct from questioning the lease and extensions. The trial court left undetermined the matter of ratification at stockholders' meetings, but approved the findings of the master that estoppel of these complainants existed.

The issues presented in this appeal may be generally classified as follows: (1) Were the lease and the two extensions properly ratified at subsequent meetings of the stockholders? (2) Can ratification thereof be legally made by a majority of the stockholders, by conduct or action other than by vote at a regular meeting thereof? (3) Can an individual stockholder be estopped by his conduct from contesting a failure to properly approve or ratify such instruments at a regular stockholders' meeting? (4) Are complainants estopped by their conduct from so contesting? The master and the court below cast the case on the third and fourth points above. Clearly, if they were right, the other two are immaterial. Therefore it seems logical to examine these contentions before approaching the other two.

[1] In our judgment, the former appeal of this case (237 Fed. 966, 974, 150 C. C. A. 616), has settled the law that a stockholder may, by

conduct, estop himself from questioning the validity of a lease given without the approval required by the Colorado statute. That leaves the inquiry as to whether these particular stockholder complainants have so conducted themselves as to be estopped. The record in this case covers 2,600 printed pages, much of which bears upon this issue. It has required much time and study to read, collect the scattered fragments, and compare the results, so as to make a connected narrative of what seem to be the essential facts as shown thereby. We deem the following to fairly outline the facts as thus shown:

The Adams Mining Company was organized in 1883. Until 1887 the control was in certain persons living in New York, and the main office was located there. In 1887 J. J. Sylvester, of St. Louis, secured control, was elected president, and moved the main offices to St. Louis. Shortly afterwards his son, W. W. Sylvester, was elected secretary-treasurer. Soon after J. J. Sylvester died, December 16, 1903, W. W. Sylvester was elected president, and the main offices were moved to Kansas City. The company books and records were kept at the main offices.

The business of the Adams Company was the development of slightly less than 10 acres of mining claims acquired by it in the Leadville district. This property was operated by the company until 1887, during which time it paid dividends of about $539,000 on a par capital stock of $1,500,000. Production practically ceased from 1887 to 1889. In May, 1889, the property was leased to David H. Moffatt for five years. Two extensions carried the Moffatt control to May 14, 1899. During 1891 and up to January 30, 1892, dividends totaling $82,500 were paid. In 1895, one dividend totaling $6,000 was paid. Moffatt practically ceased operating in 1896 or 1897 and the property became partially filled with water. The ore bodies in sight were large, but the ore was unmarketable, because of low grade and zinc penalties. The expense of fighting the water was prohibitive; there was no proper shaft for pumping and mining; there was no sufficient mill to concentrate the character of ores then found, and the company had practically no money. This was the condition of the property in 1899. About that time, David Nicholson, an experienced operator in that district, conceived the idea of combining the Adams property with several adjoining properties and operating them as a unit. With this purpose, he secured a lease upon the Adams property for a term of approximately ten years, beginning at the expiration of the Moffatt lease, May 14, 1899. This lease was made by the board of directors of the Adams Company, and was recorded May 20, 1899. June 10, 1899, the president of the Adams Company, by circular, truthfully notified all stockholders of this lease, that it was for ten years, and the general terms thereof, including the royalty rates. June 1, 1904, this lease was extended to January 1, 1914, and on October 31, 1910, was again extended until January 1, 1920. It is this lease and these extensions which are here attacked.

The stock connection of the complainants and interveners with the Adams was as follows: George R. Elder was a lawyer, mine owner, and operator of large experience living at Leadville. His wife is the

intervener Ida D. Elder. His father, George W. Elder, and his brother-in-law, Frank E. Mann, lived in Pennsylvania. In 1890, George R. Elder bought 4,200 shares (par value $42,000) of the Adams stock, and, shortly thereafter, transferred a portion thereof to his father, and also bought other stock in the Adams for his father, as well as $16,000 of the Adams bonds for his father and other members of the family. His father died, owning about 10,000 shares of this stock, in November, 1901. Shortly afterwards, Rufus C. Elder and Frank E. Mann qualified as executors. Rufus C. Elder had no connection with the Adams property until in 1901, when he became executor; later, in 1913, he became a stockholder on his own account. Frank E. Mann became a stockholder (3,000 shares) in 1890 on the recommendation of George R. Elder, and late in 1901 had the additional interest in the property as an executor of the estate of George W. Elder. Ida D. Elder acquired 1,100 shares of stock in 1890, and later inherited 500 shares from her mother. It thus appears that George R. Elder, Ida D. Elder, and Frank E. Mann have had substantial holdings of stock in the Adams Company since 1890, and that Rufus C. Elder, as executor, has been interested therein since late in 1901.

There is no doubt that all of these parties, except Rufus C. Elder, knew, within a month of the commencement of this lease, all of the essential facts concerning the original lease. These facts they learned from the circular sent out by J. J. Sylvester, president of the Adams Company. This circular, inter alia, informed them that the lease was made to Nicholson, with right of assignment to a corporation to be formed by him and other named persons; that the term was ten years; that certain specified royalties were to be paid; that certain taxes and other obligations were to be met by the lessee; that this property was to be operated in common with certain other named properties from a shaft upon the Wolftone properties; that expensive operations (such as enlargement of shaft, further sinking of shaft, and installation of a large pumping plant) were required of the lessee. It does not appear that Rufus C. Elder ever saw this circular, as his connection with the property did not begin until more than two years after its issue; but he appears in this suit solely as one of the executors of George W. Elder. The other executor, Mann, received this circular, and his knowledge was that of the estate. Therefore it may be said that the complainants and the interveners knew all of the essential terms of the original lease. While the claim, as made, may be true that none of them knew of the dates or terms of the two extensions of this lease, it is certainly true that they knew that the original lease would and did expire in 1909, and they knew that thereafter the property was being operated under some kind of lease involving the payment of royalties. They received and retained 26 dividends between 1900 and 1916, inclusive. Eight of these were after 1909, and 5 were after the filing of this complaint. They knew, all of the time, that these dividends resulted solely from royalties derived from lessees of the property, that the Adams was not operating its property, and that there was no other possible source of income other than leasehold royalties. They also knew that, during all of this time, Nicholson was in control

of the actual operation of the property. So far as the lease (including extensions) was concerned, the existence of some such arrangement was known to these parties, and they made no attempts to further learn the terms and conditions thereof.

It is strenuously contended that neither complainants nor interveners knew, until in 1914, that neither the lease nor either of the extensions had been made without ratification at a regular stockholders' meeting. The only meetings of stockholders held subsequent to the making of this lease (1899) and before suit were annual meetings in 1902, 1911, 1912, and 1913, and a special meeting, in June, 1903, to renew the corporate charter. Notices of each of these meetings were sent to all stockholders, and were received by the parties hereto. It is not contended that there were any other meetings within this time. It cannot be contended that these parties had any reason to believe that other meetings had been held. In fact, what information they had would lead them to the contrary belief. No annual report had been made for some years after 1894, until in November, 1902. At that time a so-called report was made covering the period November 1, 1894, to September 30, 1902. A statement in this report was as follows:

"The last election was held in November, 1896. In the succeeding years had personal communication with a large majority of the stockholders, and as they exhibited indifference to holding an election, and failed to provide the necessary representation, I was advised by the board of directors and the stockholders referred to to hold over from year to year until other conditions prevailed. This year, however, I deem it best to order an election to be held the third Tuesday in November, to wit, November 20, 1902, then and there to elect seven directors. I trust our stockholders will realize the importance of it, by sending in the proxies promptly, as their action will be considered as an indorsement of my official career, and approval of all the acts herein set forth by this administration up to date."

At the meeting of 1902 George R. Elder was present and the stock of the other parties hereto was represented. At that meeting Elder made an unsuccessful attempt to gain representation on the board of directors and to oust Sylvester. During the year 1903, covered by the election at the meeting in 1902, three dividends, totaling $22,500, were paid. Thereafter royalties diminished so that until 1911, only three dividends were paid—one in 1904, totaling $7,500, one of the same amount in 1905, and one of $6,000 in 1909. The last dividend was from royalties slowly accumulated from a "clean-up" of the property, which no longer revealed paying ore. Up to December, 1910, the property had been, for practical purposes, a lead and silver mine. At that time the lessees discovered a considerable body of carbonate of zinc. Dividends were resumed in 1911, and continued beyond the filing of this action. With 1911 began again the regular annual meetings. No inquiry was ever made during this period, by any of these parties, as to whether other meetings of the stockholders had been held, or whether any action ratifying or attempting to ratify the lease, or any extensions, had been taken at any stockholders' meeting. Nor was there, during such time, any inquiry as to the terms or conditions under which the property was being operated. There was, during this period, considerable friction *within* the Adams Company between the Elder

and the Sylvester interests, but that friction did not concern the operation under lease, the validity of the lease and extensions, the terms of the same, or the integrity of the lessee in carrying out the lease. This friction related solely to the management of the Adams Company by Sylvester; the Elder interests claiming that such management was extravagant, if not dishonest, resulting in diminished dividends to the stockholders. The only friction between any stockholder and the lessee was the complaint of George R. Elder that Nicholson, who was then managing the operation for the corporation lessee, refused in 1900 or 1901 to longer furnish Elder with information concerning the output of and the royalties paid on the Adams property; the reason given by Nicholson being that Sylvester, then president of the Adams, had instructed him to give no further information to any one, but leave such information to come from Sylvester. Prior to this instruction from Sylvester, Nicholson had freely given Elder such information, and he expressed repeatedly his willingness to continue doing so, if Sylvester would consent.

When the Adams property again became a considerable producer, the Elder interests, under the active leadership of George R. Elder, much dissatisfied with the Sylvester management, renewed the contest for control of the Adams Company. This culminated in the annual meeting of the stockholders held in December, 1913. At that meeting Nicholson, who had become a stockholder in the Adams Company with a nominal holding, was elected chairman. The contest there for control pivoted around the proxies for certain shares. Both Elder and Sylvester claimed to hold the legal proxies for those shares. Nicholson ruled in all instances in favor of Sylvester, and his actions had much to do with the defeat of Elder. The first hint of any dissatisfaction with the lease, or any question as to its validity, occurred when George R. Elder, during the 1913 meeting, leaned over and said to Nicholson, "Sam, look out, or some of the stockholders will cancel your lease." The following year, after trying vainly, for the time being, to get possession of the Adams books and funds, and to exercise management over the affairs of that company, this action was filed.

We do not doubt that all of these parties knew, for years before the original lease expired, of its terms and duration, and that the dividends they were receiving came solely through operation thereunder. We are equally sure that all of them knew, from the time of expiration of the original lease and until this suit was brought, that the property was still being operated under lease by the same general interests and under the same personal (Nicholson) management. In the presence of this knowledge, and in the absence of all inquiry concerning the lease or the extensions, they cannot now found any rights upon any actual ignorance of the exact terms of that lease and those extensions. There is here no basis for a claim that such inquiry was prevented by any statement or action of the lessee. The truth is that they were all well satisfied to have some responsible party take over the operation of this property, which had gotten into a condition where the Adams Company, with its debt-burdened treasury, could do nothing.

Nor can any of them base a legal right upon the claim that they

were ignorant of the lack of ratification of this lease and the extensions. They received notices to all stockholder meetings. They were present at most of them, in person or by proxy. They cannot base a claim upon a presumption or possibility, in their minds, that meetings might have been held of which they had no notice, because neither were any such ever held, nor was there any attempt to cause them to believe or suspect that such had been held, nor did they make any inquiry thereabout; also, they cannot rely upon a surmise that, at the one meeting (1911) at which none of them were present, such ratification had occurred or been attempted, because no such thing occurred, nor were they led to so believe, nor did they make inquiry thereabout. They must be held to have known, or to have been put upon inquiry, concerning the existence of the lease and the extensions, and the absence of any ratification thereof by a regular stockholders' meeting.

It is true that they did not know that the Colorado statute (section 865, R. S. 1908), requiring ratification of "incumbrances" at a meeting of stockholders, included leases of this character. They thought it did not. But this erroneous belief was in no way induced or suggested by any one connected with appellees. Until the Westerlund Case, supra, it was the general belief in Colorado that leases were not covered by the statute. But there is no evidence that this misconception of legal rights in any way influenced any of appellants. For years they were pleased enough to have some one else undertake the risk and expense of exploration and operation hereunder, until valuable quantities of ore had been extracted and uncovered and until Nicholson joined active forces with their enemy, Sylvester, shortly after, or about the time, they became informed of the Westerlund case, decided early in 1913. It is contended that appellees were bound to know the law, in this regard, but that appellants could rest secure in their ignorance of such. We cannot concede this difference. Nor is this an instance of two parties contracting under a recognized mutual mistake of law.

Appellants contend that inaction upon their part to annul the lease and extensions was induced by the action of appellees in denying information, or in giving false information concerning the output of the Adams property. The individuals so intended are Nicholson and Sylvester. The evidence shows that Nicholson and his wife were very friendly wtih George R. Elder and his wife, and that Nicholson gave freely information asked by Elder until instructed not to do so by Sylvester. Nicholson was under no legal obligation to give Elder any information concerning the operations in the Adams property. The evidence is clear, however, that he willingly did so until Sylvester objected. It was natural that Nicholson should respect such an instruction, coming from the president of his lessor, and the controlling force thereof. Nicholson at all times expressed a willingness to give such information if Sylvester would permit. At no time did Nicholson give misleading information. As to Sylvester, the situation was that he and the Elder interests were bitter rivals for control of the Adams Company, and the Elders were sharply critical of his official acts. The evidence justifies them in such criticism at least in so far as it relates to payment of extravagant salaries to himself and a kinsman. That

Sylvester used his position as president to his own gain in this respect is clear. There is, however, no testimony of any other form of misapplication of funds.

The conduct of Sylvester in refusing Elder full information, at all times, concerning the general financial affairs of the company cannot be justified. But it had nothing whatever to do, in the minds of appellants, with the lease and extensions. They sought such information solely to protect themselves against the Sylvester management in the use of the funds arising from royalties under the lease, and never to question the lease or actions of the lessee thereunder. As to false statements concerning the condition of the property, the proof is otherwise. Some circulars and communications to the stockholders were gloomy, but so were the prospects of the property at such times. The evidence shows that the bulk of the value reflected in the dividends from this property during this period came from two uncertain and unexpected sources, to wit, a smelter method of utilizing certain ores, which were unmarketable when the lease was made, and an important discovery of unknown bodies of a kind of ore new to this mining district. We cannot say that the general tenor of these Sylvester communications or that any particular one or more of them evidence any purpose to deceive or would naturally have such an effect.

We must conclude that appellants had actual knowledge, or such information as to put them upon inquiry, of every essential fact. With such knowledge, appellants made no slightest move to question the validity of the lease or the extensions. On the contrary, they received and kept dividends which they knew came solely from the operations of the lessee. This they did for years before this action was brought, and the evidence discloses such acceptance of dividends even after suit. They have received and kept every benefit from the lease. This they did with full knowledge that the lessee was expending thousands of dollars in the operation and exploration of the property. They cannot knowingly let the lessee take the risks of an uncertain mining adventure under a lease, take and keep the results of his risk, effort, and expenditure, and then deny the lease. If they desired to challenge the lease, they should not have recognized it by accepting its fruits, but they should have evidenced their intention to attack it. This should have been done promptly, for the uncertainties and risks of mining are too great and too immediate to permit one to sit by until the outcome of the venture is made certain. Patterson v. Hewitt, 195 U. S. 309, 321, 25 Sup. Ct. 35, 49 L. Ed. 214; Sturm v. Wiess (C. C. A.) 273 Fed. 457.

We approve the finding of the master and of the trial judge that appellants are estopped by their conduct from questioning the lease or the extensions here involved. This determination makes it unnecessary to examine the other points presented on the main appeal.

[2] George R. Elder and Ida D. Elder, his wife, sought to intervene. They appeal from an order of denial by the trial court. In this court, these appellants, as well as the appellants in the main case, have joined in a petition for an order permitting the interveners "to adopt as their transcript of record the transcript of record filed by the com-

plainants." In the printed brief appellants state that this petition is "to the end that the cause may proceed here upon the merits substantially as though the interveners had been permitted to join as parties complainant prior to the entry of the final decree below," and also "to the end that useless delay and expense may be eliminated and a just result attained without further and totally unnecessary proceedings before the court below." They also state that "the said interveners were both examined and exhaustively cross-examined at the trial, and it seems that there is no legal or equitable reason for their postponement to the futility of separate proceedings in the court below." The court below denied the intervention on the theory that to permit such would oust the court of jurisdiction because of the citizenship of the interveners. We think this reason unfounded. Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356, 41 Sup. Ct. 338, 65 L. Ed. 673.

[3] Without determining whether an order denying an intervention of this character is an appealable order, we think best to treat the matter in a practical way, and therefore consider the petition referred to above. The petition is unique in character, and the maintenance thereof is at least doubtful. However, the issues presented by the intervention are precisely the same as in the main case; the interveners and the complainants have not only the same legal interests, but all are controlled by the same facts, and all of those facts appear fully in this record. Thus no possible injustice or disadvantage to appellees could follow our granting the prayer of this petition. Besides, it seems a sensible, practical determination of the matter. The petition is therefore granted, and the rights of interveners considered as though they had been made parties complainant before final judgment below. Their rights, so considered, in no wise differ from those of complainants as above set forth. In fact, if there is any difference, the reasons apply more strongly to the interveners than to the complainants, for George R. Elder and his wife, Ida D. Elder, lived in Leadville, during the period here involved, almost in sight of where this property was being operated; both knew Nicholson and his wife intimately, and George R. Elder was not only a lawyer, but a mine owner and operator of years of experience in the Leadville district.

The order, therefore, will be that the petition of interveners be granted, that they be treated in this court as parties complainant below (appellants here), that the decree below, as to complainants, be affirmed, and that such affirmance include interveners as well.

THE AVON. THE LEONARD RICHARDS. THE EDON.

(Circuit Court of Appeals, Second Circuit. March 13, 1922.)

Nos. 210, 211.

Collision ⇐71(1)—Collision between anchored vessels held fault of last comer in giving the other a foul berth.

A collision between anchored vessels *held*, on conflicting evidence, due to fault of the last to come in anchoring too close to the other, and not to the dragging of her anchor by the latter.

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

Suit in admiralty for collision by J. Langfeldt, master of the bark Edon, against the ship Avon. Charles A. McCullough, claimant, and the steam tug Leonard Richards, the Cahill Towing Line, Inc., claimant, with cross-libel by McCullough against the Edon. Decree for cross-libelant, and libelant appeals. Reversed.

Haight, Smith, Griffin & Deming, of New York City (John W. Griffin and W. Parker Sedgwick, both of New York City, of counsel), for appellant.

Bigham, Englar & Jones, of New York City (C. Andrade, Jr., of New York City, of counsel), for appellee.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. On February 15, 1918, the Edon, a full-rigged ship 270 feet long, anchored on the Red Hook Flats, where she remained until March 19, 1918, when a collision occurred between her and the ship Avon. On March 12, 1918, the Avon, a full-rigged ship fully laden, anchored between the Edon and the ship Three Marys on the Flats. The Edon remained at anchor during this period and was light. Both sides agree that the Avon did not change her position at any time after she dropped her anchor until after the collision. Liability was imposed upon the Edon below on the theory that she dragged her anchor and came in collision with the Avon. The position of the Avon when she dropped anchor is fixed beyond dispute. She was anchored to the northeast of the Edon. The exact place where the Edon anchored, however, is in dispute, and for the purpose of fixing responsibility for the collision it is essential to ascertain the point where the Edon was anchored and then to learn whether the Avon's anchorage was so near to that position that under suitable weather conditions collisions would result without dragging, or whether the Avon's anchorage was so far from the Edon that the collision could not have occurred without dragging. If the collision was due to giving the Avon a foul berth, then the Avon should be held at fault. If collision is due to the Edon's dragging her anchor, of course, responsibility should rest with the latter. The question is one of fact, for, after reaching a conclusion as to the fact, the law is plain that either ship would be responsible as the question of fact is determined. The testimony as given

by the witnesses is very much in conflict. Nearly all the testimony was taken by deposition. Therefore the rule that this court will hesitate to reverse where testimony has been given in open court and an opportunity afforded the trial judge to see and hear the witnesses will not constrain us if, as here, we think the finding below was contrary to the evidence.

We think the case is one where the vessels were anchored too close together. They swung safely when they swung in unison, but were likely to collide when a favorable wind and tide therefor came together. The Edon's position was southwest of the Avon and was one in which the southwest and west winds would cause her to swing toward the Avon. This is supported by the testimony of the Edon's witnesses. On the other hand, the Avon's witnesses put the Edon in various positions. When the Edon swung up on the flood tide, her stern came within 50 or 100 feet of the buoy. If she swung to the east or northeast before a west or southwest wind, and if at the same time the Avon was drifting to the south or southwest on an ebb tie, the swing of the two vessels would intersect, and collision would probably result. The result of the happenings from March 12th to March 19th, we think, not only lends great weight to the claim of the Edon, not only as to her position, but satisfies us as to the cause of the collision.

In the oral and written argument advanced by the appellee, the Edon's original anchorage is not attempted to be placed with certainty. Liability has been imposed below upon the theory of the Edon's dragging, and it is argued from this that the original anchorage cannot be located. On the other hand, the appellant located the original anchorage with a degree of certainty which to us is worthy of acceptation. It is apparent that the anchorage ground was crowded during this period of the war. The Three Marys was two or three lengths east of the Edon, and the Avon crowded in between the two and dropped anchor at a place which apparently was too close to both of them. The master of the Three Marys, who was friendly to the first mate of the Avon, when called as a witness on behalf of the Avon, first tried to conceal that the Avon fouled his vessel, but finally admitted the fact. The mate of the Avon testified to the contact between his vessel and the Three Marys. The cause of this contact is stated by him to be due to the dragging of the Three Marys. The master of the Three Marys, however, denied that his vessel dragged or moved at any time. The crew of the Edon testified to some apprehension when the Avon anchored that she would collide with their vessel. The Avon's crew denied any such apprehension, but it does appear that there was some discussion after this among the members of the crew. One member of the crew called the attention of the mate to the close proximity of the Avon and the Three Marys, and the mate said that he was willing to take a chance and told him not to be afraid. In seeking a berth between two vessels, it would be the expected course for the master to place his vessel midway between them, and we are inclined to the belief that was done here. But the difficulty was the Avon was trying to get into a small space. On the Avon's evidence, the tide carried her stern about 50 feet or less of the buoy, and the Edon's witnesses de-

claring that, when she tailed upstream, she came within 50 or 100 feet of it. Occupying such an anchorage and position, the vessels would collide.

The position of the Edon was fixed by the bearings which the mate took of the buoy and of the Avon on March 19th, and we think this was her position, or at least a little south of it. Her witnesses describe this as that of her original anchorage. In addition to the unanimous and direct testimony of those on board the Edon that she did not drag, the tugboat master who anchored her and who observed her nearly every day said she did not drag, and no cause is set forth which would seem adequate to make her drag. She had her anchor embedded in the same spot for a month and had remained unmoved through the extraordinary storm of February 26th, when the wind blew over 80 miles an hour. Her hold on the ground was so secure that she had great difficulty in breaking the anchor out after she finally moved on March 20th to go to the repair docks. In order to account for the collision, there is no necessity to draw upon this reason of dragging. Nor do we think that entries on her log are helpful to the Avon. The Avon's first mate at first testified that the Edon dragged on March 14th and 15th, and that he would prove it by his log. He says his entry was made on this day—on the 14th. She was then dragging nearer his vessel, but the weather report shows that on the afternoon in question there was a wind velocity of 12 to 15 miles an hour on top of the Whitehall Building, perhaps 8 or 10 on the surface, and that this wind was from the northeast. Such a breeze would not cause a firmly anchored vessel to drag, and, since the Edon was southwest of the Avon, if she had dragged, it would have been in the wrong direction. It is testified on cross-examination that she was dragging partly across the river toward Brooklyn and about westerly. With a northeast wind, this is incredible. He later testified that she dragged on Friday, and that she was then closer than before. Finally he took back the statement that she dragged on the 14th (Thursday) and said it was on Friday, and then later stated that she did not drag on Friday. It was he who made the log entry. An entry was made on the 15th: "Strong westerly gale; ship Edon with foul anchors coming closer all the time." There was a strong wind on Friday, the 15th. It blew as high as 60 miles an hour, but the weather records show that after 3 a. m. it was from the northwest, and, if the Edon dragged on that day, she must have dragged to the southeast, which would have been away from the Avon, and not toward her. She could not have dragged nearer to her on Friday unless the Edon was anchored approximately northwest of the Avon, and this the Avon denied.

We think the log entries are not reliable. If the Edon was anchored southeast of the Avon, as some of her witnesses declare, when she dragged before a northwest wind, then, of course, she dragged further and further away from the Avon. There is some testimony that she dragged on Saturday, the 16th. It will be noted that on Saturday afternoon, the time when the dragging was said to have occurred, the tide was running ebb, and it is incredible that the March wind which prevailed, of 35 miles an hour, caused her to drag across and in part against the

tide. The log does not say she dragged on Saturday. The direction of the wind on Saturday as given in the log was west-northwest to northwest winds during the day, while the Weather Bureau records after 7 a. m. show that the wind was west and southwest. It may be, as claimed, that these entries in the log were made in connection with the mate's testimony. The fact that the Edon was nearer the Avon on Saturday is explainable for a better reason than dragging. That day was the first there was a west or southwest wind. The Edon, being light, tailed it toward the Avon. The Avon being loaded, was less influenced by the wind and more by the tide and lay downstream. The vessels were nearer together during that afternoon. The loaded vessel was influenced by the ebb tide of the afternoon. Between 5 and 6 the direction of the wind shifted to southwest. These conditions, together with the gradual slackening of the ebb tide, made the light Edon drift more than the Avon and made for the positions found; namely, the stern of the Edon swung toward the Avon. We think this was due to the ebb tide and the west wind. The appellee's argument that the operation of clearing the Edon's anchor chains in some way caused her to drag is not sound. The anchor was an old-fashioned fluke anchor weighing about 38 hundredweight, and was an unusually large anchor on vessels of this size. It was a good bottom to drop into and was holding a light vessel. There was no severe weather on Saturday, the day mainly depended upon by the appellant as the day of the dragging, and no good reason is advanced to believe that the anchor did not hold.

The cause, when collisions occurred, may be found in conditions of the wind and tide. With the Edon light and the Avon loaded, the Edon was more affected by the wind and the Avon by the tide. When the vessels swung at different times, and in consequence, under particular combinations of wind and tide, the vessels would collide. This is borne out by the testimony of the witnesses. Whenever a southwest or west wind and an ebb tide and a wind velocity of 20 or more miles per hour occurred, the vessels came together. The first collision occurred on Saturday and Sunday, March 16th and 17th. On that night the wind shifted from the northwest to the west at about 8 o'clock Saturday morning and thence to the southwest at about 6 p. m. During the afternoon it was west for the first time in daylight hours since the vessels had lain there. It was on that afternoon that the Edon was seen nearer the Avon, and, when this was noticeable, the tide was ebb. During these conditions the Avon was tailing nearly downstream, and the Edon toward the east. This would bring the Edon's stern near the Avon's port side. The tide changed to flood in the late afternoon and the wind to the southwest. The Avon swung around so that she was tailing to the north while the Edon swung before the wind in a northeast direction. And if the Edon swung to the northeast to the full extent of her chain, her stern would be near the Avon's anchor, and if the Edon was further north than the position claimed for her, she would swing correspondingly closer. High water occurred at 11:16 p. m. and again it diminished in strength some time earlier. The wind at 9 p. m. was 20 miles an hour, at 10, 23, and at 11, 33, at the Weather Bureau Sta-

tion. The surface velocity would be about 14, 16, and 22 miles, and this would hardly affect a loaded ship. As the force of the flood tide slackened, the Avon would be drawn by her anchor chain to a point not far from her own anchor. She would be headed with her bow down stream, since she had tailed to the flood. The Edon would have her stern to the northeast before the wind. This would make the jib boom of the Avon not far distant from the stern of the Edon. It extends about 40 feet ahead of her bow, and it was in this position and in this way that the first collision occurred. At 1 a. m. on the 17th the tide was running ebb and the southwest wind blowing, and the vessels came into contact again in the same manner. The ebb tide was then running, and the Avon was actually drifting downward on the ebb, although she had not swung around, for she had not yet brought up on her anchor chain. And this is why the contact at 1 or 2 o'clock was more violent than at 11. The Avon continued to drift down bow first on the tide with her stern gradually swinging to the east, rubbing against the starboard side of the Edon, whose stern was still held by the wind in an easterly direction. It was then found that the Avon's port side and the Edon's starboard side were in contact. The vessels were in the act of swinging around toward Brooklyn, the wind having diminished and changed more to the west, and the tide being ebb. The bow of the Avon, swinging down broadside with the tide, pushed the Edon before her. On the morning of March 17th the wind died down, but increased before noon and blew 40 miles an hour from the southwest, and after 4 p. m. from the west. This extended the Edon's anchor chain to the northeast and east as far as it would go. The wind reached its maximum velocity between 4 and 5 on that afternoon, at which time the vessels came together again when the Avon swung down on the ebb tide. High water was just before noon and low water at 6 p. m. The Avon extended her anchor chain northeast or east, and this caused the Avon, when she swung down stream on the ebb tide, to cause her port side to come in contact with the Edon's stern. Thereafter, the Avon drifted away on the flood tide and there was no further contact. Before the ebb tide came again and between 11 p. m. and midnight, the wind shifted to the northwest and remained northwest until 3 p. m. on Monday, the 18th. The wind then changed to the southwest, but with a force of only 15 to 20 miles an hour, which was not sufficient to bring about a collision, even on the ebb tide. The wind freshened, however, about 10 p. m., but there was a flood tide, and the Avon was therefore tailing up the river.

Shortly after midnight the tide turned to ebb, the wind continuing southwest at a velocity of about 25 miles an hour. This brought about the combination of circumstances which had existed at the time of the previous collisions. At about 3:30 to 4 a. m. on the morning of Tuesday, March 19th, the Avon's port side again swung against the Edon's stern, and the stern of the Edon was pushed around by the Avon until it was pointing almost north. This time the vessels remained in contact about an hour. It appears that at about 2 a. m. on March 17th and at 6 p. m. March 18th, and 4 a. m. March 19th the conditions were about the same. On the first of these occasions the vessels collided,

while on the second they did not, and on the third they did. Under substantially the same conditions, with a stronger wind, on the afternoon of the 16th, the vessels came very close, but did not touch.

From the above it is a fact that at the same time, with like conditions, collisions occurred, while at other times they did not. On the occasions when they did not it is a fact that the vessels approached nearer to each other. That they collided on three occasions, and not on the other three, when they were under substantially like weather and tide conditions, was probably due to the variations in the conditions which are not subject of exact proof; and, because there was no collision on March 12th under like conditions, it cannot be argued that the vessels must have been further apart, and therefore there was dragging. It is testified to by some of the Avon's witnesses that the Edon had remained in the same position all the time up until Saturday morning, and the tugboat master who anchored the Avon, called as a witness by it, said that the Edon was anchored the same distance away she was when he anchored the Avon. Vessels will never swing a constant difference between them unless precisely the same conditions of wind and current prevail. Such identical conditions are rare.

The argument of the Avon that, since combinations of the southwest or west wind and ebb tide did not produce collisions on the night of the 12th prior to the alleged dragging, but did produce collision after it, and therefore that there must have been dragging, is answered by the fact that there were two occasions after the alleged dragging occurred when there was a combination of southwest or west wind with ebb tide and yet no collision occurred. These two occasions were on Saturday, March 16th, and the afternoon of Monday, the 18th. It is therefore not remarkable that there was one similar occasion for the alleged dragging when no collision occurred.

We think the cause of this collision must be founded upon the charge of the Avon giving the Edon a foul berth rather than inferentially establishing a dragging. Proof thereof depends largely on the conditions of the wind and tide. But such proof is compelling.

The decrees are reversed, and the appellant, J. Langfeldt, as master and bailee of the ship Edon, may have a decree against the ship Avon, and the libel of the appellee Charles A. McCullough, as managing owner of the ship Avon, will be dismissed.

ARMSTRONG et al. v. DE FOREST RADIO TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Second Circuit. March 13, 1922.)

No. 198.

1. Patents ⊂328—1,113,149, for audion radio amplifier with feedback circuit, held to disclose invention.

The Armstrong patent, No. 1,113,149, for an audion amplifier for radio receivers, in which the variation in the plate circuit feeds back energy to the grid and increases its potential generation in the succeeding half cycles, *held* to disclose patentable invention.

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

2. Patents ⊂⊃328—1,113,149, for audion radio amplifier with feedback circuit, held not anticipated by defendant's invention or other patents.

The Armstrong invention, of a feedback circuit for an audion amplifier for radio receivers, *held* not anticipated by experiments of defendant, which did not disclose the principle before the date of patentee's reduction to practice, as established by a drawing witnessed before a notary public, nor by patents to other inventors based on applications filed subsequent to that date.

3. Patents ⊂⊃91(3)—Uncorroborated testimony of inventor as to date of conception need not be rejected.

Though uncorroborated testimony of an inventor as to the date of his conception is to be accepted with caution, there is no rule of law that requires the rejection of such testimony, if the court is satisfied of his good faith, and the apprehension of the invention is definite enough to have enabled the inventor to reduce it to practice without a further exercise of inventive skill.

4. Patents ⊂⊃328—1,113,149, for audion radio amplifier with feedback circuit, held infringed by defendant's apparatus.

The Armstrong patent, No. 1,113,149, for an audion amplifier for radio receivers, the novel element of which was the feedback circuit, *held* infringed by defendant's apparatus, containing that circuit.

5. Patents ⊂⊃328—Subsequent application for improvement held not to exclude oscillating circuits from patent No. 1,113,149, for audion radio amplifier.

A subsequent application by a patentee for an independent improvement, which constitutes a particular use of the invention disclosed by Armstrong patent, No. 1.113,149, *held* not to exclude from the prior patent the oscillating audion circuit.

6. Patents ⊂⊃328—1,113,149, for radio audion amplifier with feedback circuit, held to cover an instrumentality, and not a principle.

The Armstrong patent, No. 1,113,149, for an audion amplifier for radio receivers using a feedback circuit, *held* a patent for an instrumentality, and not for a principle.

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

Suit in equity for infringement of patent No. 1,113,149, by Edwin H. Armstrong and another against the De Forest Radio Telephone & Telegraph Company. Decree for plaintiffs (279 Fed. 445), and defendant appeals. Affirmed.

Walter H. Pumphrey, of New York City, for appellant.

Pennie, Davis, Marvin & Edmonds, of New York City (Thomas Ewing, William H. Davis, W. Brown Morton and Willis H. Taylor, Jr., all of New York City, of counsel), for appellees.

Before ROGERS and MANTON, Circuit Judges, and KNOX, District Judge.

MANTON, Circuit Judge. The patent in suit was granted for a wireless receiving system on October 6, 1914, and on an application filed October 29, 1913. There are 12 claims in suit. All are held to be infringed by the decree below. The invention relates to improvements in the arrangement and connections of the electrical apparatus and receiving station of a wireless system and particularly a system in which the so-called audion is used as the Hertzian wave detector; the object being to amplify the effect of the received waves upon the

current in the telephone or receiving circuit, to increase the loudness and definition of the sounds in the telephone or other receiver, whereby more reliable communication may be established or a greater distance of the transmission becomes possible.

There are several defenses interposed, including the one of noninfringement. The primary question is whether or not the patentee invented the feedback circuit, with an explanation of what it is. The patentee states that he has modified and improved upon the arrangement of the receiving circuits; that the improved arrangement corresponds with the ordinary arrangement of circuits in connection with an audion conductor, in that it consists of two interlinked circuits, a tuned receiving circuit in which the audion grid is included, and which is referred to as a tuned grid circuit, and a circuit including the battery or other sources of direct current and the wing of the audion, which is referred to as the wing circuit. The grid circuit passes through a stopping condenser, then through the secondary of the receiver, in parallel with which is the tuning condenser. Thus the circuit passes to the filament, and from the filament to the grid, through the space inside the audion. The plate circuit, starting from the plate, passes through the battery and the telephone receivers in series. Thus the plate circuit goes to the filament, and from the filament through the space inside the audion bulb to the plate. The path of the battery current is from the upper positioned terminal of the battery, through the plate of the audion, through the intervening space of the audion to the filament, from the filament to the telephone receivers, and then to the negative side of the battery. The grid is positioned in the middle of that path of the current from the plate to the filament and inside the audion. In other words, in the space between the filament and the plate of the audion, the incoming high frequency is impressed upon the grid, which is in the path of the flow of the battery current. The high-frequency current or oscillation is received by the antenna or aerial. An oscillation current flows through this aerial, the primary of the transformer and ground. This primary oscillating current induces a secondary oscillating current in the circuit formed by the secondary of the transformer and the tuning condenser. This oscillating current builds up by resonance a potential difference across the coil and condenser, which is transmitted through the stopping condenser, so that it exists between the grid and the filament of the audion. It is the potential on the grid which varies the steady flow of the battery current through the plate circuit. This is the fundamental operation of the audion. A tuned circuit has the same significance as a resonant circuit. It is a circuit whose inductance and capacity are so adequately related as to give it a natural frequency in accordance with the frequency of an impressed oscillating current. The usual way of a single oscillation is through the medium of an antenna and oscillation transformer, a tuned or resonant grid circuit, and a stopping condenser to the grid and filament.

The Armstrong invention consists in applying the variations in the current, which are of radio frequency, in such manner as to transfer energy back into the grid circuit.. This was a wholly novel idea. This

result was accomplished by two specific means: First, the provision of coupling between the grid circuit and the plate circuit. The specific form of this coupling consisted of the inclusion of the telephone receivers in the common portion of the grid circuit and the plate circuit. This had the far-reaching consequence of automatically transferring radio—that is, high-frequency—energy from the plate circuit to the grid circuit. The second means disclosed by Armstrong for achieving regeneration consisted in making use of the inherent coupling present in the audion bulb itself; this coupling being due to the electrostatic capacity between the plate and the grid. This capacity is inherent, and Armstrong's means made it useful and accomplished the result by the insertion of a radio frequency inductance in the plate circuit. From the sending station, radio signals are sent out in the form of radio frequency waves—waves of a frequency above audibility. These waves are received by the antenna, are impressed upon the grid, and alter the potential on the grid. The grid is interposed in a gap between the filament and plate. The plate current flows across this gap, and the variations in the grid potential cause variations in the plate current, which is a current through the telephone. It has been found that, if radio frequency waves are emitted and received continuously in unbroken trains, they would produce a continued unvarying alteration of the grid potential, and a single continued unvarying alteration of the plate current, so that the only response of the telephone would be a "click" when reception began and another "click" when it ceased.

To produce intelligent signals or speech sounds in the telephone, the transmitting waves, either when they are transmitted or after they are received, must be broken up and modulated, to produce interrupted or varying wave trains, and in consequence interrupted or varying alterations of the grid potential. In the use of the detector, wave trains must thus be interrupted or modulated. The effect of the audion as a detector was that the integrated effect of a train of received radio frequency waves caused an alteration of the grid potential which produced a single pulse of current in the plate or telephone circuit. By audio frequency interruption or modulation of the radio frequency waves, either at the transmitting station or at the receiving station, audible sounds are produced in the telephones. By interrupting or modulating the transmitted waves according to a prearranged system, intelligible signals are transmitted. Heretofore the audion, used only as a detector, was thought to be a device in which radio frequency oscillations existed in the grid circuit and audio frequency impulses—the result of integration of the radio frequency wave trains—existed in plate or telephone circuit. The idea of radio frequency oscillation in the plate circuit did not exist.

The patentee, while a student of Columbia University, living in Yonkers, was an amateur wireless operator and had a station at his home. There he made observations which led him to suspect that the radio frequency oscillations might be carried over into the plate circuit with some improvements in the detecting action of the audion. He tuned the plate circuit to radio frequency by inserting in the plate circuit such inductance and capacity as to make it responsive to the radio frequency

waves. Then he found, not only that the radio frequency waves could be carried over into the plate circuit, but that they could be there amplified by the energy derived from the local battery in the plate circuit without change of frequency or wave form, and that they could be fed into the grid circuit, where they increased the potential variations on the grid and the operation continuously repeated itself, producing the feedback regeneration which increased normally the sensitiveness of the device and the loudness of the receiving signals. It was in this way that he thought out his invention, which has been a great advance in the wireless art. In this feedback audion circuit, as disclosed by the patent, the incoming signal is impressed upon the grid in the same manner with the simple audion circuit, but the flow of current in the plate circuit is varied in a very different manner. Now, because of the feedback connection, regenerative amplification begins. The first half cycle of plate current variation will feed energy to the grid circuit, and will cause a larger subsequent variation in the grid potential. In turn, this increased variation in the grid potential will increase the variation in the plate circuit, and this again feeds back energy to the grid and increases its potential generation in the third and succeeding half cycles. This cyclic process continues to build up the variations in the plate current and grid potential as shown. The building up of the oscillations continues indefinitely, and the limitations are due only to the vacuum tube or audion, which weaken the feedback or regenerative action, as strong oscillations are built up. If the regenerative or feedback coupling is sufficient to transfer enough energy from the plate circuit to the grid circuit, the energy released from the battery in the plate circuit will be greater than the entire loss of energy in the system of circuits, whereupon continuous independent electrical oscillations will persist in the system, irrespective of the oscillations which may be impressed thereon from the antenna, and the audion in the regenerative feedback circuit becomes an independent generator of continuous oscillations.

[1] The invention, though simple in its instrumentalities, is a radical modification of an instrument which was little understood. The action of the audion was very obscure, and was not understood in the art, until Armstrong wrote his article in the Electrical World on December 12, 1914, and later an article in the Radio Institute paper in September, 1915. These articles demonstrated the action of the simple audio detector, and of the feedback audio as a detector, amplifier, and oscillator. That Armstrong has given a correct statement of the operation of the audion, with or without the feedback circuit, in these papers, has been established to judicial satisfaction. Marconi v. De Forest (D. C.) 236 Fed. 942. What this patent discloses, and what Armstrong did, clearly amounts to patentable invention.

[2] But it is sought to defeat the patentee by the claim of prior date of invention by De Forest, and some patents in the prior art also submitted as defenses. Since it is important to fix a date of the conception of the patentable idea, we shall review briefly his early study of the subject-matter. While a student in high school in 1906, Armstrong erected a radio station at his home, operating it as an amateur during

that year. His first vacuum tube detector, a two-element vacuum tube, he used in 1908, and continued using it until 1910 or 1911, when he obtained a three-element vacuum tube detector, a De Forest audion. He used this last secured audion in experiments, trying out various circuit connections in order to improve its sensitiveness. It was in the spring of 1912 that he started an intensive study and technical analysis of the action of the audion, and during this time he connected a condenser across the telephones of the simple audion receiving station, and noticed that on some bulbs an increase in signal strength would result. In the summer of 1912 the idea occurred to him to tune the plate circuit of the audion system by means of an inductance, and in September, 1912, he set up an apparatus at his home to try the experiment on a small antenna and on the press signals sent out by a radio station located on the Atlantic Coast, at Cape Cod, Mass. The signals became very much louder than any he had ever been able to receive before. In the fall of 1912, in his experiments, he found that an inductance was gradually introduced in the plate circuit, and, as the signals became stronger and stronger, a certain point would be reached where the character of the tone of the radio station signal, which was normally clear and musical, changed into a hissing or mushy sound. At the point of adjustment at which this phenomenon occurred, the tuning of the system became most exceedingly critical. This effect was due to heterodyne beat action on spark signals, and resulted from the fact that the audion feedback was so adjusted as to release from the wing or plate circuit, or battery circuit, sufficient energy to maintain within the system continuous high-frequency oscillation, independent of the received oscillations. It was in February, 1913, when he learned to understand the cause of this phenomenon.

After obtaining these characteristics and results, he continued to use this arrangement of apparatus, particularly at night, in testing out the range of his apparatus and trying experiments with it. He made many modifications in the audion receiving circuit. One which proved to be very effective was the placing of the telephone receivers in the path common to both the plate and grid circuits of the audion, and, because of its effectiveness, he used it permanently thereafter. His apparatus was set up in his bedroom, located in his home in Yonkers, N. Y., and the antenna was very small and of a primitive type, being swung between the roof of his house and that of the house next door. In the fall of 1912 he replaced this small antenna by a 110-foot mast. His first experiments were conducted on wave lengths of from 2,500 meters down to the ship radio service wave lengths of about 600 meters. He was able to receive all of the Atlantic coastal radio stations within a very short time thereafter. Then he constructed a suitable apparatus to be used in the reception of longer waves; that is, wave lengths of the order used by the then-existing transatlantic radio stations. This apparatus, which he constructed, was offered in evidence. It was identified by amateurs, who saw it in his home. He told his father of the discovery, and showed him his apparatus, and had him listen to the signals about the 1st of October, 1912, and asked financial aid to secure a patent. This was not granted him. On December 7, 1912, he told

a college mate of his success in improving the sensitiveness of the audion receiver by means of a new connection and an entry was made by that college mate of that fact in his diary. Two days later, December 9, 1912, he told the same college mate of having heard Clifden, Ireland, and a notation of this was made in the diary. There is corroboration of his testimony as to experiments in 1912. He showed his receiver to his uncle, and tried to get him to advance money for a patent application. He did not succeed, but was advised by his uncle to go before a notary public and make a drawing of the connections and have it witnessed by such notary. This was done on the 31st of January, 1913. A drawing on a tracing cloth of his circuit connections was witnessed by a notary and the date was fixed thereon. The sketch shows his mental conception showing the essential features of an invention which was already a completed, successfully operative instrumentality. It fixes, beyond dispute, a date prior to which the invention was completed. He was without means to file his patent application, because he was unsuccessful in getting the money from his father or his uncle. He realized the importance of his invention, made the drawing, and had it witnessed before a notary, and there made a record of his invention, the best he could under the circumstances. Therefore we have a reduction to practice at least as early as January 31, 1913, the date of the drawing.

[3] There is no reason to doubt the testimony of the patentee as to the date of his inventive thought. While it is true that uncorroborated testimony of an inventor is to be accepted with caution (Clark Thread Co. v. Williamantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521), yet there is no rule of law that requires the rejection of the uncorroborated testimony of an inventor as to the date of his conception. The court must be satisfied as to the fact of demonstration and that the conception was complete. A mere assertion of the inventor at a given time, unaccompanied by contemporaneous acts or words indicating its existence, is not sufficient evidence; but if a court of equity is satisfied of the good faith, and the truth of the apprehension of the invention is definite enough to have enabled him to reduce it to practice without a further exercise of inventive skill, that is sufficient. In other words, an earlier conception, when alleged, is a matter of fact, and must be established by sufficient proof. Where there has been disclosure to others, or embodiment of the invention in some clearly perceptible form, such as a drawing, with sufficient proof of identity in point of law, that is sufficient. While the mere unsupported evidence of the alleged inventor on an issue of priority, as to the fact of conception and time, cannot be received as sufficient proof of prior conception, any full and accurate description of the invention, either in words or drawings or by model, will suffice, although the attempt to represent it may have failed. All that the law requires is that the drawings exhibited and relied on as evidence of the conception of the invention must show a complete conception, free from ambiguity or doubt, and such as would enable the inventor or others skilled in the art to reduce the conception to practice without any further exercise of inventive

skill. The rule as to corroboration is one of caution and discretion, and is not a statutory provision.

Here the patentee had a complete disclosure of the invention in his sketch. He had an actual apparatus, which was in existence at the time of the sketch, and which is received in evidence. Further than this, on February 17, 1913, the patentee wrote a letter to one Underwood, telling of his experiments and results. It sets forth sufficient to justify the claim that he was referring to the regenerative audion, and stamps the patentee as the original inventor of the feedback circuit. He expressed his intention to make quantitative measurements to determine the cause of the choke or hissing state. He suspected that the audion was independently generating high-frequency currents, and after discovering that the audion was generating high-frequency oscillations, the explanation of the whistling note on the telephone occurred to him. He said he became convinced that he was observing a beat effect between the incoming signals and the local oscillation. To test this out, he set up a second audion system similar to the first, and by adjusting both audion systems in the hissing state, he obtained beats between them, which could be carried to any desired pitch. In March, 1913, he constructed apparatus with constants suitable for receiving messages from Clifden, Ireland, and Glace Bay, in conjunction with the small antenna he was using, and succeeded in receiving the Clifden signals with regularity. Prof. Mason confirms this as of March, 1913.

We think this was sufficient to fix the date of the invention as to the date of the sketch, to wit, January 31, 1913. He demonstrated diligence in making known his idea and in protecting it. He was handicapped financially, and we do not think he was guilty of any laches which worked to the disadvantage of any competitor in inventive thought in the art or himself. He used the apparatus upon which he made his invention, subsequently in commercial use at Sayville, N. Y., with the single exception that some of the original induction coils used at his home were bulky and wound upon holsters or cardboard cylinders, and in the apparatus used at Sayville they were replaced by coils which were physically smaller, but possessed the same electrical constants. He was called into this practical service at Sayville to overcome difficulties in the receipt of signals from Nauen, Germany, in 1914. His apparatus continued in use there for a considerable length of time, until the engineers were able to construct a duplicate system, when the apparatus was returned to Armstrong. The engineers there preferred to use this apparatus in the oscillatory state, even in the reception of spark signals. Since then apparatus built under his invention have reached a high degree of commercial success.

The testimony of De Forest has been offered in evidence, by which it is attempted to show that he had conceived the invention in 1912 and 1913, and that he is, in point of fact, the prior inventor. His testimony shows that he experimented, having in mind two uses of the audion: First, the use of the audion as a telephone relay or repeater; and, second, the development and use of the audion as an amplifier of telephone and detector of radio signals, and the use of the amplifier to record detected radio signals on a telegraphone wire. The invention

involved here has the greatest value in the amplification of radio signals and the recording of them on a telegraphone wire. It would have produced the long sought for high-pitched note which De Forest and his associates were trying to produce throughout this period, and failed in. It is testified that De Forest was endeavoring to produce a beat note for the reception of continuous wave signals, and to record them on the telegraphone. The appellant offered in evidence De Forest's experimental note books, showing entries made under date of June 21, 1912, where there is the observation of a beat or high-frequency note with a straight audion hook-up. The note shows this to have been transient and incapable of reproduction, and he recognized that it was not the true heterodyne effect. This was due to the gas action in the tube, an effect which has always been observed by users of the straight audion hook-up, and which is explained in the testimony of Hazeltine in the interference record. A true heterodyne effect is produced whenever there is, at the local receiving station, a series of oscillations differing slightly in frequency from the received oscillations, so that the two groups of oscillations combining, produce beats. This true heterodyne effect is characterized by the fact that, upon adjustment of the local frequency, the signal becomes audible in the telephone as a very high pitched note, which gets lower in pitch as the frequency of the two oscillations approach one another, becomes so low as to be inaudible, and then comes in again at a low pitch, passes on to the high pitch, and goes above audibility again. A high pitched note may be produced by the gas action at audio frequency. This note is not due to the heterodyne beat, but to the audio frequency oscillations of the tube. This entry of June, 1912, was probably due to gas action, local oscillations of audio frequency, and in the entry of April 17, 1913, the note was due to gas action, local oscillations of radio frequency combining with the incoming oscillations to produce a beat note. In neither of these was there any feedback action. The entry of June 21, 1912, indicates that De Forest did not produce, or know how to produce, a beat note with an audion receiver. He appreciated the importance of applying the audion, if possible, to the production of the beat note by heterodyne reception, but failed to do so.

A notebook of Van Etten was offered under date of August 6, 1912. Van Etten was working on the audion as a telephone relay and amplifier, having had telephone experience which qualified him for the work. On July 23, he entered in his note book a two-way telephone circuit, using two audions, with a note: "Think the following would possibly make a good telephone repeater." On July 24 Van Etten attempted to set up this two-way circuit with a single audion having two grids and two plates. An entry on August 6 shows this was a failure. On August 6, he connected the input circuit of the double audion to the output circuit, and thus in an accidental way found that the audion would howl or sing. He pointed out in his notes that the arrangement gave beautiful clear tones, which lowered and raised in pitch as the B battery was varied, and could be wiped out by the magnet, and "then the watch ticks come through as before." He says:

"This phenomenon is apparently similar to the 'howl' produced in an ordinary C. B. telephone when the receiver is placed against the transmitter, but nevertheless, as shown by variations of number of cells in battery B and by the magnetic wiper, is also intimately associated with the audion."

On the same day he set up the balanced two-way telephone circuit, corresponding to the two-way telephone circuit which is used to prevent the howling of the mechanical telephone relays, and then made an entry in his notes that he tried "following circuit, but it was n. g.; could not make it boost at all; could only make it howl." These were characteristic of the notes of Van Etten, and showed efforts to produce a telephone relay circuit in which the audion would not howl, and in this he succeeded August 29, 1912. There is nothing to show, however, that what Van Etten learned about the circuit arrangement on August 6, 1912, was ever brought to De Forest's attention. He did not include it, and, on the contrary, the record indicates "that this new and simplified circuit" was deemed useful only for abortive "trigger effect." Although De Forest's testimony attempted to show that he had in mind the feedback connection on August 6, and that he had conceived the idea that the feedback would improve the amplifying properties of the audion, Van Etten, when called in the De Forest interference record, says that he did not know, even to this day, that the feedback circuit could be used to produce amplification.

On February 20, 1915, De Forest published in the Electrical World an article in which he made claims with respect to his early work on the oscillating audion, and referred to two such experiments, the first of which he said occurred in the latter part of 1910 or 1911, and the second on August 26, 1912. In these there is no mention of the feedback circuit of the Van Etten August 6 entry, which it is now claimed represents his first real discovery of a controllable oscillating audion. These and other circumstances seem to us inconsistent with the idea that De Forest had any real knowledge of or understood the Van Etten accidental circuit arrangement of August 6, 1912. Nowhere in the notes which are in evidence is any reference made to the terms which would ordinarily be used if such a discovery were made and understood. The terms "feedback" or "regeneration," "input circuit" or "output circuit," or "reamplification," are not found in the notes. An entry of August 29, 1912, referring to the two-way circuit which did not howl, made by Van Etten, showed the use of two audion amplifiers and cascade, and the record shows that he explained this arrangement to De Forest, and that it was considered of great importance, and was copied in De Forest's notebook by Van Etten on that day. It is described merely as an amplifier by Van Etten in his notebook, but De Forest in his notebook says that, by reversing certain connections, the arrangement makes all sorts of musical notes in the telephone, and that the notes could be changed by putting very small capacities between ground and grid, wing or filament. De Forest says this was due to a feedback. Van Etten does not corroborate him as to the existence of any feedback in the circuit, and Hazeltine, in his discussion, makes it clear that, through the complex circuit arrangement of a cascade audion amplifier, it is difficult to avoid electrostatic or capacity coupling be-

tween the plate of the second audion and the grid of the first, and that this difficulty will give rise to oscillations similar to those described in De Forest's notebook of uncertain frequency, and liable to jump from one frequency to another, because in the complex circuit arrangement there are several independent inductances having difficult natural periods, at any one of which oscillations may occur.

These entries show that, at the very date, De Forest did not have the invention here in controversy. The thing which makes valuable the feedback circuit is that the amount of feedback and the frequency of the oscillations depend directly upon the electrical constants; that is, the inductance and capacity of the circuit, and not the heating current or plate potential. This characteristic makes the instrument a practical one, capable of control in a commercial way, and responsive to the desires of the operator. One having this conception of the feedback circuit would not make an entry suggesting that the oscillations were independent of the electrical constants, or that they were peculiar to the audion itself. The De Forest 1914 notes disclose when and where he discovered that the oscillation of phenomenon was not peculiar to the double audion. These notes contain the idea that the pitch of the sounds depends upon the inductance and capacity of the circuits. In February, 1915, after the Armstrong patent was issued, in an article written in the Electrical World, he showed that he knew that the frequency depends upon the electrical constants of the circuit, and he then made claim of this characteristic for the gas action straight audion hook-up of 1910 and 1911, even though gas action oscillations do not have this essential characteristic. The inference is fair that at the time of this writing he did not know the difference between the two. He did not disclose the circuit arrangement to his associates on his own statement, although he says that this was for fear the Federal Telegraph Company would lay claim to it, but at that time he was under contract to assign his inventions to that company and to use his best endeavors in their behalf.

On April 17, 1913, notes were made of the work done in June, 1912, and they show that he was looking for "beat note" and showed an arrangement of the straight audion hook-up, in which, instead of having a single tuned circuit connected to the grid, there were two tuned circuits so connected; the intention being to break up the received signals into two sets of signals of slightly different frequency, which would together produce a "beat note." His later entry showed that this was an impossibility. A later entry, made under date of April 17, 1913, said: "This day I got the long looked for beat note." The entry made on that day establishes that De Forest had not been able to get the heterodyne phenomenon prior to April 17, 1913, which was some months after the day we are crediting Armstrong for his invention, to wit, January 31, 1913.

In his testimony, De Forest said that, to change the circuit in his experiment, the load coil was taken out of the antenna and put in the plate circuit, although he stated that his note of April 17 did not mention this essential change. In the interference, De Forest said two loaded coils were used, one in the antenna, and the other in the plate

circuit. On the trial he said it must have been a feedback circuit, because the true heterodyne effect could not otherwise be produced. However, on the trial, it was demonstrated that, with a straight audion hook-up, the beat note can be produced by gas action, without any feedback at all. De Forest's relation to the art, and what he was endeavoring to discover, and his association with engineers engaged in the same art was so intimate, that we feel confident that, if he had in his mind the feedback, or anything bordering upon the invention which Armstrong discovered, he would have made it known, together with appropriate records, to put his having invented it beyond controversy.

The notebook entries of 1914 negative the idea of his having had the conception of this invention in 1912. His notes deal with his "trying for squeal or whistle—to get this in a critical state, where the right spark frequency will start it, and other frequencies will not." He refers to his having followed the directions of his Palo Alto notes without any result; "couldn't get one bulb alone to squeal—used a double grid and plate bulb with distinct leads." This negatives the claim that De Forest knew about the feedback circuit, and how to set it up and control it, and was in possession of the vast amplifying capacity of the feedback circuit. If he was in possession of all this, he could get the audion to "squeal or whistle," and there would have been no necessity for his pursuing the idea of "adjusting the audion circuits to a critical state, where the right spark frequency would start oscillations, and other frequencies would not." As late as February 10, 1914, he made an entry:

"I find that both grids are necessary—either alone, or with both joined together, will give the whistle."

It seems he still had the idea that the whistle or oscillating condition was the characteristic of the double wing, double grid audion, and could not be produced with a standard audion having a single wing and a single grid. It was not until September, 1915, that De Forest filed an application describing his feedback circuit. This is the application which is involved in the interference, and contains broad claims for a feedback circuit used to generate oscillations. The record shows that he had filed some 30 patent applications, and it is curious to note the late day that he filed his application. This record clearly negatives the claim that he invented and had the idea of a feedback circuit in 1912.

Meissner filed an application in this country on March 16, 1914. In the oath, four German applications are recited, filed April 9, 1913, October 1, 1913, October 23, 1913 and December 6, 1913. The German application of April 9, 1913, was granted, and is now known as the German patent, No. 291,604, dated June 23, 1919. It discloses the regenerative or feedback circuit adjusted to produce oscillation. There is nothing suggesting the use of this arrangement in a radio signaling system either as receiver or transmitter. The German application of October 1, 1913 (now German patent No. 295,673), granted June 23, 1919, discloses a double audion generator which is not of interest in this issue. The grant of October 23, 1913, provides for a divided grid.

electrode circuit, which is useful in connection with the generation of oscillations, and the last application of December 6, 1913, deals with the provision of a metallic filament for an oscillator bulb. Since we have fixed the date of Armstrong's invention as early as January 31, 1913, these applications and subsequent patents would not anticipate, even though they were for the same invention.

The Schloemlich and Von Bronk (United States) patent No. 1,087,892, issued February 17, 1914, was filed March 14, 1913. The oath recites two German applications, one filed September 2, 1911, and the other filed February 8, 1913. Prof. Hazeltine points out that there is no regenerative feedback included in it. The inventor recognized the existence of high-frequency plate current variations in the plate circuit, and that these variations were of greater amplitude than the potential variations on the grid. They proposed to use the straight audion hook-up, without feedback, for amplification of high-frequency signals, without using it as a detector; the amplified variations being detected by a separate crystal detector associated with the circuits. They show no realization of a use for reamplification or regeneration, or that it could be used simultaneously as an amplifier and detector. It lacked essentially what Armstrong invented, namely, the feedback from the plate circuit to the grid circuit, and the plate current variations to accumulatively amplify the potential variations on the grid.

The Reisz patent, No. 1,234,489, was filed subsequent to Armstrong's date of invention, namely, April 9, 1913. It does not anticipate the patent in suit.

[4] Concluding as we do, that the patentee has a meritorious patent that has not been anticipated, the remaining question is: Does the appellant use, and therefore infringe, the appellee's patent? The patent in suit is for a definite electrical instrumentality, and differs from the prior art. It is a straight audion hook-up, in that the patentee inserted in that prior art arrangement means supplementing the electrostatic coupling of the audion to facilitate the transfer of energy from the wing to the grid circuit. It is either the radio frequency inductance in the wing plate circuit, the inductance L^1 of Figures 1, 2, 3 and 6, or the feedback coupling in the common path, the telephones R, Figures 2 and 4, or the telephone R, transformer T, and shunted capacities C^5 and C^6 of Figure 1, or the inductance L^2 and the shunted capacity C^5 and C^6 of Figure 6. The patentee's invention covers the regenerative or feedback audion. It is a definite instrumentality; that is, an arrangement of the audion circuits on which oscillating current energy is transferred from the output or plate circuit to the input or grid circuit, to sustain the oscillations in the grid circuit. It is essentially useful as a radio receiver, and has proven to be a wonderful improvement on the old audion receiver. The appellant uses the feedback circuits in a radio transmitter, and the patent covers the use of the feedback circuit, and applies even though the claims are in terms limited to a receiver. Western Electric Co. v. LaRue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294. The inventor is entitled to the benefit of all uses to which his invention can be put, no matter whether he conceives the idea of the use or not.

[5] It is contended that the oscillating audion circuit, for which both De Forest and Armstrong have pending applications in the Patent Office, constitutes another invention and that the nonoscillating audion receiver only is involved in the patent in suit. But the language of the claims of the patent in suit covers the feedback audion circuit adjusted to produce independent continuous oscillations. It is another particular use of the invention of the patent in suit. It involves a self-heterodyne use. It was an independent improvement invention, which is described in Armstrong's second application. Its validity is not involved in the present consideration. McCreary v. Penn. Canal Co., 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; Suffolk Mfg. Co. v. Hayden, 70 U. S. (3 Wall.) 315, 18 L. Ed. 76. Nowhere did Armstrong disclaim the oscillating audion. The feedback circuit of the patent can receive all sorts of signals, damped waves or continuous waves, in the oscillating or nonoscillating condition. If the audion is in the nonoscillating condition, it receives the damped waves with a musical tone greatly amplified. If the audion is in oscillating condition, damped waves will come in with a mushy tone, but greatly amplified. If continuous waves are to be received with the oscillating audion, it is found cheaper and better (though not always) to use the audion simultaneously as a local heterodyning source.

[6] We do not agree with the claim of the appellant that the patent is for a principle. It is for an instrumentality. It should be construed to cover the uses of the apparatus which are described and claimed. As the testimony of the expert called by the appellee indicates, the appellant's use infringes all of the claims of the patent in suit relied on. The feedback connection of the patent is shown in each of the appellant's apparatus. There is a two-path feedback in each apparatus, which is pointed out in charts 7, 8, and 9. On chart 7 there is a two-path feedback, but the principal path is through the telephone shunted by the primary condensor. These two instruments, the red and green lines running side by side, show that they are connected by a commor path. Chart 8 shows that the feedback is through the telephones and the grid condensor connected in the common path, and chart 9 shows the coupling is through the induction of the tickler coil alone, or, in other words, the inductance of the tickler coil and the transformer coil shunted with the antenna.

We think this excellent contribution to the wireless art should be accorded the full scope which the court below gave it in the decree. We think the decree is not too broad, but properly describes what the inventor conceived, and for which protection must be accorded to him.

Decree affirmed.

CARPENTER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. March 4, 1922.)

No. 1929.

1. **Criminal law ⟸369(6)—Evidence of operation of still held admissible in prosecution for sale of liquor.**

   Under an information charging defendant with illegal sale of whisky at his house, evidence that a still had been operated at a place three-quarters of a mile distant from the house, and that there was a path between the two places, *held* admissible.

2. **Criminal law ⟸369(6), 1169(11)—Admission of evidence of other sales held error, but harmless.**

   In a prosecution for possessing and selling liquor in violation of National Prohibition Act, admission of evidence of other sales, prior to the taking effect of the act, and not shown to have been connected with those charged, *held* error; but, in view of other evidence which clearly warranted conviction, such error *held* without prejudice and not ground for reversal under Judicial Code, § 269, as amended (Comp. St. Ann. Supp. 1919, § 1246).

3. **Criminal law ⟸369(6)—Evidence of prior sales admissible under charge of maintaining nuisance.**

   On a charge of maintaining a common nuisance under National Prohibition Act, tit. 2, § 21, by the sale of liquor on certain premises, evidence of prior sales there at near the same time and while before that act went into effect, at a time when such sales were illegal, *held* material and competent.

4. **Criminal law ⟸1147—Sentence within limits prescribed by statute not reviewable.**

   The question whether a sentence is excessive, where it is within the limits prescribed by the statute, cannot be considered by the appellate court.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Edwin Y. Webb, Judge.

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

B. J. Pettigrew, of Charleston, W. Va. (W. S. Wysong, of Webster Springs, W. Va., on the brief), for plaintiff in error.

Lon H. Kelly, U. S. Atty., of Charleston, W. Va.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WADDILL, Circuit Judge. The plaintiff in error, hereinafter called the defendant was proceeded against by information for violation of the National Prohibition Law, known as the Volstead Act (41 Stat. 305).

The information contained four counts: First, that on the 20th day of July, 1920, the defendant possessed and unlawfully transported certain intoxicating liquors; second, that on the ——— day of July, 1920, the defendant unlawfully manufactured intoxicating liquors; third, that on a day subsequent to the 17th of January, 1920 (on which date the Volstead Act became effective), the defendant unlawfully sold intoxicating liquor in contravention of said act; and, fourth, that during

the said year 1920, and subsequent to the 17th day of January, the defendant owned, controlled, occupied, and maintained a certain room, house, building, structure, and place where intoxicating liquors were then and there being manufactured, kept, bartered, and sold, and that he then and there and by means thereof maintained a common nuisance.

The jury returned a general verdict of guilty on the information, and the court fined the defendant $500, on the first count, and sentenced him to imprisonment for 12 months for maintaining a nuisance, under the fourth count. From this action of the District Court the writ of error was sued out.

The defendant assigned sundry errors, particularly to the action and ruling of the court in the admission of testimony pending the trial; the first assignment being that testimony was admitted of the existence of a still some three-quarters of a mile away from defendant's residence, where it is claimed the whisky was sold, and that such evidence related to something too remotely connected with the offense for which he was being tried, and should not have been admitted. The second, third, fourth, and fifth assignments relate to the admission of testimony of other alleged sales of liquor by the defendant, which occurred in the month of December, 1919, prior to the passage of the Volstead Act, and which defendant insisted could not be introduced to prove offenses under that act, and for which he was being tried. Assignment sixth related to a statement by the court to the jury as to what consideration should be given to the testimony adduced of other alleged offenses than those covered by the information.

The record is not as complete as it should be for intelligent consideration by this court. It is evident that the defendant relied chiefly upon the exceptions and assignments of error mentioned, though upon the hearing it was agreed between counsel for the defendant and the government that the entire testimony as taken by the stenographer should be submitted to this court for its consideration of the case upon its merits. We will accordingly consider the case upon the assignments of error as made and upon the testimony.

[1] The question raised by the first assignment relates entirely to whether the evidence, excepted to, referred to an occurrence too remotely connected with the offense charged, to be taken into account on the trial of the accused. The court thinks that the exception bears more particularly upon the weight that should be given to this testimony. It is true that parts of a still, and evidence of the manufacture of intoxicating liquors, were found some three-quarters of a mile away from the residence of the defendant, and that there was another house nearer to the still than that of defendant; but there was a path or road directly from the residence of the defendant to the still in the woods, and it was within the discretion of the court to allow the testimony to be introduced, leaving to the jury to determine under all the facts and circumstances, the weight to be given to the same. Whisky had been undoubtedly sold upon the defendant's premises about the time; whisky was found there; and the existence of the still in connection therewith was the subject of legitimate consideration by the jury. Barton v. United States (C. C. A.) 267 Fed. 174, 175; Bishop

on Stat. Crimes (3d Ed.) 1078 and note; 1 Greenleaf on Evid. (15th Ed.) § 13; 16 Cor. Jur. 561, § 1078.

The questions raised by the second, third, fourth, and fifth assignments bear entirely upon whether the testimony of sales, other than that for which the defendant was tried and convicted, should be introduced at all, and, if so, whether evidence having relation to sales made prior to the time the National Prohibition Act became effective, should not, for that reason, have been rejected. This question is not free from difficulty, and will be considered from a three-fold viewpoint:

[2] First. Undoubtedly sales at time other than those covered by the information, and apparently in no way related directly to the offense charged, should not be received in testimony (Day v. United States, 220 Fed. 818, 136 C. C. A. 406), unless the element of intent is in some way involved. Intent is not charged here, nor is it material that it should be, so far as the sale or possession is concerned, as the mere selling or possessing is an offense under the law. Hence this evidence on the counts of the information for possession and sale should not have been admitted, though we are not inclined to believe that it was prejudicial to the defendant, as there was ample evidence not covered by the exception, to warrant the conviction for unlawful possession and sale, if the jury believed the same, which in the light of their verdict, we assume they did.

Second. Was there prejudicial error in the admission of this testimony, for which reversal should be had? We think, for the reasons stated, there was not. Evidence of the possession and sale of intoxicating liquor by the defendant after the date of the Volstead Act was clear and positive, and evidence of the manufacture of intoxicating liquor was fairly inferable from all the circumstances. The testimony of the possession and sale of liquor was sufficient to warrant a conviction under the count of the information for having in possession, if believed by the jury. Judicial Code, § 269, as amended, Comp. St. Ann. Supp. 1919, § 1246; Dye v. United States, 262 Fed. 6; Sneierson v. United States, 264 Fed. 275 (both decisions of this court).

[3] Third. Whether testimony as to other sales was not permissible under the fourth count of the information, with a view of establishing the maintenance of the nuisance, presents a different question, and as to that we are quite clear that evidence of other sales at and about the date of the alleged nuisance was proper, as bearing on the creation and maintenance of the same; and the fact that this testimony related to a period prior to the Volstead Act becoming effective is immaterial, in view of the close relation it had to the transactions covered by the information. It was unlawful to sell intoxicating liquors before as well as after the Volstead Act went into effect on the 17th of January, 1920, and hence the various sales as to which testimony was introduced, occurring in the previous December, were properly, in our judgment, admitted, as throwing light upon the character of the place where the alleged nuisance was maintained.

The sixth assignment of error, in the light of what we have stated as to the materiality of this testimony, furnishes no just cause of ex-

ception. The trial judge properly explained to the jury that they could convict only for sales after the Volstead Act became effective, and what was otherwise said as to the weight to be given to this evidence becomes immaterial, in our view that the admission of the testimony was harmless error.

Having thus passed upon the six assignments, it is proper that the court should say that we have fully and carefully considered the case on its merits, upon the testimony offered for our consideration by agreement of counsel, and are forced to the conclusion that the verdict of the jury was plainly right, and that no error occurred in the trial of which the defendant can justly complain.

[4] It is urged with great earnestness that the punishment imposed upon the defendant is greater than under the law should reasonably have been inflicted. With that question we have nothing to do, as the same was in the province of the District Court, within the limits prescribed by statute; but we feel that the same will be given proper consideration by the executive branch of the government, if asked for.

The judgment of the lower court will be affirmed.

Affirmed.

LOUIS WERNER STAVE CO. v. MARDEN, ORTH & HASTINGS CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1922.)

No. 139.

1. **Courts ⟸332—Depositions ⟸80—Depositions are "opened in court," when opened by clerk pursuant to rule of court; court rule held valid.**

The provision of rule 6 of the District Court for the Southern District of New York, relating to depositions de bene esse, and in force since 1913, that "upon the return of a commission the clerk shall open and file it forthwith in his office and give notice thereof by mail to the counsel for the respective parties, and any motion to suppress such commission must be made within 10 days after the mailing of said notice," is valid and not inconsistent with Rev. St. § 865 (Comp. St. § 1474), requiring such depositions to remain under seal until "opened in court."

2. **Statutes ⟸218—Practical construction entitled to weight.**

The practical construction by a court in adopting rules of an ambiguous provision of an old statute *held* entitled to weight when the validity of the rule is challenged in an appellate court.

3. **Words and phrases—"In open court" defined.**

The expression "in open court" refers generically to the occasion when the judge is hearing a cause or some part thereof in public, in the sense of the right of the public to attend.

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

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

Suit in admiralty by the Louis Werner Stave Company against the Marden, Orth & Hastings Company. Decree for libelant, and respondent appeals. Affirmed.

Appeal from a decree entered March 15, 1921, awarding libelant damages in the principal sum of $3,284.41. There was a shipment of oak staves which libelant delivered to a steamship at Galveston, Tex., for transportation to Bordeaux, France. At Bordeaux there was short delivery. It is conceded that libelant's claim as to the quantity delivered to the ship at Galveston was sustained by the depositions of witnesses at Galveston taken de bene esse prior to the trial, if those depositions were properly received in evidence. It is further conceded that, except for those depositions, there was no evidence showing the quantity delivered at Galveston. The reception in evidence of the depositions was therefore vital to libelant's case. The sole ground upon which the decree below is attacked is that these depositions were not opened "in court," as appellant claims these words are to be construed under R. S. § 865 (Comp. St. § 1474).

The depositions were duly mailed from Galveston, Tex., by the commissioner, under seal, addressed as follows: "To the Clerk of the U. S. District Court for the Southern District of New York, New York City, N. Y." In the upper left-hand corner, the following appears: "Ethel F. Hilton, Notary Public, Galveston County, Texas." (Officer before whom the deposition was taken.) A similar legend appears in the upper right-hand corner. On the reverse side of the envelope the title of the action is given, together with the following statement: "Depositions of B. A. Kobler, J. Utz, J. A. Boillin, R. M. Bain, S. Blagge, M. B. Sweeney, and Henry Carstens, Witnesses for Libelant."

Prior to the trial, without the consent of the appellant, and without notice to appellant or its proctors, the envelope containing the depositions was opened, not in open court nor by a judge, but as provided by general rule 6 of the District Court for the Southern District of New York.

Rhinelander, Durkin & Perkins, of New York City (Edward N. Perkins and Charles A. Schneider, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Vine H. Smith, of New York City, of counsel), for appellee.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). [1] The sole question in this case is whether the following part of the General Rules of Practice duly adopted by the District Court for the Southern District of New York is valid and not inconsistent with R. S. § 865 (Comp. St. § 1474), viz.:

"Upon the return of a commission the clerk shall open and file it forthwith in his office and give notice thereof by mail to the counsel for the respective parties, and any motion to suppress such commission must be made within 10 days after the mailing of said notice."

This rule became effective on February 1, 1913, in place of former rule 6, which read as follows:

"Upon the return of a commission the same shall be opened as of course by any judge of this court at the instance of any party, and on summary notice to all other parties, and all objections to the form or manner in which such commission was executed, taken or returned shall be deemed waived unless such objection or objections be specified in writing and filed within five days after said commission is opened."

For a period of over eight years prior to the entry of the decree herein, some hundreds of depositions have been opened under rule 6 and received in evidence in causes before the District Court for the Southern District of New York, and, so far as is known to us, no objection to rule 6 has been heretofore made. Many other depositions

have been opened, which, in due course, will be offered in evidence in causes yet to be heard, and doubtless the determination of many of these causes will depend upon whether or not these depositions are received in evidence. The importance of the rule and the great injury to many litigants, which would be likely to result if the rule is not valid, make it necessary for us to consider its validity, and not to dispose of this appeal upon the ground that appellant failed to move to suppress the depositions.

Section 30 of the Judiciary Act of 1789 (1 Stat. 88, 89) is quoted in part in the margin.[1] It will be noted that near the beginning of this section occur the words "in open court" and later (in the last sentence quoted) the words "into the court" and "such court" and "in court." The word "court" may have any one of several meanings. 15 C. J. 715 et seq.; Words and Phrases, vol. 2, 1675 et seq.; Words and Phrases, Second Series, vol. 1, 1111 et seq. The meaning to be assigned to this word when used in a statute is ascertained by the application of the usual rules of statutory construction, one of the most important of which is, of course, the object of the statute.

[3] The expression "in open court" refers generically to the occasion when the judge is hearing a cause or some part thereof in public, in the sense of the right of the public to attend. In U. S. v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853, the court, in construing a section of the Naturalization Act, held that the term "open court" in that statute was used in contradistinction to a judge sitting in chambers.

In rule 46 of the present Equity Rules of the Supreme Court of the United States (198 Fed. xxxi, 115 C. C. A. xxxi), the term "in open court" is used to contrast the present method of trying equity causes with the preceding method discussed in Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521. Without further reference, it is plain that "in open court" does not necessarily mean "into the court" or "in court," and the last two expressions are to be differentiated from the first. It must be remembered that in 1789 the post office facilities were limited—according to Encyc. Britannica there were but 75 post offices in what then constituted the United States, and hence personal delivery of documents was not unusual. "Open court" was, of course, not in continuous session, nor was the business of the courts such as to require daily the

[1] "Sec. 30. That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken de bene esse. * * * And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. * * *"

presence of the judge, and indeed, as the records show, there was very little business in the earlier days of the national courts.

It is not to be supposed that, where personal delivery was made by the magistrate, he would be compelled to wait until there was a trial in open court, and that then, and only then, would the delivery be in accordance with the statute. When referring to the delivery by the magistrate of the deposition "with his own hand," it will be noted that the statute did not provide that the deposition should be sealed. There was nothing secret about the deposition. On the contrary, the statute required that the magistrate before whom the deposition was to be taken should notify the adverse party to be present, and in the case of seizures in admiralty, in which the adverse party is not named, it was required that notification should be given to the person having the agency or possession of the property libeled, if known to the libelant.

As, thus, the parties to the litigation would know, or, in any event, would have the right to know, the contents of the deposition, there was not the slightest reason why the deposition should not be placed upon the files of the court and become accessible to the litigants, and for that matter to the public. The magistrate was, of course, presumed to do his duty, and not to change or tamper with the deposition, and therefore the sole purpose of the statute was to make certain that, if the magistrate made personal delivery, he would physically and safely hand the deposition "into the court." He was not required by the words of the statute to hand it to the judge or the clerk. The broader words "into the court" were used, obviously meaning delivery to the official person who was a part of the court in the place where the court was physically situated. The expression "into the court" could be elaborately traced in statutes and rules, but, as matter of practical construction, it is sufficient to refer to present Supreme Court equity rule 49, which provides that—

"All evidence offered before an examiner * * * shall be * * * returned *into the court*." (Italics ours.)

For years depositions under rule 49, supra, have been filed in the office of the clerk of the District Court for the Southern District of New York, and probably the same course has been followed in every District Court in the United States. Thus the words "into the court" have been practically construed as meaning the delivery to and filing with the clerk, and the provision of the act of 1789 as to delivery "into the court" was certainly satisfied whenever a magistrate before whom a deposition had been taken delivered such deposition to the clerk at his office.

If the magistrate did not personally deliver the deposition, he had the alternative of sending it under seal, by messenger or post, directed to "such court." No one would seriously contend that if, instead of addressing the envelope to "such court"—i. e., the District Court—he addressed it to the clerk of the District Court, such address or inscription would be in violation of the provisions of the statute. To hold to the contrary would be to impose an embarrassing and unjustifiable technicality, which, in many instances, would impair the rights of parties and defeat the practical administration of justice.

When, therefore, the deposition came into the hands of the clerk in his official capacity, the next step was to safeguard against changes or tampering. There was no reason why the deposition should remain secret, and not be thrown open on the files of the court. The deposition was no more secret if forwarded under seal than if delivered by the magistrate with his own hand. Therefore it is plain that the sole purpose which the statute sought to accomplish when it provided that the deposition was to remain under seal "until opened in court" was to safeguard the physical integrity of the deposition.

There would be no occasion for the foregoing analysis, but for the construction which appellant urges in respect of Beale v. Thompson, 8 Cranch, 70, 3 L. Ed. 491. That is the only case of authority which has been cited to us, or which we have been able to find. There are cases in the Circuit and District Courts referred to infra, but no other case in the Supreme Court, nor any case in the Circuit Court of Appeals. The statement of facts in Beale v. Thompson, supra, is meager. Whether or not the clerk opened the deposition away from the courthouse or the clerk's office does not appear; for it is merely stated that—

"The deposition was sealed up by the judge, but directed to the clerk of the court, and he, supposing it to be a letter respecting his official business, opened it out of court."

Mr. Justice Story said:

"Independent of all other grounds, the court are of opinion that the fact of the depositions, not having been opened in court is a fatal objection."

Viewed from the most extreme standpoint, the most that this case decides is that, because the statute did not specifically empower the clerk to open a sealed deposition, such unauthorized opening by the clerk, in the absence of appropriate authority, must be deemed to have taken place out of court; i. e., because the clerk, as matter of law, thus acted in a private capacity, with no greater authority in this respect than was conferred upon any other person. Whether the court had power to authorize the clerk to open a sealed deposition was not before the court, and hence not considered.

In U. S. v. Tilden, 28 Fed. Cas. 169, No. 16,520, Judge Choate had occasion to construe section 865 of the Revised Statutes (Comp. St. § 1474), quoted in the margin [2] which with sections 861 and 863 (Comp. St. §§ 1468, 1472) is derived from the act of 1789. He held that the word "then," which appears in that statute as it did in the act of 1789, was not to be construed as requiring that the deposition be opened in

[2] "Sec. 865. Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."

court upon the trial, and he pointed out clearly that there was no policy of keeping the deposition secret until the trial. He said:

"On the contrary, the rules of court as well as the decisions assume that, in respect to all depositions taken before the trial, the policy of the law is to have them opened and made accessible to the parties to the suit, in order that all formal questions in respect to the manner of taking may be disposed of before the trial."

He then referred to rules 113 and 114 of the District Court for the Southern District of New York adopted in 1838. These rules are quoted in the margin.[3] It will be noted that they required the filing of depositions in the clerk's office, and they gave permission to either party, after such filing, to enter an order of course to open the deposition and deliver copies thereof. If "opened in court" means what appellant contends, then there was no power in the old District Court to make these rules, because the court in such circumstances could not do away with the requirement of keeping the deposition sealed until opened "in open court." It is true that, at the conclusion of his opinion, Judge Choate stated that he thought the statute would be entirely satisfied by the depositions being opened in the presence of the parties or their attorneys in open court; but this sentence, when construed with the context, clearly means when opened pursuant to an order of court, and evidently was by way of extra caution. Thus, in the District Court for the Southern District of New York, there has been a practical construction of the statute since 1838, or, in other words, for over 80 years.

Rule 6 is no different in principle than these old rules 113 and 114. Rule 6 is a standing order of court. If under old rule 114 either party, without notice to the other, could enter an order, as of course, to open a deposition, certainly the court of its own motion could make such an order in each and every case, and, similarly, to avoid the burden of detail, could make a standing order. The sole purpose of the act of 1789 and of R. S. § 865, of safeguarding the physical integrity of the deposition, is met when the court enters its formal order authorizing its clerk to open the deposition. There are cases which hold that the clerk is a part of the court, and a court was defined by Bacon to be "an incorporated political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which and at a place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court," and by Lord

[3] "Rule 113. Depositions taken under commissions, or otherwise, shall be forwarded to the clerk immediately after they are taken, and be filed on their return to the clerk's office, in term or vacation, and notice thereof shall be forthwith given by the party filing them to the proctor of the opposite party. And all objections to the form or manner in which they were taken or returned shall be deemed waived, unless such objection shall be specified in writing in four days after the same are opened, unless further time shall be granted by the judge.

"Rule 114. In suits between individuals, either party may at any time after the commissions or depositions are deposited with the clerk, enter an order of course, as of a special sessions, if in vacation, to open the same and deliver copies thereof."

Coke as "a place where justice is judicially administered." Lewis v. City of Hoboken, 42 N. J. Law (13 Vroom) 377, 379; Oaks v. Rodgers, 48 Cal. 197, at page 201.

In Shankwiker v. Reading, 21 Fed. Cas. 1163, No. 12,704, the court in construing the statute said:

"The law did not intend that either party should have possession of the deposition *until it would be received by the clerk and opened by the general or special order of the court.*" (Italics ours.)

In The Roscius, 20 Fed. Cas. 1175, No. 12,042, the deposition was apparently opened by the clerk of the court under the impression that there had been a consent. So far as the report of the case shows there was, in that case, no rule of court, and the District Judge followed what he regarded as the authority of Beale v. Thompson, supra.

In the case of In re Thomas (D. C.) 35 Fed. 337, the deposition was opened by the clerk, not in his capacity as clerk, but as special master, and presumably, without rule or order of court. The court, however, said:

"The court is always open for purposes like this. Application can be made, heard, and acted upon at any time by the court."

This dictum, therefore, supports the proposition that at any time the court may order the opening of a deposition.

In Stewart v. Townsend (C. C.) 41 Fed. 121, the deposition was opened by one of the judges of the court; but, as the parties had waived this with other points, Judge Simonton, who decided In re Thomas, supra, did not pass upon the question.

In Eiffert v. Craps (C. C.) 44 Fed. 164, the same judge passed upon a question as to a commission under old Supreme Court equity rule 67 (Hopkins, New Federal Rules [Ann. 2d Ed.] 119–121), and called attention to a local rule which allowed the commission to be opened by leave of the clerk upon the consent of the parties in writing. In that connection, see, also, old rule 69 of the Supreme Court (Hopkins, supra, p. 122), which provided for the return of commissions and depositions into the clerk's office, and permitted publication thereof in the clerk's office by order of any judge upon notice to the parties.

It is concluded, therefore, that the words "opened in court," as used in R. S. § 865, and as previously used in the act of 1789, comprehend and allow the opening of the deposition in pursuance of a formal order of court, whether such order is an order in an individual case or a standing order, in the form of a rule of practice duly adopted, and that the court has power to permit the physical act of opening to be performed officially by its clerk. R. S. § 918 (Comp. St. § 1544), authorized the District Courts, in any manner not inconsistent with any law of the United States, to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

The District Court for the Southern District of New York has long been confronted with the largest volume of litigation of any District Court in the United States. On its calendars, among others, are many hundreds of admiralty causes. In such causes, perhaps, more peculiarly

than in any other, depositions are necessary, because of the departure to domestic and foreign ports of the officers and crews of vessels from all over the world. If depositions de bene esse are not taken, the litigant may lose forever the benefit of the testimony of important witnesses. In order to prevent delays and to advance justice in pursuance of the provisions of R. S. § 918, the court must deal in practical fashion with its administrative requirements and problems. The clerk of the court is a public officer and presumed to do his duty. For over eight years prior to the entry of the decree in this suit, and now for over nine years, this very necessary, sensible, and practical rule has been in operation. It has served to assist litigants and counsel, and no objection nor complaint has ever been made in respect thereof, except in the case at bar.

[2] In adopting rule 6, the District Court construed the phrase "opened in court," derived from an old statute, and the phrase is not free from ambiguity. In such circumstances, the doctrine of practical construction is of great value, and, although we entertain no doubt as to our construction of the statute, we may readily resort to its practical construction to confirm our conclusion. B. & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; U. S. v. Alabama G. S. R. Co., 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134.

Decree affirmed, with costs.

FOREMAN et al. v. HILTON CO., Inc.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1922.)

Nos. 3069, 3070.

1. **Landlord and tenant ⟸93—Reserved right to terminate lease.**
   Under a lease giving lessors the right to terminate, before expiration of term, if they "shall desire to make a 99-year lease * * * or shall desire to sell or rebuild the building now upon said premises," the making of a 99-year lease was not a prerequisite to cancellation, but only a genuine and purposeful desire, and the making of a lease for 99 years, though with an option to lessee to cancel after 15 years, *held* sufficient.
2. **Landlord and tenant ⟸94(4)—Service on employé on demised premises of notice of termination of lease held sufficient.**
   Under a lease requiring lessors to "serve a written notice" on lessees of the exercise of an option to terminate the lease, delivery of a copy of such notice to the employee on the demised premises in apparent authority *held* sufficient, where during more than two weeks preceding expiration of the time for service unavailing efforts had been made to find and serve lessees personally.

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

Action at law by the Hilton Company, Inc., against Winfield A. Foreman and Loren O. Foreman. Judgment for plaintiff and defendants bring error. Affirmed.

There is here involved right of possession after April 1, 1921, under two leases covering together the second, third, and fourth floors, part of basement,

and 25 feet front on State street side of first floor, of the five and six story building on northwest corner of State street and Jackson boulevard, Chicago, agreed to be used only as a clothing store by lessee, a partnership. The term of the leases was 10 years, beginning April 1, 1916, and the clause of the leases under which the controversy arises is: "It is further mutually understood and agreed that, if the parties of the first part shall desire to make a 99-year lease on said property, or shall desire to sell or rebuild the building now upon said premises, the parties of the first part shall have, and they are hereby given, the right and option to terminate said term and cancel this lease on the 30th day of April, 1921, provided that they shall on or before the 1st day of November, 1920, serve a written notice on the parties of the second part, stating in said notice that they have exercised their said option to cancel and terminate said lease, and provided further that they shall pay to the parties of the second part at the time of the service of said notice the sum of twenty-five thousand ($25,000) dollars." The amount stated appears in one of the leases; the amount in the other is $5,000.

In 1920, or earlier, the lessors, being desirous of making a 99-year lease of the entire building and premises (having total frontage on State street of 120 feet), in the early part of that year entered into negotiations with defendant in error for such lease. The negotiations, which were carried on by brokers, continued, for most of the year, culminating September 29, 1920, in the execution of such lease, whereby lessors leased the entire building and premises to defendant in error for a term of 99 years, the lease containing a proviso that at the end of the first 15 years of the term, lessees may terminate the lease by giving to lessors notice of intention so to terminate not less than 6 months before the end of the 15 years.

Plaintiffs in error were nonresidents of Illinois. Their Chicago store was one of many they were running in various large cities from coast to coast. They had offices in New York and Los Angeles, and a large Eastern factory, and their presence at Chicago was intermittent and uncertain. On October 13, 1920, lessor undertook to serve upon plaintiffs in error notice of termination of the two first-named leases, pursuant to the quoted clauses therein, and to deliver the $30,000 as provided, and they persisted in such effort to and including November 1. Repeated calls by phone and in person at the demised premises failed to locate lessees. Visits were made to a hotel at Chicago where lessee W. A. Foreman had for a short time been stopping, but he could not be located. The notice and money were brought to the premises and offered to one or more of lessees' employees there in apparent authority or charge, but were refused. Notice was finally left at the office there with a cashier and telephone operator, and one or more of the employees then present and in apparent charge was informed of its nature, though they had refused to take physical possession of notice or money. The money was deposited in one of the leading Chicago banks, and a letter, addressed to lessees, sent by an officer of the bank, informing lessees that the money had been left there for them, as payment on termination of the lease.

Defendant in error, learning that the principal office of the partnership was at Los Angeles, Cal. (where they had two stores), sent a messenger there with a notice and $30,000 in cash, but on diligent search and inquiry, assisted by detectives, was unable to find plaintiffs in error there, and at one of the stores he left a similar notice with, and tendered the money to, an employee of lessees in apparent charge of the store, explaining the object and purpose; but this person declined to receive it. A registered letter containing a notice, with a statement of the various attempts to serve it and tender the money, and notification that the money had been deposited with the bank, so that plaintiffs in error might get it, was sent to the tenant, addressed to the demised premises, but was returned as having been refused. All this took place prior to November 1, and on the afternoon of that day persons in the employ of the tenants brought back, apparently unopened, the notice which had a few days before been left at the office on the demised premises. From October 13, until some days after November 1, plaintiffs in error were absent from Illinois. They testified they were, when absent, in frequent, perhaps daily, communication with the Chicago store, but that up to about a week after November 1 they had no knowledge or intimation that the lessor was desirous

of terminating the lease or of serving notice of termination or paying the specified amount. At the close of all the testimony the court directed the jury to return a verdict for defendant in error.

Henry Russell Platt, of Chicago, Ill., for plaintiffs in error.

W. B. Hale, of Chicago, Ill., for defendant in error.

Before BAKER and ALSCHULER, Circuit Judges, and LUSE, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). The action of the District Court is assailed upon two grounds: (1) That the evidence does not show there was a 99-year lease made; and (2) that the tender and service of notice were insufficient to warrant cancellation of the lease. Involved in both propositions is the contention that there was contradictory evidence respecting questions of fact, and that it was improper to direct the verdict.

[1] The cancellation clause, by its terms, became operative if the lessors "shall desire to make a 99-year lease, * * * or shall desire to sell or rebuild the building now upon said premises." In neither contingency was the consummation of the desire a prerequisite; indeed, as to rebuilding, it could not well have been. All that was required is that in good faith they shall definitely have the indicated desire. It must, of course, be a desire, not in the abstract or a mere hope or longing; but it must have taken such definite form as shall indicate that the desire was genuine and purposeful and that it was not a mere sham, for the purpose of terminating the lease. Surely reasonable minds could not differ as to the genuineness of the desire and intent here appearing. A broker was employed, who devoted much time on the subject. Parties were brought together, and the lease negotiated and executed. The desirability of having these exceedingly valuable premises on State street under a single lease is apparent. One of plaintiffs in error testified that some time before he had been spoken to on the subject of a continuance of the tenancy, on the ultimate expiration of the lease, and that on another occasion an agent of the lessor had suggested that a 99-year leasing was being considered. The uncontradicted evidence leaves no room for doubting the desire and definite purpose in good faith to effect such a lease. But it is contended that the clause of defeasance in the 99-year lease indicates that the lease was for 15 years only, with option for 84 years more. While this does not necessarily militate against the conclusion that the lessors were genuinely desirous of effecting a 99-year leasing, this is to all intents a 99-year lease; the lessors binding themselves absolutely for that term, and the lessee likewise binding itself, subject only to its exercise of the right of defeasance when and in the manner prescribed.

[2] Respecting tender and notice it is not disputed that had the lessees willfully evaded the same they could not be heard to complain that they did not receive them. While the facts and circumstances shown point quite unerringly to deliberate evasion of tender and service of notice, plaintiffs in error testified to their entire want of knowledge that tender and service were sought, and that there was no evasion upon their part. So far, therefore, as the validity of the tender and

service might depend upon showing evasion by lessees, the issue of fact thereon could not properly be withdrawn from the jury. The issue of tender and service must therefore be considered upon the assumption that the element of evasion is absent. Were the tender and service under the indicated facts sufficient in law to terminate this tenancy?

Where a right is dependent upon tender of money or deed by one party, the opposite party may not complain of want of such tender where, through his own absence for any cause, the tender to him cannot be made, provided the other party was ready and able and undertook to make the tender, which lacked only the presence of the other party to effect it. Tasker v. Bartlett, 5 Cush. (Mass.) 359; Smith v. Smith, 25 Wend. (N. Y.) 405; Santee v. Santee, 64 Pa. 473; Hale v. Patton, 60 N. Y. 233, 19 Am. Rep. 168.

Where a notice for termination of the tenancy is required by law or agreement to be given by the landlord to the tenant, and no mode of service is pointed out, the notice should in general be given personally to the tenant; but, where the tenant is not present to receive the notice, it may be given by leaving it upon the demised premises with some person there of years of discretion, in the employ of lessees and in apparent authority or agency for them, informing him of the contents of the notice. Blish v. Harlow, 15 Gray (Mass.) 316; Walker v. Sharpe, 103 Mass. 154; Clark v. Keliher, 107 Mass. 406; Wade on Notice, § 640.

If parties contract that the notice must at all hazards and under all circumstances be delivered personally to the tenant himself, such service is essential, because the parties themselves have so agreed. An instance of this is Hogg v. Brooks, 15 L. R. Queen's Bench Div. 256, whereon counsel for plaintiffs in error place much reliance. Here the lease stipulated for its termination after 14 years on lessor's "delivering to the tenant, his executors, administrators or assigns 6 calendar months' notice of their intention so to do." Of this it was said in the opinion, "The court must construe that clause according to the ordinary meaning of the English language," which that court held to mean an undertaking that at all hazards this notice must be delivered to the tenant himself, or the others specified, before the tenancy could be terminated. The requirement that the lessor "serve a notice" on the tenant is quite different from that of delivering it to him. "Serving" notice is not different from "giving" it, and, as has been seen, under statutes or provisions for "giving" notice to the tenant the notice is considered given if, in his absence it is left on the demised premises under circumstances as stated.

The case of Henderson v Carbondale Coal Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332 which counsel urge as holding to the contrary, is not in conflict. There the court held that, under the circumstances there pointed out, the mailing of a letter addressed to a tenant was not a compliance with the first part of section 10 of the Illinois Landlord and Tenant Act (Hurd's Rev. St. 1921, c. 80), providing that notices of statutory demands "may be * * * served by delivering a written * * * copy thereof to the tenant."

We are of opinion that the continued absence of plaintiffs in error

for the indicated period of time on and next prior to the last day upon which the stipulated notice might be served on them justified service of the notice by leaving copy upon the demised premises with some employee of lessees there, of mature age, in apparent authority or agency, informing him of the contents, in the manner as appears here to have been done, and that the service of notice here appearing was, under the uncontroverted facts, in law sufficient.

What has been said sufficiently indicates our conclusion that the direction of the verdict did not withdraw from the jury any controverted issue of fact material to the determination of the cause.

The judgment of the District Court is affirmed.

TABER v. DAVIS, Director General of Railroads.

(Circuit Court of Appeals, Second Circuit. February 20, 1922.)

No. 168.

1. **Master and servant ⟸285(9)—Evidence on question whether brakeman struck against canopy over platform held for jury.**

   In an action for the death of a brakeman, who had been riding on top of a freight car, and whose body, after a crash was heard overhead, fell between the car and the engine, evidence *held* sufficient to take to the jury the question whether deceased was knocked from the car by his head striking against a canopy erected over a freight platform alongside the track.

2. **Master and servant ⟸286(8)—Evidence on question of necessity for canopy over freight platform held for jury.**

   In action for the death of a railroad brakeman, evidence that a canopy over the freight platform, which plaintiff claimed knocked decedent from the car, was the only similar structure along defendant's railroad, and was unnecessary, *held* to present a question for the jury.

3. **Master and servant ⟸286(15)—Whether canopy over freight platform was reasonably safe for employés held for jury.**

   The question whether a canopy erected over a freight platform alongside a railroad track was reasonably safe as to employés whose duties required them to be on the tops and sides of freight cars presented no engineering or scientific problem, but could be determined by the jury without expert aid.

4. **Master and servant ⟸288(9)—Brakeman's knowledge of canopy over freight platform held for jury.**

   Evidence that decedent had worked on the same railroad for 6 years, without showing he had worked at the point where he was subsequently killed during all of that time, though he had worked as brakeman there 6 years before his death, *held* not to show as a matter of law that he must have known of the existence and construction of a canopy over a freight platform.

5. **Master and servant ⟸288(8)—Brakeman's knowledge of clearance between car and canopy over freight platform held for jury.**

   A brakeman, who was not shown to have been familiar with the existence and construction of a canopy over a freight platform alongside the track, and whose duties required him, after signaling for a highway crossing from the top of the car, to go down the ladder at the side of the car to turn a switch while the car was approaching the canopy, is not charged

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as a matter of law with the duty of accurately calculating the clearance between the car and the canopy, so as to assume the risk of injury by striking against it.

Hough, Circuit Judge, dissenting.

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

Action at law by Florence E. Taber, as administratrix of the goods, chattels, and credits of Harry T. Taber, deceased, against James C. Davis, Director General of Railroads and Agent under Transportation Act, § 206 (41 Stat. 461). Judgment for defendant, after the court at the close of plaintiff's case had granted a motion for nonsuit, and plaintiff brings error. Reversed.

Mortimer L. Sullivan, of Elmira, N. Y., for plaintiff in error.

Stanchfield, Collin, Lovell & Sayles and Frederick Collin, all of Elmira, N. Y. (Halsey Sayles, of Elmira, N. Y., of counsel), for defendant in error.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge. At about 2 p. m. on June 28, 1918, Taber, plaintiff's intestate, a trainman then and for some time in the employ of Delaware, Lackawanna & Western Railroad Company, suffered the injuries which resulted in his death. He was working on a train known as the local freight and pick-up, which in the course of its trip reached Bath, N. Y. A pick-up train is a local which picks up and sets out cars at various stations. At Bath the railroad runs east and west, and the freight station is south of the main tracks.

The theory of plaintiff's case is that Taber was struck by a canopy over a transfer platform, which was just west of the freight house and next to the freight house siding. Taber was the middle brakeman of the train, which was proceeding in an easterly direction. When it reached Bath, the orders required that the train take cars from behind the freight house. As the train entered Bath, it proceeded along the track next to the freight house and the canopy to a point easterly therefrom. The engine was then cut off and proceeded to a switch, where it took on a car, detoured around the remainder of the train, and then returned on the track next to the freight house canopy. During this time, the engine was proceeding westerly backing up and pushing this one car. Directly east of the freight house was a crossing and Taber was on the top of the car, as the crossing was approached.

"He was there like for any crossing. At a crossing it is mostly customary for a freight man to ride on top to prevent any accident."

As this movement was being made, Pelone, the head brakeman stood between the tank or tender of the engine and the car, with his right foot on the car and his left foot on the engine sill. He stood about 6 or 7 inches to a foot from the outer edge of the engine and was in this position, watching for signals from Taber on top.

"As we approached the freight house," testified Pelone, "I was standing in the same place, and I heard a crash, and it sounded overhead; so I hung on as tight as I could and a few minutes later I was hit with Taber's body on

my left shoulder and glancing my head. * * * He hit the concrete platform and it sort of rolled down in between the engine and the platform. * * *"

Pelone further testified:

"It [the crash] sounded right about the place where the canopy projects out from the freight house there."

In answer to the question, "Now, do you know what was to be done after this crossing was flagged as you had passed it?" Pelone testified:

"It was customary—in railroading you always, in backing up and trying to get in a switch, you always cut off and interlock your switch to save time; and when the engine goes by, you turn your switch. That was Taber's job when he was on the car."

The switch was on the side toward the canopy. It was the custom to get off the cars on the side where the switch, which was to be thrown, was situated and this necessitated the use of the side ladder toward the engine; i. e., the side near the end where Pelone was standing, as there was no ladder on the same side at the opposite end of the car. Taber was taken to a hospital, and later died of concussion of the brain, due to trauma.

Further description as to the locus in quo, except as to the canopy, infra, will not be useful, as the location of the tracks is understood by the litigants, and verbal description is not helpful without the aid of the diagram and photographs in evidence.

At the threshold, the question of fact on the evidence is whether Taber came in contact with the canopy, or whether the falling of his body was due to some other cause. The edge of the roof of the freight house proper was back about 18 inches to 2 feet; but according to Barton, a photographer, there was a clearance of only an inch between the edge of the canopy and one car which he observed when photographing, and no clearance in the case of another car. In other words, there was practically no clearance between canopy and car. The freight station was 112 feet long. The canopy was 62 feet long and 12 feet wide, and did not cover the entire cement platform. From the ties of the railroad track vertically to the edge of the canopy, the distance was 15 feet 3½ inches. The canopy was about a foot higher than the roof of the car on which Taber stood, and Taber's height was 6 feet. There were no telltales nor warning devices before the canopy was reached. It is stipulated that Taber and defendant were engaged in interstate commerce and that Taber was in defendant's employ.

[1] 1. The first question is whether or not Taber was struck by the canopy. No one saw the contact. While a witness, Burke, saw Taber "falling in the air," he did not see him prior thereto. Thus the evidence is that Taber, a temperate and experienced man, without physical defect, so far as the record discloses, had been standing on the roof of the car in the performance of his duty, that he was 6 feet tall, that the canopy was only a foot above the car, that there was practically no clearance between the side of the car and the edge of the canopy and that a crash was heard just about the time the car was passing the canopy, and at a time when it could reasonably be inferred that Taber, in the performance of his duty, was going down the ladder to turn

off the switch. There are other details of argumentative value, which need not be recited. The question is, not what counter arguments could be presented to a jury by defendant, but whether, on this testimony, the jury would have been remitted to speculation, or whether there was evidence upon which the jury could predicate the conclusion that the injury was caused by contact with the canopy.

We think the case at bar presents a state of facts less troublesome in this respect than those set forth in Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96. We have not failed carefully to consider the observations in respect of this same occurrence of the experienced judge who wrote for the Appellate Division of the Supreme Court, Third Department, in Taber v. McAdoo, 188 App. Div. 341, 177 N. Y. Supp. 104. We have not before us the testimony of McGrain, the "actual eye witness" therein referred to. But, irrespective of such testimony, we think that the physical movement of Taber's body on the evidence in this case cannot be so surely accounted for as to warrant us in holding, as matter of law, that his body did not come into contact with the canopy. Experience in the trial courts warns us that, except in the plainest cases, it is unsafe for courts to assume that the descent of a body, in circumstances such as here described, can be explained only upon one theory. The testimony, in our opinion, was of the character which invites argument pro and con, and presents a question of fact for submission to a jury.

2. The Construction of the Canopy. This is the third trial. Taber v. McAdoo, 188 App. Div. 341, 177 N. Y. Supp. 104, and 192 App. Div. 939, 182 N. Y. Supp. 953. In this case, plaintiff, for the first time, called one Mather, a civil engineer, who testified that the general practice regarding clearances of railroads in New York state from the center of the track was 8 feet lateral and 23 feet vertical, and not less than 2 feet 6 inches from the edge of the car. An examination of Mather's testimony, however, suggests serious doubt as to whether, as matter of law, he qualified as an expert, so as to testify to general railroad practice in the respects here concerned, and we think the wiser course is to disregard his testimony.

[2] The construction is simple and easy to understand. The sole purpose of the canopy was to protect from the weather the transfer platform, which was used to transfer freight from one car to another. There was testimony from which it might be argued that there was no need for the canopy, and that the work could have been efficiently done in connection with the freight house proper. With the merit of this argument we are not concerned. It is referred to solely as illustrative of the fact that there was testimony from which the jury might have determined that this is a case "where the dangerous structure is not justified by the * * * situation." McDade Case, supra, 191 U. S. 64, 24 L. Ed. 24, 48 L. Ed. 96.

Soper, who was conductor in charge of this local freight and an experienced Delaware, Lackawanna & Western employé contributed an important piece of testimony, when he stated that, so far as he knew, there was not another transfer platform on this railroad system like that here described. Thus it appears that there was evidence that this

canopy was an unusual construction on this road, that it was not a necessary requirement for this railroad operation, and that any layman could understand its construction from the testimony and from the diagram and photographs in evidence.

[3] There was not presented any engineering or scientific problem, such as is found in Tuttle v Milwaukee Railway, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; New York Central & H. R. R. R. Co. v. Banker, 224 Fed. 351, 140 C. C. A. 37; Ford v. McAdoo, 231 N. Y. 155, 131 N. E. 874; and Delaware, L. & W. Co. v. Donahue, 238 Fed. 770, 151 C. C. A. 620. On the contrary, a jury, without expert aid, could readily determine on all the facts whether the canopy was reasonably safe, as affecting an employé of this character, in view of the nature of the duties of such an employé and others similarly situated, of the operation of trains and cars of similar relevant facts and circumstances.

Probably Southern Pacific Co. v. Berkshire, 254 U. S. 415, 41 Sup. Ct. 162, 65 L. Ed. 335, is the case nearest to that at bar. In that case the arm of the postal crane was 14 inches from the window of the engineer's cab, the construction of these postal cranes was uniform and necessary for the business of the United States mail, and the deceased employé knew of the existence of the crane and could have seen it from his seat, had he looked, long before he reached it. Here there was no clearance, no similar construction on this railroad, no mechanical requirement of operation, and a debatable question of necessity for the canopy.

[4] Plaintiff testified that Taber had worked on the Delaware, Lackawanna & Western for six years, and most of the time was running between Elmira and Buffalo; but her testimony was a blank as to Taber having worked in this canopy locality. Soper, after consulting records, testified that Taber had worked with him at Bath 34 days in September and October, 1912; but there is no testimony that the canopy then existed, nor that Taber ever worked at the particular place where the canopy was, although Soper stated that Taber was a member of his crew on the local freight and that the local freight in 1912 did the "same sort of work." Soper's testimony in this respect was of the most vague and general character, and it may very well be that, when Taber passed through Bath in 1912, he was assigned to some other duty.

In Jacobs v. Southern Railway Co., 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970, it had been customary for 11 or 12 years for ashes to be accumulated upon the tracks and Jacobs testified that he had knowledge "of the cinders being there," but "had forgotten them being there at the time." In the case at bar, under the most unfavorable inference, all that can be said is that Taber might have noticed the canopy in 1912, although, of course, on this nonsuit, plaintiff is entitled to the most favorable inference from the facts. It certainly cannot be held as matter of law that Taber must have known on January 28, 1918, of the existence of a structure on which he might have been in September or October, 1912, nearly seven years before.

We have not before us the record upon which the Appellate Division

concluded that Taber "had full opportunity of knowing all that defendant is presumed to have known about the conditions prevailing in that place." On this record, there is no evidence that Taber knew about the canopy, and, so far as this record discloses, this was the first time Taber was engaged in a switching operation, which required passing this canopy.

[5] The question, then, is whether a brakeman on a moving car, with his mind concentrated on the necessity of warning as to a crossing, and on his duty of turning a switch, was bound, as matter of law, to calculate visually the clearance of the only canopy of its kind on the railroad on which he worked, and a canopy of whose existence and construction he had no previous knowledge. The mere statement of the question carries its own answer, within the authority of Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382, Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, supra, and Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. Cf., not on assumption of risk, but having analogous features, Chesapeake & O. R. Co. of Kentucky v. Vaughan's Adm'r, 159 Ky. 433, 167 S. W. 141.

On this branch, the case is quite different from the Berkshire case, supra. There the employé "perfectly well knew of the existence of the crane where it stood * * *"; he "had been upon this route for some years, had passed over it many times, and must be presumed to have known of the crane." Further the court said:

"He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger, and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train. As we have said, the only possible inference on the uncontradicted evidence of the plaintiff's witnesses was that he leaned out considerably more than 14 inches, as shown by the position of his body and the place of the cut on his head."

And the court reversed the judgment, "confining ourselves to the case of postal cranes. * * *"

In Taber's Case there was no knowledge, and whether the danger was "plainly observable" (McDade Case), or was "so obvious that an ordinary prudent person under the circumstances would have appreciated it" (Gila Valley Case), was on this evidence a question of fact for the jury.

Judgment reversed.

HOUGH, Circuit Judge (dissenting). This record shows no doubted or contradicted fact; yet it is said that the case must go to the jury. It seems to me the reasons why it should not are sufficiently set forth in Judge Woodward's opinion in the Appellate Division. But it is fundamentally wrong to use a jury to evade decision, and by no one has the point been better put than by Justice Holmes, as follows:

"It is a featureless generality that the defendant was bound to use such care as a prudent man would use under the circumstances; and this gener-

ality ought to be continually giving place to the specific one that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant in tort was bound to come up to was a standard of specific acts or omissions with reference to the specific circumstances in which he found himself. If in the whole department of intentional wrong the courts arrived at no further utterance than the question of negligence, and left every case without rudder or compass to the jury, they would simply confess their inability to state a very large part of the law which they require the defendant to know, and would assert by implication that nothing could be learned by experience." Holmes' Common Law, p. 111.

PORT OF NEW YORK STEVEDORING CORPORATION v. CASTAGNA.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 221.

1. **Master and servant ⟸120—Stevedore must furnish employees with safe place to work.**
   An employing stevedore is required to furnish its employees with a safe place in which to perform their work and with safe implements or tools in connection therewith.
2. **Master and servant ⟸124(4)—Employing stevedore must make reasonable inspection of vessel's equipment.**
   Though an employing stevedore is not required to make a thorough inspection of equipment for work furnished by a vessel, he is required to make a reasonable inspection, and where the slightest inspection would have disclosed that a board holding up a pile of dunnage was rotten, the stevedore is liable for injuries to an employee caused by the breaking of that board and the fall of the pile of dunnage.
3. **Master and servant ⟸124(4)—Employing stevedore's inspection of vessel's equipment must be such as reasonable stevedore would make.**
   An employing stevedore must make such inspection of the equipment furnished by the vessel as a reasonably prudent stevedoring company would have made under like circumstances, and, if such casual inspection indicated danger, it was required to go further and make a more careful inspection, in order to eliminate the danger.
4. **Master and servant ⟸217(7)—Risk of dangers ascertainable by inspection not assumed.**
   The fact that the danger was one which could be ascertained by casual inspection by the employing stevedore of the equipment furnished by the vessel does not establish that the employee had assumed the risk of the danger, since the employee owed no duty to inspect, but assumed the risk of injuries only if the defect was plainly observable, or so obvious that an ordinarily prudent person under the circumstances would have appreciated it.
5. **Master and servant ⟸217(24)—Risk of fall of dunnage not assumed.**
   Though a servant of a stevedoring company would assume the risk of stepping or stumbling into a hatchway, which he could see was unguarded, he did not assume the risk of being knocked into the hatchway by the fall of a pile of dunnage not properly secured.
6. **Admiralty ⟸20—Injury of stevedore's employee is maritime tort.**
   The negligent injury of an employee of a stevedoring company on a vessel, resulting from the employer's failure to inspect equipment furnished by the vessel, is a maritime tort, which might have been the subject-matter of admiralty jurisdiction, since the locality of the tort determines whether or not it is maritime.

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

7. Admiralty ⟸31—Contributory negligence does not bar the recovery for a maritime tort.

A person injured on a vessel through a maritime tort is not debarred from all recovery because of the fact that his own negligence contributed to his injuries.

8. Admiralty ⟸31—Suing at law for maritime tort does not make contributory negligence a bar.

The right to recover damages for a maritime tort, irrespective of contributory negligence, is a right, and not a matter of procedure, nor governed by the choice of the forum, so that the fact that an injured employee sought his remedy at common law, instead of in admiralty, does not make his contributory negligence a bar to recovery.

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

Action at law by Michael Castagna against the Port of New York Stevedoring Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Certiorari denied 257 U. S. ——, 42 Sup. Ct. 463, 66 L. Ed. ——.

Writ of error to the District Court for the Southern District of New York to review a judgment of $20,040.25 entered upon a verdict in favor of plaintiff below. The parties will be referred to as they were aligned below.

Plaintiff is an alien. Defendant is a New York corporation in the business of stevedoring. Plaintiff was a longshoreman. In the circumstances hereinafter related he was precipitated into the open hold of the steamer Lake Fackler, upon which he was working for defendant; the latter, through its employees, being engaged in loading barrels of cement into the hold of the vessel. The vessel, which was not owned by defendant, was lying alongside a pier in Jersey City. As a result, plaintiff suffered injuries of the gravest character.

For the purpose of packing the barrels in tight, dunnage was used. This dunnage had been previously piled by the sailors on the vessel, but had not been inspected by defendant. During the early part of the work the men found sufficient dunnage in the hold, but later more dunnage was needed, and plaintiff went to Facciola, the foreman, and asked him where he could get additional dunnage. The foreman told plaintiff to go on deck, but plaintiff found none there, whereupon the foreman told him to go to the 'tween-deck, which was immediately over the hold, where the foreman said there was "lots of dunnage * * * close to the hatch." Plaintiff climbed up the ladder to the 'tween-decks and saw the dunnage piled in a rack.

The manner of piling was that two or three long boards were stuck behind one of the sweatboards of the vessel, and large quantities of the dunnage were stacked up on the rack thus made. The particular pile approached by plaintiff stuck out 5 or 6 feet from the side of the ship, and extended about 3 feet from the deck to a point opposite plaintiff's chin or head. It was testified that the top of the pile was about 8 feet above the deck. The distance from the side of the vessel to the open hatchway was 12 feet 9 inches. This hatchway was flush with the deck and entirely unprotected. What is known as the life line, which is customarily stretched around such an opening, was not present.

One of the sticks which held up the pile was, according to the testimony of the first officer of the Lake Fackler, "rough stuff, very light stuff." One of the plaintiff's fellow workmen saw the broken board as it lay on the deck after the accident, and testified that "it was a rotten board." As plaintiff grasped the first piece of dunnage, this rotten piece of wood, which acted as a support, gave way. The whole pile thereupon fell and struck plaintiff full in the chest. He attempted to "grab something"; but there was nothing to grab, and thus he was thrown into the open hold, where he fell upon the pile of cement barrels.

The foregoing version of the accident is, of course, that for which there is support in the testimony adduced on behalf of plaintiff. In respect of several questions of fact, there were contradictions put forward by the testimony of the witnesses for defendant. With the differences in these versions we are not concerned, as it is necessarily assumed that the jury accepted the story of plaintiff and his witnesses.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for plaintiff in error.

David M. Fink, of New York City (Harold R. Medina, of New York City, of counsel), for defendant in error.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). [1] 1. The first point urged by defendant is that he did not neglect any duty which he owed to plaintiff in regard to the inspection of the pile of dunnage wood, and therefore that the complaint should have been dismissed. There would, of course, have been no duty on the part of defendant, if the defect were a latent one, not discoverable by such an inspection as a reasonably prudent employing stevedore would make under like circumstances. It is now too elementary to require citation of cases that the employing defendant was required to furnish plaintiff with a safe place in which to perform his work and safe implements or tools in connection therewith.

[2] The fact that the dunnage wood was originally piled by the sailors on the vessel is a matter of no consequence. When defendant took charge of the loading of the cement barrels, he at once became the master, both in respect of the place where his employees worked and the implements or tools (other than those furnished by themselves) with which they worked. Defendant made no inspection whatever of the dunnage, and yet the slightest inspection might have disclosed the fact of the existence of this rotten piece of wood, which was the original cause of the accident which ultimately hurled plaintiff down the hatch.

The case is quite different from Liverani v. Clark & Son, 231 N. Y. 178, 131 N. E. 881. In that case the hoisting falls were hooked into an iron ring bolt fastened in the ship's deck. During the progress of the work the ring bolt broke, and the pulley block struck Liverani, causing his death. The defective condition of the ring bolt could have been ascertained according to the testimony of an expert only under the hammer test. The court said:

"Under such circumstances, what was the duty which the law placed upon the stevedore with relation to the use of the ship and its parts? In the absence of any condition to excite suspicion, or to suggest defects or danger, the stevedore might assume the safety of the appliances, and that due care had been used by the shipowner to keep and maintain them in reasonably safe condition."

Having stated the foregoing, the court was careful to point out:

"*This does not mean that the stevedore could use the tackle or the ship's parts blindly and without looking at them,* but that, if appearances indicated no danger or defects, an inspection by tests for latent imperfections was not required of it. To expect a stevedore in the absence of these indications to

minutely examine masts, booms, and bolts, and apply to them expert scrutiny before permitting his servants to use them, would be unreasonable." (Italics ours.)

From the foregoing it is plain that the court did not hold that the stevedore had no duty to make any inspection, but merely that, under the particular facts of the case, certain instructions and refusals to instruct were error. In commenting upon certain parts of the trial court's charge, the court again indicated that it was directing its attention to the character of inspection which the court below had not properly stated in its charge, for the court said:

"Up to this point the court did not explain what this inspection would consist of, whether it would be a look at the ring bolt to see if it appeared safe, or whether it would be the hammer test, suggested by the expert, which would reveal latent defects."

In brief, and without further analysis, there is nothing in the Liverani Case, which negatives the necessity of inspection.

[3] The kind and character of inspection applicable to the case at bar is well stated in the extract (noted in the margin)[1] from the admirable charge of Judge Grubb in this case. The question on the evidence in this case was one of fact for the jury under proper instructions, and these were given.

[4] 2. It is contended that error was committed when the trial judge charged the jury that, if the plaintiff was knocked into the hold by the falling of the pile of dunnage, then it was for the jury to say whether or not he assumed the risk of such accident. This contention seeks to place plaintiff in a dilemma; the argument being that, if the defect was one which a proper inspection would disclose, then plaintiff necessarily assumed the risk as matter of law. This argument, however, is based upon a misapprehension of the theory underlying the duty of inspection and the theory underlying the doctrine of assumption of

[1] "Still the stevedore owed some duty of inspection. The stevedoring company, the defendant here, owed some duty of inspection, while not the same exacting duty that the ship owed. That measure of duty is for you, gentlemen, to determine—what a reasonably prudent stevedoring company would have done under like circumstances, where it had put its men to work on a ship where a condition of danger might have been created by the ship itself, to find out whether it had complied with that duty, under the circumstances in this case; that is, whether it made such an inspection as a stevedoring company under those circumstances would have been required by the law to do; that is, such an inspection as a reasonably prudent stevedoring company would have made under like circumstances. That is for you to determine from the evidence and from the surrounding circumstances. If it made a casual inspection, and there was anything in the appearance of the pile or the supports of the pile that would indicate danger, then it was required to go further and make a more careful inspection, in order to eliminate the element of danger, if there was such element—following the casual inspection. They had the duty to make, as I say, such a reasonable inspection as would have been made, in your opinion, by a stevedoring company, a reasonably prudent stevedoring company—under similar circumstances, where it did not create the danger itself, but the shipowner created it. If it did that, if it made that kind of inspection, or if you believe that that kind of inspection, although not made, would have revealed any danger in the piling of the dunnage, then the stevedoring company would not be liable, even though the ship might have been."

risk. The duty of inspection arises out of the duty of the master to provide a safe place for the work of the employé, a duty which may not be delegated. The doctrine of assumption of risk rests upon the implied contract of the servant that he assumes responsibility for injuries arising out of a defect "plainly observable," or "so obvious that an ordinarily prudent person under the circumstances would have appreciated it." As we have recently noted a tendency to misunderstand the doctrine of assumption of risk which prevails in the national courts, we note in the margin a quotation from Gila Valley Ry. Co. v. Hall, 232 U. S. at pages 101 and 102, 34 Sup. Ct. 229, 58 L. Ed. 521.[2]

Plaintiff was not called upon to inspect the pile of lumber. He had the right to assume that it was in good order and safe, unless, as above stated, the rotten board was plainly observable, or so obvious that an ordinarily prudent person would have appreciated the defect, and hence the danger. There is a marked difference between the knowledge which an employer acquires through proper inspection and the lack of knowledge of an employé, due to the fact that he has not made an inspection and that he is only chargeable when the defect is of a character which comes within the definitions of the McDade and Gila Valley Cases, supra. See also Taber v. Davis, 280 Fed. 612, decided by this court February 20, 1922. It was therefore for the jury in the case at bar to determine from the evidence whether in point of fact plaintiff had assumed the risk of the rotten plank.

[5] 3. It is contended, also, that plaintiff assumed all risk incident to the absence of guards around the hatch, and that the following instruction to the jury of the trial judge was erroneous:

"If he was knocked into the hold, involuntarily, by the falling of the dunnage, then you could not say that he assumed the risk of knowing that the hatch was unprotected. It would have to be shown that he also knew of the danger of being knocked into the hold by the dunnage, because, if he did not know that, then he was assuming no risk of getting into the hold or hatch by its merely being unprotected. The defendant would have to also show that he knew the danger of being struck by the dunnage and knocked into the hold."

If in the pursuit of his work, plaintiff had tripped or fallen into the hatch, obviously such a result would have been due to one of the risks which was to be expected in connection with plaintiff's work, and such

[2] "An employé assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employé has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employé with the assumption of a risk, attributable to a defect due to the employer"s negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety, or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it." Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521.

risk, of course, was assumed; but the risk of being unexpectedly thrown into the hatch, because of the prior unexpected falling of a pile of defective dunnage, due to a rotten board, certainly cannot be regarded as a risk incident to the business of the master and the work of the employé. The argument for the defendant loses sight of the primary cause of the accident, to which we must always return for a clear understanding of the results which flowed from that primary cause.

While the McDade, Gila Valley, and Taber cases, supra, were railroad cases, the Supreme Court nevertheless laid down or restated the general principles of assumption of risk. In referring to the charge of the trial court in the McDade Case, Mr. Justice Day pointed out that the charge was more favorable to the railroad than the law required, as it exonerated the railroad from fault, if, in the exercise of ordinary care, the employé might have discovered the danger, and he said:

"Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé."

In the case at bar, the defect was not known, and in view of the fact that the question was one for the jury, as we hold, supra, we must assume that it cannot be said as matter of law that the defect was plainly observable by plaintiff. Falling down the hatch was thus due to an unknown, and, according to the verdict, an unobservable, defect, and to say that an employee assumes the risk of falling down an open hatchway, due to an unknown and unobservable defect or danger, would be to introduce a novel doctrine into the law, and one opposed to the steady modern trend of judicial decision.

4. It is also contended that error was committed in charging the jury that, if plaintiff was guilty of contributory negligence, such contributory negligence only went to the question of reduction of damages, and in refusing to charge the jury that, if the plaintiff did not exercise reasonable care, he could not recover. The court fully and properly charged the jury as to the necessity of finding defendant guilty of negligence before plaintiff could recover, and as to the assumption of risk. So far as we are able to ascertain, there was no evidence of contributory negligence, and this part of the court's charge was doubtless due to extra caution. The question of contributory negligence seems on this record to be academic.

[6] In any event, however, the tort in the case at bar was a maritime tort, which might have been the subject-matter of admiralty jurisdiction. That the locality of a tort determines whether or not it is maritime is now so well settled that it is necessary only to refer to Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

[7] In The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586, it was held that, where a person is injured on a vessel through a maritime tort arising partly from the negligence of the officers of the vessel and partly from his own negligence, and sues the vessel in admiralty for damages for his injuries, he is not debarred from all recovery

because of the fact that his own negligence contributed to his injuries. Carter v. Brown, 212 Fed. 393, 129 C. C. A. 69.

[8] The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum. In the case at bar, plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common-law court with the same right as he would have entered the admiralty court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, and this right of plaintiff sprang into existence because he suffered a maritime tort. The trial judge was peculiarly familiar with the question, for it was he who wrote the opinion in Carter v. Brown, supra, and our view is that his charge as to contributory negligence was sound.

There are no other questions which, in our opinion, require comment.

Judgment affirmed.

MONROE CIDER VINEGAR & FRUIT CO. v. RIORDAN, Late Collector of Internal Revenue.

(Circuit Court of Appeals, Second Circuit. February 20, 1922.)

No. 136.

1. Evidence ⟸7—Internal revenue ⟸11—Nature of sweet cider a matter of common knowledge; "sweet cider" is within ordinary definition of "soft drinks"; "hard cider."

"Sweet cider," which as a matter of common knowledge is a nonalcoholic beverage composed of the expressed juice of apples, as distinguished from "hard cider," which is fermented cider, is within the dictionary definition of "soft drink" as any drink that is nonalcoholic, so as to be taxable under the act imposing a tax on soft drinks unless a contrary intention appears.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cider; Second Series, Soft Drinks.]

2. Statutes ⟸206—Consideration should be given to all words of a statute.

Consideration and weight should be given to all the words and phrases of a statute in ascertaining the legislative intent.

3. Internal revenue ⟸11—Sweet cider is not taxable as soft drink under revenue act of 1918.

Under Revenue Act of 1918, § 628 (Comp. St. Ann. Supp. 1919, § 6161½d), imposing a tax upon cereal beverages, upon unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters, other carbonated beverages and other soft drinks, and upon all natural mineral waters, the designation of particular beverages would be meaningless if the term "soft drinks" were given its dictionary definition, and the act does not impose a tax on sweet cider, in view of the fact that all the drinks mentioned were artificial preparations except the grape juice, which was expressly specified, and that no mention was made of cider, though it was one of the commonest of nonintoxicating drinks, and especially in view of the report of the committee in presenting that act of Congress which indicated an intention to reduce rather than enlarge the field of taxation.

4. Statutes ⟸225—Acts in pari materia may be referred to.

In cases of doubt or uncertainty, acts in pari materia passed either before or after the act in question, and whether repealed or still in force,

may be referred to to ascertain the intent of the Legislature in the use of particular terms, but, when the act under consideration is a revenue act, it must be remembered the Legislature is constantly changing the list of taxable subjects, and caution must be exercised in appropriately assigning the weight to be given other legislation on that subject.

5. **Internal revenue ⟸11—Revenue act of 1921 indicates construction prior act did not tax cider as soft drink.**

The Revenue Act of 1921, which adopted a classification of taxable beverages which differed from previous classifications and included a new classification of still soft drinks which might appropriately include sweet cider, and then expressly excluded from such classification sweet cider, indicates an understanding by Congress that sweet cider was not taxed as a soft drink under the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6161½d).

6. **Internal revenue ⟸11—Regulations including cider in taxable soft drinks cannot change statute.**

Though regulations of an executive officer empowered to make them had the force of law if not inconsistent with statute, and the construction placed by an executive officer upon a statute is given weight, a regulation that the term "soft drinks" in the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6161½d), includes sweet cider cannot write into the statute a provision which is not there, and is nothing more than an expression of opinion by an administrative officer.

7. **Internal revenue ⟸11—Ambiguity in taxing laws must be construed in favor of taxpayer.**

Where the construction of a revenue law is doubtful and seriously debatable, the tax will not be construed to apply to the doubtful article.

Manton, Circuit Judge, dissenting.

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

Action at law by the Monroe Cider Vinegar & Fruit Company against Vincent H. Riordan, late Collector of Internal Revenue, to recover taxes paid under protest. Judgment for defendant on dismissal of the complaint (274 Fed. 736), and plaintiff brings error. Reversed.

In November, 1920, plaintiff, a domestic corporation engaged in the sale of sweet cider, sold and delivered to its customers 290 barrels of sweet cider for $3,862.17. Of this amount, $2,702.17 represented the sales price and value of the sweet cider, and $1,160 the sales price and value of the barrels. Plaintiff under protest paid to defendant collector $386.22 beverage taxes. A claim for refund was filed by plaintiff with the Commissioner of Internal Revenue, which was thereafter rejected upon the ground that sweet cider was taxable as a beverage, and that the aggregate amount paid for the sweet cider and the barrels was the basis for computing the tax. Plaintiff thereafter brought this action to recover the amount paid under protest, alleging that sweet cider was not taxable as a soft drink or otherwise, and that the sales price or value of the container was not taxable.

By stipulation the essential facts are undisputed, and thus only questions of law were argued at bar.

William W. Armstrong, of Rochester, N. Y., for plaintiff in error.

Stephen T. Lockwood, U. S. Atty., and Edward N. Mills, Asst. U. S. Atty., both of Buffalo, N. Y., for defendant in error.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). This is concededly a test case. The principal question is whether sweet cider

is included in the classification "other soft drinks" set forth in section 628 of the Revenue Act of 1918, which became law February 24, 1919. 40 Stat. at L. 1057, 1116 (Comp. St. Ann. Supp. 1919, § 6161½d).

Section 628 reads as follows:

"Sec. 628. That there shall be levied, assessed, collected, and paid in lieu of the taxes imposed by sections 313 and 315 of the Revenue Act of 1917—

"(a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, and containing less than one-half of one per centum of alcohol, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 15 per centum of the price for which so sold; and upon all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold; and

"(b) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 2 cents per gallon."

A reading of this section shows at once that Congress classified and referred to different kinds of beverages which were to be subjected to the tax.

[1] If this case were to be decided by the dictionary definition of "soft drink," then unquestionably sweet cider would be included; for according, for instance, to the Century Dictionary, "soft drink" is "any drink that is nonalcoholic, as lemonades, ginger ale, tea," etc. "Cider," according to the dictionaries, was "formerly any liquor made of the juice of fruits; now the expressed juice of apples, either before or after fermentation." "Hard cider" is "fermented cider." "Sweet cider" is "cider before fermentation or cider in which fermentation has been prevented."

It is agreed by the parties, and it is a matter of common knowledge, that "sweet cider" is a nonalcoholic beverage, and therefore, within the dictionary definition supra, is a soft drink just as tea is a soft drink in the sense of a nonalcoholic beverage. If, therefore, Congress had intended that every nonalcoholic beverage should be taxed under section 628 supra, it would have been easy to frame a statute which would have read merely that there shall be levied, assessed, collected, and paid certain taxes upon "all soft drinks," or upon all drinks, whether fermented or unfermented, containing less than one-half of 1 per cent. of alcohol.

[2] It is a familiar rule of statutory construction that the legislative body is not presumed to use meaningless language, or, putting the rule another way, that in ascertaining the legislative intent due consideration and weight shall be given to the words and phrases of a statute.

[3] The inquiry immediately suggests itself: In mentioning such well-known drinks as ginger ale, root beer, and others, why did Congress omit "sweet cider," when it is probably the oldest nonalcoholic beverage of all the list set forth in section 628? The answer is to be found in the history of the legislation as illuminating the phraseological structure of the statute and in ascertaining the position of "cider" in common knowledge and in the English language.

"Cider" originally meant strong drink, and was known to the ancients, as a most cursory examination of the encyclopædias will disclose. In medieval English it was "cyder," and so continued until it attained its present spelling.

It has a familiar place in literature; for Bacon refers to "a kind of cider made of a fruit of that country," and in Audley Court Tennyson speaks of "a flask of cider from his father's vats." An English revenue or excise statute of 1763 was known as the Cider Act. Sweet and hard cider have been designations of the fermented and unfermented expressed juice of apples in common use in the English language long before any man now living was born.

Doubtless in every state of the Union and almost in every corner of every state sweet cider is produced for home consumption or commercial distribution, and, whether in the Genesee Valley or the Shenandoah Valley, there is hardly a farm, large or small, where typical of the farms throughout the country, there is not some production of sweet cider. Yet, with the knowledge of its widespread production, Congress deliberately omitted mention of this healthful beverage from the statute here under consideration.

An examination of the list of beverages specifically named in section 628 (a) will show that, with the exception of "unfermented grape juice," all are manufactured or artificially created, as distinguish from the natural juice of the apple expressed from it by mechanical means more or less simple. Artificial mineral waters and other carbonated waters are manifestly artificial. "Ginger ale" is defined in the Century Dictionary as "an effervescing drink similar to ginger beer. The name was probably adopted by manufacturers to differentiate their production from ordinary ginger beer." Ginger beer is defined as "an effervescing beverage made by fermenting ginger, cream of tartar and sugar with yeast and water." Root beer is a drink containing the extracted (not expressed) juices of various roots, as of dock, dandelion, sarsaparilla and sassafras. Sarsaparilla is derived from a plant found in various countries throughout the world and the drink is not an expressed juice, but a preparation made by extraction or some similar process.

"Pop" is an effervescent beverage, so called from the sound made by the explosion of the cork, as ginger "pop," and is an old generic term for an effervescent drink.

Dictionaries in common use do not define "unfermented grape juice," but the International Encyclopædia states that it is made by expressing the juice, sweetening, heating to the boiling point, and sealing while still hot in cans or strong bottles. Albert E. Leach, a recognized authority on foods and beverages, in his work entitled Food Inspection and Analysis, defines it as "the juice of grapes filtered, sterilized and put in glass containers." It is probably correct, therefore, to assume that unfermented grape juice is the expressed juice of the grape, and, if so, it is the only instance specifically mentioned in the statute of a beverage which is an expressed juice of a fruit as distinguished from beverages otherwise and artificially made.

It is attempted to find support for the proposition for which the government here contends in the judicial definition of "soft drinks" in

some reported cases, but definitions must always be read in the light of subject-matter and of context and of the object sought to be accomplished.

In Eureka Vinegar Co. v. Gazette Printing Co. (C. C.) 35 Fed. 570, will be found a discussion of the definition of the word "cider." It was there held:

"In strictness, the juice of the apple before fermentation is simply apple juice, and it is only by fermentation that it becomes cider; and, when the word 'cider' alone is used in law or commerce, it is commonly understood to mean the fermented juice of apples."

We think this conclusion was erroneous, but whether it was or not is a matter of no consequence; for the same court said:

"The terms 'sweet cider' and 'hard cider' are in popular use to distinguish between the juice of the apple before and after fermentation."

The statute under consideration in that case referred to "alcohol, or any spirituous, ardent, vinous, malt or fermented liquors" and the court construed "Old Orchard hard cider" as a fermented liquor with alcoholic content, and thus as falling within the statute. This conclusion was sound and has nothing whatever to do with the question as to whether Congress under the act here concerned intended to tax sweet cider as a soft drink.

In State v. Oliver, 26 W. Va. 422, 53 Am. Rep. 79, the question was whether sale of crab cider was prohibited without a license under a statute which required a license for the sale of "spirituous liquors, wine, porter, ale, beer, and drinks of like nature." The court in a very interesting opinion held that crab cider was not comprehended within the classifications of the statute, and the case is an excellent illustration of the doctrine of noscitur a sociis, and its reasoning fully supports the contentions of plaintiff in error instead of those of defendant in error.

In Bradford v. Jones, 142 Ky. 820, 135 S. W. 290, the court was construing an ordinance which provided that "any person * * * who shall engage in the business of selling soft drinks shall pay a license tax. * * *" The court refers to "soft drinks that contain any per cent. of alcohol" as hurtful, and therefore within the regulation of the police power of the state, and then refers to "soft drinks, as lemonade, soda water, and mineral waters * * * as not detrimental to the public good and not needing police regulation." This decision and its observations may well have been sound for the purposes of the case there under consideration, but they are not in the remotest sense relevant to the case at bar.

In this case Congress had been confronted with the gravest problem of taxation in its history. In the report of the Committee on Finance (65th Congress, First Session, Report No. 103 to accompanying H. R. 4280) submitted by Senator Simmons attention was called to the fact that the Senate Committee on Finance had devoted more than 10 weeks to a consideration of the bill, that the printed hearings covered over 650 pages, and that the hearings were attended by representatives of

nearly every interest affected by any of the provisions of the bill—i. e., the bill which ultimately became the War Revenue Act on October 3, 1917 (40 Stat. 300). In discussing "Title III, War Tax on Beverages," the report stated:

"Your committee approves the scheme of the House bill by which so-called soft drinks sold at soda fountains, bottling establishments, and other similar places are taxed through the medium of the tax imposed upon the carbonic acid gas used in the production of carbonated waters and other drinks, but it believes that the tax of 8 cents per pound imposed by the House bill upon carbonic acid gas is too high, and recommend that the House rate be reduced to 5 cents per pound, to be paid by the purchaser, and that the tax imposed on bottlers who make their own carbonic acid gas and are not subject to this tax be correspondingly changed from 2 cents to 1 cent per gallon on the beverages produced."

It will be noted that in this report the only reference to so-called soft drinks assumed that they were drinks of the kind in which carbonic acid gas was used, and this is in part reflected in the act of 1917, which, so far as here relevant, reads as follows:

"Sec. 313. That there shall be levied, assessed, collected, and paid—

"(a) Upon all prepared sirups or extracts *(intended for use in the manufacture or production of beverages, commonly known as soft drinks, by soda fountains, bottling establishments, and other similar places)* sold by the manufacturer, producer, or importer thereof, if so sold for not more than $1.30 per gallon, a tax of 5 cents per gallon; * * *

"(b) Upon all unfermented grape juice, soft drinks or artificial mineral waters (not carbonated), and fermented liquors containing less than one-half per centum of alcohol, sold by the manufacturer, producer, or importer thereof, in bottles or other closed containers, and upon all ginger ale, root beer, sarsaparilla, pop, and other carbonated waters or beverages, manufactured and sold by the manufacturer, producer, or importer of the carbonic acid gas used in cabonating the same, a tax of 1 cent per gallon; and

"(c) Upon all natural mineral waters or table waters, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon, a tax of 1 cent per gallon."

(Italics ours.) Act of Oct. 3, 1917, 40 Stat. at L. 310–312.

In the foregoing, which is the predecessor of the act here under consideration, subdivision (a) refers to the prepared sirups or extracts which are to be used in the manufacture or production of certain kinds of soft drinks by bottling establishments, while subdivision (b) refers to "soft drinks," inter alia, when manufactured or produced. It is plain that the term "soft drinks," had a trade significance and comprehended different kinds of soft drinks, as used in the 1917 Act.

It will be noted that the words "unfermented grape juice" are not followed by the words "and other soft drinks," but merely by "soft drinks," thus indicating that Congress considered soft drinks as used in this section to be something else than unfermented fruit juices. Congress was clearly using this expression "soft drinks" not to distinguish one class of beverages from another from the viewpoint of a prohibition or license act, but to distinguish soft drinks from the other items of the statute from a technical trade-name aspect.

When the Revenue Bill of 1918 was under consideration, Mr. Kitchin submitted the report of the House Committee on Ways and Means (65th Congress, Second Session, Report No. 767 to accompany H. R.

12663) and under the heading "Title VI, Tax on Beverages," that report read, in part, as follows:

"In the case of all other beverages, other than soft drinks, the rates under existing law are doubled.

"The present law levies the tax upon soft drinks, upon the basis of the gallon and the present tax only applies to soft drinks sold by the manufacturer, producer, or importer. As a considerable portion of the soft drinks sold are compounded at the soda fountain, and not reached under existing law, the taxes levied under existing law are not great revenue producers. In order to secure a greater revenue from soft drinks the bill provides that a tax of 30 per cent. be levied upon the manufacturer's, producer's, or importer's selling price of cereal beverages, and that a tax of 20 per cent. be levied upon the manufacturer's, producer's, or importer's selling price of all other soft drinks.

"In the case of soft drinks, compounded or mixed at the soda fountain, ice cream parlor, or other similar places of business, and ice cream, ice cream soda, sundaes, or other similar articles of food or drink when sold for consumption in or in proximity to such places of business, the bill levies a tax of 2 cents for each 10 cents or fraction thereof of the selling price to be collected from the consumer by the proprietor of the soda fountain or similar place of business and returned to the government. In the case of sales amounting to 7 cents or less the tax will only be 1 cent.

"The following table shows the beverage rates under existing law and under the proposed bill:

* * * * * * * * * *

	Existing Law. Rate per Gallon	Proposed Bill. Per Cent.
"Upon all prepared sirups or extracts used in the manufacture of soft drinks:		
If sold for not more than $1.30 per gallon	$0.05	——
If sold for more than $1.30 and not more than $2 per gallon	.08	——
If sold for more than $2 and not more than $3 per gallon	.10	——
If sold for more than $3 and not more than $4 per gallon	.15	——
If sold for more than $4 per gallon	.20	——
Upon all unfermented grape juice, soft drinks, or artificial mineral waters (not carbonated) sold by manufacturer, producer, or importer in bottles or closed container	.01	20
Upon beverages derived wholly or in part from cereals or substitutes therefor, containing less than one-half per cent. of alcohol	.01	30
Upon all ginger ale, root beer, sarsaparilla, pop, and all other carbonated waters or beverages manufactured and sold by the manufacturer, producer, or importer of the carbonic acid gas used in carbonating the same	.01	20
Upon all natural mineral waters or table waters sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 10 cents per gallon	.01	(1)
Upon all carbonic acid gas in drums or other containers (intended for use in the manufacture or production of carbonated water or other drinks), sold by the manufacturer, producer, or importer thereof per pound	.05	——
Soft drinks compounded or mixed at a soda fountain, ice cream parlor, or other similar place of business, ice cream, ice cream sodas, sundaes, or other similar articles of food or drink, when sold for consumption in or in proximity in such place of business		(2)
"(1) 2 cents per gallon		
"(2) 2 cents for each 10 cents or fraction thereof of the amount paid. When the charge is 7 cents or less the tax will be 1 cent."		

The report of the Senate Committee on Finance (65th Congress, Third Session, Report No. 617 to accompanying H. R. 12863) called attention to the necessity of reducing taxation and stated:

"The cessation of war, therefore, brought with it not only the opportunity, but the necessity of reducing the large tax budget which the House had voted."

To this report was attached the report of the House Committee on Ways and Means above referred to.

Whatever, therefore, may have been the true construction of the act of 1917, it is apparent that Congress attempted to reduce rather than enlarge the field of taxation, and one of the most interesting features of the House Report is its classification of beverages for the purpose of pointing out the difference between the tax under the act of 1917 and the tax contemplated under the Revenue Bill of 1918. It will be noted that this classification follows the order of the act of 1917, and that "soft drinks" are not put in the classification under the head of "ginger ale, root beer," etc. In the act here concerned "unfermented grape juice" again appears as specifically mentioned and really standing alone, and all the drinks mentioned by classification, such as "carbonated waters" or specifically named, such as "ginger ale," then follow and at the end, and in association with and following these manufactured or artificial drinks are to be found the words "other soft drinks."

As is well known there are hundreds, perhaps thousands, of manufactured soft drinks with trade-names which are made up of various components, and it was naturally impossible for Congress to attempt to enumerate this large collection of soft drinks, and no doubt Congress intended under the act under consideration to tax all kinds of soft drinks in which, among other things, carbonated or artificial waters or extracts or sirups or other ingredients of one kind or another were used.

It is plain, however, that it never was the legislative intent to include sweet cider, for there can be no other explanation of specific mention of unfermented grape juice, on the one hand, or of ginger ale, sarsaparilla, etc., on the other.

Congress had undoubtedly investigated all aspects and data of this troublesome problem of taxation and arranged its schedules and picked out subject-matter for taxation, not in a haphazard way, but after thorough consideration, in the light of the nation's necessities and the usual conflicting interests which are involved in any tax measure. When, therefore, it failed to include sweet cider, that failure must be regarded, not as an accident, but as a deliberate omission to include a beverage of common and widespread use, fully as well, if not better, known than any other beverage mentioned in section 628, supra.

The necessity and desirability of examining closely the history of a statute has recently been illustrated in International Railway Company v. Davidson, 257 U. S. ——, 42 Sup. Ct. 179, 66 L. Ed. ——, decided January 30, 1922, where the Supreme Court had occasion to construe the words "vessel or other conveyance" found in a federal statute.

[4] It is a recognized rule of interpretation that—

"In cases of doubt or uncertainty, acts in pari materia, passed either before or after, and whether repealed or still in force may be referred to in order to discern the intent of the Legislature in the use of particular terms, or in the enactment of particular provisions. * * *" Vane v. Newcombe, 132 U. S. 220, 235, 10 Sup. Ct. 60, 33 L. Ed. 310; Stout v. Board of Commissioners, 107 Ind. 343, 348, 8 N. E. 222; Tiger v. Western Investment Co., 221 U. S. 286, 306, 31 Sup. Ct. 578, 55 L. Ed. 738.

Bailey v. Clark, 21 Wall. 284, 22 L. Ed. 651, is a striking illustration of a resort to a subsequent statute to resolve the doubt as to the construction of a provision of a prior revenue act. See, also, Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; and (for a statement of the principle) U. S. v. A. J. Woodruff & Co., 175 Fed. 776, 99 C. C. A. 348.

[5] Of course, in considering the list of taxable subjects, it must be remembered that the Legislature is constantly making changes, and that caution must be exercised in appropriately assigning the weight to be given to such legislation in construing the previous statute. In the case at bar, however, the Revenue Act of 1921, which became law on November 23, 1921 (42 Stat. 227), is most instructive. In the report submitted by Senator Penrose from the Committee on Finance (67th Congress, First Session, Report No. 275 to accompany H. R. 8245) the following is stated under the "Title VI, Tax on Soft Drinks and Constituent Parts Thereof":

"Section 600 imposes manufacturers' sales taxes as follows: Two cents per gallon upon cereal beverages: 2 cents per gallon upon unfermented fruit juices intended for consumption as beverages; 2 cents per gallon upon 'still' or noncarbonated soft drinks; 10 cents per gallon upon natural or artificial mineral waters; 7½ cents per gallon upon finished or fountain sirups used in manufacturing or mixing soft drinks; and 5 cents per pound upon carbonic acid gas. * * *

"By section 628 of the Revenue Act of 1918 a tax of 15 per cent. is imposed upon the manufacturer's selling price on cereal beverages, and a like tax of 10 per cent. is imposed upon the manufacturer's selling price of all other soft drinks except natural mineral or table waters, which are taxable at the rate of 2 cents per gallon if sold at over 10 cents per gallon."

It will be noted that for the first time "unfermented fruit juices" are mentioned as a class in contrast with the single item of "unfermented grape juice" in the previous statutes, and it will also be noted that there is a new classification in the way of "still or noncarbonated soft drinks."

These recommendations took form in section 602 of the Revenue Act of 1921, which reads as follows:

"Sec. 602. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 628 and 630 of the Revenue Act of 1918—

"(a) Upon all beverages derived wholly or in part from cereals or substitutes therefor, containing less than one-half of 1 per centum of alcohol by volume, sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.

"(b) Upon all unfermented fruit juices, in natural or slightly concentrated form, or such fruit juices to which sugar has been added (as distinguished from finished or fountain sirups), intended for consumption as beverages with the addition of water or water and sugar, and upon all imitations of any such

fruit juices, and upon all carbonated beverages, *commonly known as soft drinks* (except those described in subdivision [a]), manufactured, compounded, or mixed by the use of concentrate, essence or extract, instead of a finished or fountain sirup, sold by the manufacturer, producer or importer, a tax of 2 cents per gallon.

"(c) Upon all still drinks, containing less than one-half of 1 per centum of alcohol by volume, intended for consumption as beverages in the form in which sold (except natural or artificial mineral and table waters and imitations thereof, and *pure apple cider*), sold by the manufacturer, producer, or importer, a tax of 2 cents per gallon.

"(d) Upon all natural or artificial mineral waters or table waters, whether carbonated or not, and all imitations thereof, sold by the producer, bottler, or importer thereof, in bottles or other closed containers, at over 12½ cents per gallon, a tax of 2 cents per gallon.

"(e) Upon all finished or fountain sirups of the kinds used in manufacturing, compounding, or mixing drinks *commonly known as soft drinks*, sold by the manufacturer, producer, or importer, a tax of 9 cents per gallon; except that in the case of any such sirups intended to be used in the manufacture of carbonated beverages sold in bottles or other closed containers the rate shall be 5 cents per gallon. Where any person conducting a soda fountain, ice cream parlor, or other similar place of business manufactures any sirups of the kinds described in this subdivision, there shall be levied, assessed, collected, and paid on each gallon manufactured and *used in the preparation of soft drinks* a tax of 9 cents per gallon. * * *"

(Italics ours.)

The foregoing contains an orderly and, in a sense, scientific classification of soft drinks. The statute seems to indicate that for commercial purposes to unfermented fruit juices there is added sugar or water or sugar and water, and consequently pure apple cider is not a soft drink under subdivision (b) of the statute, supra; nor is it a soft drink under (e), supra, which subdivision defines another class of soft drinks. Pure apple cider would come under the classification of still drinks (not soft drinks) containing less than one-half of 1 per cent. of alcohol. The exceptions under subdivision (c) are natural or artificial mineral and table waters and imitations thereof, which are dealt with under subdivision (d); and then standing out in sharp contrast to all other drinks and singled out from the hundreds or thousands of drinks of one kind or another is pure apple cider.

Certainly by the test of subsequent legislation there could be no more convincing proof that it never was the intent of Congress to tax sweet cider, and it is plain that Congress only thought that it was necessary specifically to except pure apple cider, when for the first time there appeared a classification—i. e., still drinks—under which it would naturally be included.

[6] It is urged, however, that article 13 of Regulation 52 of the Commissioner of Internal Revenue must be regarded as a practical construction of the statute. Article 13 provides:

"*Soft Drinks.* * * * the term 'other soft drinks' includes, among other drinks, apple juice * * * and other fruit juices sold as beverages by the manufacturer in bottles or other closed containers."

The rules as to the effect of an administrative regulation need not be elaborately stated. The most familiar are those which hold that, where an executive officer or department is empowered to make regulations, such regulations, if not inconsistent with the statute, have the force of

law, and those which require, by virtue of the doctrine of practical construction, that great heed shall be given to the construction which an executive officer or department places upon a statute, particularly where such construction had been followed for a considerable period of time; but an executive officer or department cannot write into a statute something which is not there, and a regulation such as quoted supra amounts to nothing more than an expression of opinion by an administrative officer, and not by a court. This article 13 must therefore be laid aside without further consideration.

[7] Finally, the most that can be said in favor of contention of defendant in error is that the question here presented is doubtful and seriously debatable. In such circumstances it must be remembered that the imposition of a tax is one of the highest and gravest powers of sovereignty.

In calling attention to the fact that the Supreme Court had repeatedly held that the custom revenue laws should be liberally interpreted in favor of the importer, Mr. Justice Brown, in Eidman v. Martinez, 184 U. S. 578, 583, 22 Sup. Ct. 515, 517 (46 L. Ed. 697), stated the general principle as follows:

"It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language. * * *"

It is suggested arguendo that there was no economic reason for omitting cider from the statute here discussed. The reason or occasion for a tax is a matter for legislative, and not for judicial, consideration; but the best answer to this suggestion is found in the Revenue Act of 1921 which disclosed that Congress, for reasons it thought wise, expressly excluded pure apple cider from the list of taxable subject-matter.

We are fully satisfied that sweet cider is not subject to the tax, but, in any event, it is plain that in this instance Congress has not expressed its intention to tax sweet cider in that clear and unambiguous language which must be present before it should be held that a particular article of commerce is subject to a tax statute which does not name it specifically and comprehends it only if a meaning be given to the term "other soft drinks" which neither the history nor the structure of the statute justifies.

Judgment reversed.

MANTON, Circuit Judge (dissenting). An answer was filed to the complaint in this action which seeks to recover the return of taxes paid under the Revenue Act of 1918 under protest. Thereafter the denial of the material allegations of the complaint set forth in that answer was withdrawn by stipulation, and a motion made by the internal revenue collector for judgment on the pleadings. It resulted in the dismissal of the complaint on the merits, and judgment was thereafter entered against the plaintiff in error. This writ is sued out seeking to review the judgment so entered.

The plaintiff in error is engaged in the manufacture and sale of sweet cider containing less than one-half of one per cent. of alcohol, and for

a sale which was made the collector of internal revenue for the Twenty-Eighth district of the state of New York, by virtue of authority claimed to be vested in him, assessed a tax under the Revenue Act of 1918 (40 Stat. 1057, 1116). The tax, amounting to $386.22, was paid by the plaintiff in error under protest. Thereafter it filed a claim for the refund of this tax. This claim was disallowed, and it has resulted in this action. The theory of the plaintiff in error's right of recovery is based upon the ground that sweet cider is not taxable as a beverage within the provisions of the Revenue Act of 1918; further, that if cider is taxable, the Commissioner of Internal Revenue had no authority for and could not collect a tax which included the price of the container in which the cider was sold.

The act in question (40 Stat. 1057, 1116) provides for a tax on beverages derived from cereals or substitutes thereof and containing less than one-half of 1 per cent. of alcohol sold by the manufacturer, producer, or importer, in bottles or other closed containers, and a tax on all unfermented grape juice, ginger ale, root beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks, sold by the manufacturer, producer, or importer, in bottles or other closed containers. This is a tax equivalent to 10 per cent. of the price for which they are sold. The act provides that the tax is levied, assessed, and collected in lieu of the tax imposed by section 313 of the Revenue Act of 1917 (40 Stat. 300, 312). This act also provided a tax on soft drinks. It is provided by the Revenue Act of 1918 (section 1309, 40 Stat. 1057, 1143 [Comp. St. Ann. Supp. 1919, §§ 6371½i, 6371½j]) that the Commissioner of Internal Revenue with the approval of the Secretary, is authorized to make all needful rules and regulations for the enforcement of its provisions, and it is provided by section 1310a (section 6371½k) that, in the case of overpayment or overcollection of any tax proposed by section 628 (section 6161½d), the person making such overpayment or overcollection may take credit therefor against taxes due upon any monthly return, and shall make refund of any excessive amount collected by him upon proper application by the person entitled thereto. Pursuant to this authority, the collector of internal revenue formulated articles 11 and 13 of Regulation 52, which was approved on May 3, 1919, relating to this tax on soft drinks sold in bottles or other closed containers. In substance, it provides that the amount paid for the beverage in the closed container is a basis for computing the tax, though the container is billed separately. If the beverage is sold under an agreement by which the manufacturer is to refund the purchaser a specified amount upon the return of the container, the tax nevertheless attached to the whole price, including the amount agreed to be refunded upon the return of the container. And in such case the manufacturer may take credit in any monthly return for that portion of the tax paid which the amount actually refunded to the purchaser for the return of the container bears to the total sales prices as above computed. Credit is allowed only if at the time of making return and paying tax on the original sale a statement has been attached to the return showing the containers subject to refund, and at the time of the application for

the credit separate affidavit is made of the refunds actually identifying them with the sales referred to. By article 13 of the Internal Revenue Department, rule that fermented liquors other than cereal beverages are taxable at the rate of 10 per cent., the term "other soft drinks" includes among other things, fruit juices sold as beverages by the manufacturer in bottles or other closed containers. The question presented is whether "sweet cider," as that term is commonly understood, is a soft drink under the provision of section 628a of the Revenue Act of 1918. In common phrase, cider is referred to (a) as sweet cider and (b) as hard cider. It is defined as "formerly any liquor made of the juice of fruits and now as the expressed juice of apples, either before or after fermentation." Century Dictionary. Sweet cider is cider before fermentation, and hard cider is that which has lost its sweetness from fermentation. Before the change of sweet cider to hard, the liquid is nothing but apple juice, and the fermentation is the yeast or leavening of the juice of the apple. It is this which changes the cider from sweet to hard.

The courts are obligated to take notice of the ordinary acceptation of the words in the English language and also such matters of science as are well known to all men of common understanding and intelligence. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293; King v. Gallum, 109 U. S. 99, 3 Sup. Ct. 85, 27 L. Ed. 870.

The meaning of the word "cider," its method of production and its general constituents are matters of common knowledge and upon which all books of accepted authority agree. No court would be justified in affecting ignorance of these facts or in closing its eye to them in a case requiring their application. Eureka Vinegar Co. v. Gazette Printing Co. (C. C.) 35 Fed. 570. As that term is commonly understood, cider is the expressed juice of apples, either fermented or unfermented. The terms "sweet cider" and "hard cider" are used to distinguish in the popular understanding between the juices of the fruit before and after fermentation. It is a matter of common knowledge that sweet cider is not intoxicating. There may be a trace of alcohol, but it is not more than one-half of 1 per cent. In State v. Oliver, 26 W. Va. 422, 53 Am. Rep. 79, the court held that cider or crab cider was not a spirituous liquor, and that—

> This "common beverage found in every locality, used more or less at certain seasons by all classes of our people, as well as for many culinary purposes, as for a beverage, would naturally be present in the minds of every legislator who was endeavoring to classify and arrange artificial drinks technically correct but not in popular understanding. The term should be construed according to universal use and understanding."

Unadulterated juice of apples pressed by the addition of one-tenth of 1 per cent. of benzoate of soda, and called preserved sweet cider, is not within the National Prohibition Act of October, 1919 (41 Stat. 305). Hildick Apple Juice Co., Inc., v. Williams (D. C.) 269 Fed. 184. As the term "soft drink" is univerally used and understood, cider is within that class of beverage. "Soft drinks" has been commonly understood to mean nonintoxicating beverages.

"While including lemonade, soda water, mineral waters, and other innocent and harmless beverages that are and have been for years sold all over the country, they are generally used in reference to 'malt mead,' 'near beer,' and other alcoholic decoctions, invented to take the place of intoxicating drinks." Bradford v. Jones, 142 Ky. 820, 135 S. W. 290.

By the use of the word "other," Congress denotes grape juice as a fruit drink and taxes other drinks considered to be of a similar nature or "soft." To give meaning to the term "soft drinks" in the statute, it is essential to charge Congress with an intent to mean and to include other fruit juices. I do not think that Congress intended to discriminate in favor of sweet cider. No economic reason is advanced why fruit juices such as grape juice should be taxed and the juice of apples should not. Pursuant to his authority, the Commissioner of Internal Revenue has ruled that by article 13 of Regulation 52 sweet cider is taxable. Md. Casualty Co. v. U. S., 251 U. S. 342, 40 Sup. Ct. 155, 64 L. Ed. 297. I think this regulation was not in conflict with the statutory provision, and that by virtue of the authority thus intrusted to the Commissioner sweet cider in this instance is properly taxable.

Nor was it error to hold below that the tax was rightly imposed upon the sale price of both the contents and the container. By a departmental regulation, a rule has been established which forms a basis for the tax on the sale price of both the beverage and container. A departmental regulation addressed to and reasonably adapted to the enforcement of the act of Congress, the administration of which is confided to such department, has the force and effect of law, if it be not in conflict with expressed statutory provision. U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; U. S. v. Morehead, 243 U. S. 607, 37 Sup. Ct. 458, 61 L. Ed. 926. The acts of the Commissioner are presumed to be the acts of the Secretary of the Treasury. In re Huttman (D. C.) 70 Fed. 699. Section 628 provides that soft drinks sold by the manufacturer or producer "in bottles or other closed containers" imposes a tax equivalent to 10 per cent. of the price for which so sold. The manufacturer in the course of his business may agree to make a refund upon the return of the container, and, while the selling price of the beverage includes the price of the container, he is entitled, under the departmental regulation, to a rebate upon a proper showing. By the delivery of the beverage a sale is made, and indicates the intent on the part of the manufacturer to sell both. The price is fixed for both. This is reasonable because the plaintiff in error does not know that the container will be returned for the refund. Reasonable provision is made that, if it is returned, full credit may be obtained. Under these circumstances, the selling price of the beverage and container are an inseparable total. The tax attaches when the beverage is sold, when the vendor passes title to the purchaser. I think the regulation is a reasonable one and provides fairly for the refund. The phrase "sold by the manufacturer, producer or importer in bottles or other closed containers," indicates an intent by Congress that the beverage taxed shall be that sold in such closed containers, and that the price upon which the tax shall be imposed is the price charged by the manufacturer at the time he sells and on the total selling price.

Our attention is called to Revenue Act Nov. 23, 1921, § 602, which repeals the section of the law under consideration in the present case. In the 1921 act Congress specifically exempts "pure apple cider." Subdivision (c), § 602. It is argued from this that Congress did not intend to include cider in the definition of "other soft drinks" in the act of 1918. But a statutory provision the meaning of which is not clear should be construed with reference not only to the statute as a whole, but with reference to contemporaneous and subsequent enacted statutes in pari materia. Where a statute repeals or replaces an earlier law, any change of language is more consistent with the change of intent than with the purpose of defining or declaring the meaning of the language of the earlier repealed statute. U. S. v. A. J. Woodruff & Co., 175 Fed. 776, 99 C. C. A. 348.

The court below, holding that the complaint did not state facts sufficient to constitute a cause of action, was right, and the judgment rendered for the defendant should be affirmed.

In re TIDEWATER COAL EXCHANGE.

(Circuit Court of Appeals, Second Circuit. February 20, 1922.)

Nos. 112, 117, 118.

1. **Bankruptcy ⟸70—Tidewater Coal Exchange held "unincorporated company," subject to act.**

The Tidewater Coal Exchange was an unincorporated association formed during the war, at the instance of the Council of National Defense, to expedite the transshipment of coal at tidewater points and the release of coal cars. Its members were tidewater coal shippers and consignees, and included individuals, corporations, and partnerships. It had no constitution, articles of association, or by-laws, no capital stock, made no charge for membership, and collected no fees, but adopted rules and operated under direction of a commissioner and an executive committee, and its expenses were paid by the railroads and government Railroad Administration. *Held*, that it was an "unincorporated company," within the meaning of Bankruptcy Act, § 4b (Comp. St. § 9588), and subject to adjudication as a bankrupt.

2. **Associations ⟸18—Evidence ⟸69—Regularity of proceedings presumed.**

An association being solely a creature of convention between the members, no check exists upon its right to transact its business in such manner as it may agree upon, so long as it does not act illegally or contrary to public policy, and the regularity of the proceedings of officers is presumed, in the absence of a showing to the contrary.

3. **Associations ⟸18—Formal acceptance of resignation of member of managing committee not essential to effectiveness.**

Formal acceptance of the resignation of a member of the executive committee of an association *held* not essential to its effectiveness.

4 **Bankruptcy ⟸61—Adoption by unincorporated company of resolution consenting to adjudication held valid; "act of bankruptcy."**

Where the executive committee of an association, which was the governing body, with authority to make rules, had made no rule as to quorum or proxies, but it was the "usual practice" to permit members not present at meetings to be represented by another member of their firm or corporation, the adoption by unanimous vote of five of the eight members

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of the committee who were present or so represented of a resolution admitting the inability of the association to pay its debts and consenting to its adjudication as a bankrupt *held* valid and effective as an act of bankruptcy.

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

5. Bankruptcy ⟸88(2)—Permitting creditor to intervene and answer petition after five days discretionary.

Under Bankruptcy Act, § 18b (Comp. St. § 9602), the right of a creditor to answer an involuntary petition ceases on the expiration of five days from return day, and denial of a motion by a creditor for leave to intervene and answer, made two months after return day without sufficient excuse, *held* within the discretion of the court.

Petition to Revise and Appeals from the District Court of the United States for the Southern District of New York.

In the matter of the Tidewater Coal Exchange, bankrupt. The New England Coal & Coke Company, the Delaware Steamship & Commerce Corporation, and the Achibald McNeil & Sons Company, Inc., appeal from and petition to revise different orders of the District Court. Affirmed.

For opinions below, see 274 Fed. 1008, 1011. See, also, 280 Fed. 648. Certiorari denied Delaware Steamship & Commerce Corporation v. New England Coal & Coke Co., 257 U. S. ——, 42 Sup. Ct. 587, 66 L. Ed. ——.

James F. Curtis and Root, Clark, Buckner & Howland, all of New York City, for New England Coal & Coke Co., and others.

Peale & McLaughlin and John Caldwell Myers, all of New York City (John W. Davis, of New York City, of counsel), for Archibald McNeil & Sons Co., Inc., and protective committee of shippers of Tidewater Coal Exch.

Nelson B. Cramer, of Cincinnati, Ohio, and T. K. Schmuck, of New York City, for Delaware Steamship & Commerce Corporation.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The New England Coal & Coke Company, which is a Massachusetts corporation, together with two other corporations, alleging themselves to be creditors of the Tidewater Coal Exchange, hereinafter called the Exchange, filed a petition in the District Court for the Southern District of New York on May 12, 1921, in which they asked that the Exchange be adjudged a bankrupt. The claims of the petitioning creditors aggregated $276.687.37. The petition alleged that the Exchange was insolvent, and that while insolvent, and within four months of the filing of the petition, to wit, on May 11, 1921, it committed an act of bankruptcy, in that it admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

The Exchange put in an answer, and set up certain facts, hereinafter more fully referred to, and averred that, in view of the facts which it alleged, it was in doubt whether or not it was subject to the provisions of the Bankruptcy Act (Comp. St. §§ 9585–9656).

A "protective committee of shippers of Tidewater Coal Exchange," by Howard Adams, chairman, pursuant to leave of court, intervened and filed an answer, in which they denied that the Exchange was such a person or incorporated company as could be adjudicated a bankrupt under the act. The answer also denied that the Exchange had committed the acts of bankruptcy set forth in the petition, and further stated on information and belief that the Exchange was not insolvent.

The Archibald McNeil & Sons Company, Inc., similarly intervened, and put in a separate, but similar, answer.

The Delaware Steamship & Commerce Corporation asked leave to intervene and answer. Its proposed answer the court, in the exercise of its discretion, declined to receive.

The petitioning creditors afterwards moved to strike out the answer of the protective committee of shippers of the Tidewater Coal Exchange and the amended answer of Archibald McNeil & Sons Company, Inc. The ground upon which this petition was based was that neither the protective committee nor the Archibald McNeil Company was a creditor of the bankrupt, or a person authorized to file an answer under the provisons of the Bankruptcy Act. These motions were denied by order dated August 4, 1921. The petitioning creditors thereupon filed a petition to revise the order denying the motions to strike out the answers above referred to.

The Protective Committee and the Archibald McNeil Company each appealed from the order of July 27, 1921, which adjudicated the Exchange a bankrupt.

The Delaware Steamship & Commerce Corporation also filed a petition for appeal from the order of July 27, 1921, adjudicating the Exchange a bankrupt, and from the order, dated August 4, 1921, denying its motion to intervene and file its answers. It also filed a petition to revise both orders.

On August 12, 1921, the District Court entered an order consolidating the appeals and petitions to revise, and directed that they should be heard on a single record. They were argued in this court together, and they will be disposed of in a single opinion. The case was disposed of by the District Judge upon a stipulation of facts, certain of which will be referred to as we proceed.

[1] The first question we have to consider is whether the Exchange is such a person or company as can be adjudicated a bankrupt within the meaning of the Bankruptcy Act. The District Court concluded that it came within the purview of the act, and accordingly adjudged it a bankrupt. Before proceeding to consider whether the Exchange comes within the terms of the act, it is necessary to refer to the nature of the association and the object which it was created to accomplish and how it came into being. It appears that it was organized at the instance of the Council of National Defense on June 20, 1917, and that it continued in existence until April 30, 1920. It was established to expedite the transshipment of coal at tidewater points and to secure the prompt release of coal cars at the various ports. In November, 1917, under an order of the Fuel Administrator, every shipper of bituminous coal for transshipment at any one of the tidewater ports where the Ex-

change operated was obligated to consign all shipments of coal to the Exchange. These shipments and consignments were to be made in accordance with and subject to the provisions of the existing rules of the Exchange. As a result of this order, shippers of coal were forced to use it in connection with tidewater shipments, although nothing in the Fuel Administrator's order made such an involuntary shipper a member of the Exchange. The Exchange was not incorporated. It had no constitution or articles of association or by-laws. When it was formed certain rules were adopted, and were subsequently revised, and under its rules the Exchange functioned.

The original rules of the Exchange provided that any tidewater coal shipper or consignee could become a member of the Exchange, subject to the approval of the executive committee, provided he subscribed to the agreements covering the handling of coal through the Exchange. The membership of the Exchange included, not only individuals, but corporations and partnerships as well. No member was required to contribute any capital, to pay any initiation fee or suffer any assessments, or to bear or pay any of the expenses of the Exchange. Its operations were conducted at no cost to the members and without any possibility of pecuniary profit. There was no capital involved in this common undertaking, and by arrangement with various railroads all of the operating expenses of the Exchange were borne and paid by the railroads. During the period of government control of railroads, the Director General of Railroads took over and assumed the obligations of the railroads with respect to expenses.

The chief administrative officer of the Exchange was a commissioner. There was also an executive committee, which seems to have had its origin in the executive committee of the tidewater producers, who, with the railroads, co-operated in bringing about the formation of the Exchange. The original rules of the Exchange made no provision for the selection of a commissioner or for the selection or election of an executive committee. The revised rules of the Exchange provided that the executive committee should be elected by the members of the Exchange, but these contained no provision with respect to the election or selection of a commissioner.

We now come to consider whether the Exchange comes within the purview of the Bankruptcy Act. Section 4 of the act (Comp. St. § 9588) enumerates the persons who shall be entitled to the benefits of the act. Subdivision "b" of section 4 declares that—

> "Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, *any unincorporated company*, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, * * * may be adjudged an involuntary bankrupt. * * *"

The act in section 4 makes three classes subject to its provisions and liable to be adjudged an involuntary bankrupt: (1) "Any natural person," except such as are engaged in certain enumerated pursuits; (2) "any unincorporated company;" (3) "any corporation" engaged in certain enumerated pursuits. And section 5 (Comp. St. § 9589) provides

a fourth class and declares that "a partnership" may be adjudged a bankrupt.

The act in its first section defines the meaning of words and phrases used in the act, and there are 30 of such definitions. But nowhere in the act is there to be found any definition of the meaning of the words "unincorporated company." The court must therefore determine their meaning, and in attempting to do so we find little assistance in the cases. In 1904, in Burkhart v. German-American Bank (D. C.) 137 Fed. 958, Judge Thompson, speaking of an "unincorporated company" under section 4b of the act, said:

"It is generally understood to be a body or association occupying middle ground between partnerships and stock corporations, possessing some of the powers and privileges of both, and is generally so recognized by the courts."

In 1905 the District Court for the Southern District of New York in the case of In re Seaboard Fire Underwriters, 137 Fed. 987, held that an unincorporated Lloyd's association of fire underwriters was "an unincorporated company," within the meaning of the act, and as such subject to be adjudicated a bankrupt, although, if it had been incorporated, it could not have been proceeded against, because corporations carrying on the business of insurance were expressly excepted from the provisions of the act. Judge Holt in the above case, referring to section 4b, said:

"Under this provision, in my opinion, any unincorporated company may be adjudged a bankrupt," and "that any unincorporated company engaged in any kind of business may be put into bankruptcy if it is insolvent and has committed an act of bankruptcy."

In 1914 the District Court for the District of Massachusets, in the case of In re Associated Trust, 222 Fed. 1012, held that a trust association, created by an instrument of trust providing that the property acquired should be held and managed by a trustee, but the capital of which was contributed by certificate holders, who had power to elect a trustee in case of a vacancy, each share having one vote, also power to amend the declaration of trust, increase the number of shares, and by a three-fourths vote terminate the trust, was an "unincorporated company" within the meaning of the act. The court thought the words of the act implied—

"an association of individuals, not partners, carrying on business under a distinct name, and having common rights inter se, but having no individual ownership in the joint property, no individual control over the business in which their joint capital is embarked, and no direct individual liability for the company's debts. Its use in connection with the word 'unincorporated' would seem to imply that the organization should have some of the attributes usually found in corporations."

The court thought the words "unincorporated company" exactly described what the respondent was.

In 1917 the Circuit Court of Appeals in the Third Circuit had the meaning of the words "unincorporated company" as used in this act before it in the case of In re Order of Sparta, 242 Fed. 235, 155 C. C. A. 75. The Order of Sparta was an unincorporated fraternal beneficial association. It had no capital stock, and its members were not

liable for its debts or the benefit certificates which it issued to its members; these being payable only out of its treasury. It was not organized for profit, but for the sole benefit of its members and beneficiaries. Its purpose was fraternal or social and beneficial. The court below held it was an unincorporated company within the meaning of the act, and as such might be adjudicated a bankrupt; and this was affirmed. In the course of its opinion the court said:

"Whatever may be the full scope of the word 'company,' it does include at least any unincorporated association or group of individuals whose object and purpose are either wholly or chiefly of the same kind as the object and purpose of a moneyed business, or commercial corporation. A corporation is also a group of individuals, and the fact that one group has a charter, while another group with an identical object has none, hardly furnishes a sufficient reason for exempting the latter from the scope of the act."

A company is defined in the Century Dictionary as "a number of persons united for performing or carrying on anything jointly." If such a number of persons are united for carrying on any kind of business enterprise jointly, and are not incorporated, and do not constitute a partnership, they are an "unincorporated company" within the true intent and meaning of the acts of Congress relating to bankruptcy. We are not now called upon to determine whether a company which is not engaged in carrying on some sort of trade or business enterprise, some commercial or industrial undertaking, is or is not also comprehended by the words; for it is clear that what the Exchange was created to accomplish was clearly a business or commercial enterprise.

If each word in the phrase "any unincorporated company" is given its ordinary and popular meaning, the Exchange is unquestionably included therein; and, considering the phrase as a whole and in the light of the subject-matter of the act, we can see no reason for giving it a restricted meaning which would exclude it. It is not a "corporation," not having been incorporated at the time involved. It is not a partnership, there being no agreement to divide the profit and bear the loss. It is not a joint-stock company, for there is no stock. It is simply an unincorporated company or association engaged in the prosecution of a business enterprise, as distinguished from one which is charitable, or religious, or educational, or social.

It is true the Exchange did no trading. It bought no coal and sold no coal. It was not designed to earn a profit for itself. It was a mere instrumentality or device created to provide for the handling of coal in tidewater ports in such a manner that the coal-laden cars could be unloaded rapidly, and so promptly released for the handling of other coal. It was in effect a clearing house for coal; but a clearing house for coal is as truly a commercial enterprise as is a clearing house for the settling of balances between banks arising from the interchange of checks and drafts. Whether an unincorporated company not organized for a business purpose can be adjudicated a bankrupt under the act is not before us and is not decided. It is sufficient that the Exchange is an association of individuals in pursuit of a common business object, under a control agreed to by all its members, and capable of having debtors and creditors, and which is neither a corporation, nor a partnership, nor a joint-stock company. It is "an unincorporated com-

pany" within the meaning of the act, and as such can be adjudicated a bankrupt.

This makes it necessary to inquire whether at the time of the adjudication it had committed an act of bankruptcy, or was insolvent. The "stipulation of facts," already referred to, among other things stipulated as follows:

"(1) After the filing of the involuntary petition in bankruptcy against the Tidewater Coal Exchange on May 9, 1921 (No. 29,629), and with knowledge that such petition had been filed, the executive committee of the Tidewater Coal Exchange took action, which is reported in a certificate in writing of which the following is a copy:

"'Admission of Willingness to be Adjudicated a Bankrupt.

"'At a special meeting of the executive committee of the Tidewater Coal Exchange, an unincorporated company, which meeting was duly called and held according to law and to the by-laws and regulations of the said Exchange, the following resolution was duly adopted by the vote of five members thereof, constituting a quorum, being all of those present.

"'Resolved, that the Tidewater Coal Exchange, an unincorporated company, the principal place of business of which is at New York City, in the state of New York, do and the same hereby does admit its inability to pay its debts and consents to being adjudged a bankrupt on that ground.

"'State of New York, County of New York—ss.:

"'We, the undersigned, Girvan N. Snider, chairman of the executive committee, and Constance I. McCormack, secretary of the executive committee, of the Tidewater Coal Exchange, do hereby certify that the foregoing resolution, admitting the inability of the said Exchange to pay its debts and its willingness to be adjudged a bankrupt on that ground, was duly adopted at a special meeting of the executive committee of the said Exchange duly called according to law and to its by-laws and regulations, which meeting was held at the Grand Central Terminal at New York City, New York, on the 11th day of May, 1921. G. N. Snider, Chairman. Constance I. McCormack, Secretary.'"

The above statement as to the action taken by the executive committee is accompanied by an affidavit, made by the secretary of the executive committee, certifying to the fact that the copy of the resolution was a full, true, and correct copy of the original resolution as adopted.

The Exchange carried on its operations under a set of revised rules adopted by the executive committee on April 24, 1919. The second rule provided that the executive committee should be composed of eleven persons, to be elected by the members of the Exchange, but only nine were ever elected, and one of the nine had resigned, prior to the adoption of the resolution to which reference is hereinafter made. The fourth rule provided that the executive committee should supervise the Exchange, and that it was "to be assisted when necessary" by a committee of railroad officers, to represent and to be appointed by certain specified railroad companies. The seventh rule provided that the executive committee might after due hearing amend the rules. The rules contained nothing as to the number necessary to constitute a quorum, and nothing as to voting by proxy.

[2] An association being solely a creature of convention between the members, no check exists upon its right to transact its business in such manner as it may agree upon, so long as it does not act illegally or contrary to public policy, and the regularity of the proceedings is presumed, in the absence of a showing to the contrary. Coombs v.

Harford, 99 Me. 426, 59 Atl. 529. The chairman and secretary of the executive committee have certified that the resolution, admitting that the Exchange was insolvent and consenting that it be adjudicated a bankrupt, was adopted "by a vote of five members thereof, constituting a quorum." The board never consisted of more than nine members, and as one of these had sent in his written resignation prior to the adoption of the resolution, the board was composed of eight members at the time the above action was taken.

[3] It is said that the resignation of the member who resigned had not been accepted; but it does not appear that after his resignation he ever acted as a member, and the law does not make a formal acceptance of such a resignation essential to its effectiveness. We declared such to be the law, even where the president of a corporation resigned. In re Guanacevi Tunnel Co., 201 Fed. 316, 319, 119 C. C. A. 554. And in an earlier case we held that the resignation of the secretary and treasurer of a corporation took effect upon its delivery to the president and without any acceptance by the board of directors. International Bank of St. Louis v. Faber, 86 Fed. 443, 30 C. C. A. 178. And see Briggs v. Spaulding, 141 U. S. 132, 154, 11 Sup. Ct. 924, 35 L. Ed. 662.

[4] The certificate was accordingly correct in saying that a quorum was present, if true that five of the eight members were present. But it is said that two of the five necessary to constitute the quorum were not present in person, but were represented by proxies. It is true that no rule seems to have been adopted by the executive committee authorizing the use of proxies. It appears, however, that it was the usual practice for a member of the executive committee who could not attend its meetings to send some member of his firm or corporation to attend as his proxy. The record contains the affidavit of the chairman of the executive committee. He states therein that he has acted in that capacity since April 24, 1919; also that since that date he has attended numerous meetings of that committee and is thoroughly familiar with the rules and regulations of the Exchange and the practice of the committee in the transaction of its business and the conduct of its meetings; also that since April 24, 1919, it had been the usual practice, if a member of the executive committee was absent, for some member of his firm or corporation to attend the meeting as his representative or proxy.

There is, of course, some analogy between the executive committee of this Exchange and a board of trustees of a corporation. But the directors of a corporation represent the whole body of stockholders, and no director represents a particular shareholder. The members of the executive committee of this Exchange, however, did not represent the entire membership of the Exchange, but particular districts, or corporations or firms in particular districts. One of the members of the executive committee who was absent represented the Maryland, Somerset & Northern West Virginia coal operators, of which he was the president, and he gave his proxy to a representative of the same corporation, who had represented him at previous meetings of the committee. The other absent member represented the United States Rail-

road Administration, and he gave his proxy to his assistant in the Railroad Administration.

All this is significant, but is not in itself of controlling importance; but in view of the nature of this executive committee and of this unincorporated company, and that this method of voting by proxy had been "the usual practice" since April 24, 1919, we hold that it did not invalidate the business done at the meeting referred to that two of the quorum were present as proxies. And in this connection we are not overlooking the fact that the executive committee was expressly authorized to establish the rules governing the Exchange, and that no restriction was placed upon its power so to do. Its authority in that respect was plenary. In allowing this practice of voting by proxy to become the "usual" practice, its action in that regard is to be regarded as equivalent to the adoption of a formal rule on that subject. It is not necessary to add that, even in the law of corporations, a continued usage permitting voting by proxy establishes the legality of that method of voting as much as an express by-law. Walker v. Johnson, 17 App. (D. C.) 144; Rossing v. State Bank, 181 Iowa, 1013, 165 N. W. 254; Miller v. Eschbach, 43 Md. 1; Holly Springs Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; 23 Am. & Engl. Encyc. of Law, 296.

The court below was in error in holding that the resolution was not validly adopted; but this error worked no harm, inasmuch as the court reached the conclusion that, while the resolution was invalidly adopted, it was validated subsequently by acquiescence after knowledge brought home to the other members of the committee. That there was such acquiescence with knowledge, and that this would constitute ratification, if ratification were needed, is clear, and it is unnecessary to enlarge upon that subject.

The conclusion which we have reached makes it unnecessary to consider the objections raised to the answers which were interposed by the Archibald McNeil & Sons Company, Inc., and by the protective committee. The conclusion that the Exchange was properly adjudged a bankrupt was arrived at both in the court below and in this court, quite regardless of those answers.

[5] The Delaware Steamship & Commerce Corporation on July 20, 1921, moved for leave to intervene and to be permitted to file an answer opposing an adjudication. It alleged that it was a credit member of the Exchange, and entitled to $37,239.90 from the debit members thereof. Section 18, subdivision "b" of the Bankruptcy Act (Comp. St. § 9602) provides that the bankrupt or a creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow. The absolute right of a creditor to answer ceases upon the expiration of the five-day period, and thereafter the right to appear and plead is only permissible within the discretion of the District Court. Collier on Bankruptcy (12th Ed.) 470, 471; In re D. F. Herlehy Co. (D. C.) 247 Fed. 369.

The petition in bankruptcy against the Exchange was filed May 12, 1921, and the return day was May 19, 1921. The above motion to intervene was thus made two months after the return day. In its attempt to excuse this delay in applying for leave to intervene, it alleged

that the corporation was not then and had not for some time been actively engaged in business, and that its attorneys and officers had been engaged continuously for months past in investigating, adjusting, and litigating matters of vital importance to the corporation, which matters were of such pressing moment as to require immediate attention.

The motion to intervene was not only made, as has been pointed out, two months after the return day, but it was made almost two weeks after the District Judge had rendered his opinion of July 7, holding that the Exchange was subject to the provisions of the Bankruptcy Act. In the exercise of his discretion the District Court denied the motion to be permitted to intervene, and in doing so said:

"I use my discretion against the applicants, because they allowed a default of nearly two months to run against them without any excuse whatever. I must conclude from their affidavit that they knew of the proceedings all the time and chose to take no action. It is certainly not necessary to do more than allude to the excuse of other pressing business, unless all judicial proceedings are to be delayed at the convenience of the parties or their attorneys. Moreover, there seems good reason not to open a default in this case. If the tangled affairs of this society can be unraveled in bankruptcy and any preference set aside, it is surely in the interests of justice that it should be done."

As the motion, at the time it was made, was one addressed to the discretion of the District Court, in the absence of a manifest abuse of its exercise of that discretion, it is not reviewable in this court; and a review of the record fails to persuade us that the court below was guilty of any abuse of its discretion in refusing permission to intervene and file an answer. It is the policy of the Bankruptcy Act that creditors should proceed promptly, and no sufficient excuse is given to justify such a delay as exists in this case.

The order of August 4, 1921, denying the motion of the Delaware Steamship & Commerce Corporation for leave to intervene and file its answer is affirmed, and its petitions to revise are dismissed.

The appeals of the protective committee of shippers, and that of Archibald McNeil & Sons Company, Inc., are dismissed, as is the petition of the New England Coal & Coke Company, the Seaboard By-Product Coke Company, and Dexter & Carpenter, Inc., to revise the order of August 4, 1921, denying their motion to strike out the answer of the said protective committee of shippers and the amended answer of the Archibald McNeil & Sons Company, Inc.

The order and decree of July 27, 1921, adjudicating the Tidewater Coal Exchange a bankrupt, is affirmed.

In re TIDEWATER COAL EXCHANGE.

DAVIS, Director General of Railroads, v. COYLE.

(Circuit Court of Appeals, Second Circuit. February 20, 1922.)

No. 195.

1. **Railroads ⟸5½, New, vol. 6A Key-No. Series—Director General, in claiming money arising out of operation, acts in governmental capacity.**
   The Director General of Railroads, in claiming on behalf of the United States money arising out of the operation of the railroads, is seeking to recover public money, and is acting in a governmental capacity.

2. **Bankruptcy ⟸349—Claim for freight charges due Railroad Administration entitled to priority.**
   Unpaid freight charges for shipments by railroad during federal control are property of the United States, and a claim therefor is entitled to priority, under Bankruptcy Act, § 64b (5), being Comp. St. § 9648, and Rev. St. § 3466 (Comp. St. § 6372).

3. **Statutes ⟸233—General language of statute does not apply to United States, where it would be deprived of existing rights.**
   The rule that the United States as a sovereign is not bound by the general language of a statute unless named therein ordinarily applies where the statute tends to restrain or diminish existing powers, rights, or interests of the sovereign.

4. **Bankruptcy ⟸123—United States, as preferred creditor, not entitled to vote for trustee.**
   Bankruptcy Act, § 56b (Comp. St. § 9640), providing that "creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings," merely limits a right given solely by the statute, and does not deprive a creditor of any right, and under such provision the United States, as a creditor having priority, *held* not entitled to vote at a meeting for appointment of trustee.

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

In the matter of the Tidewater Coal Exchange, bankrupt. As to an order of the District Court dismissing the petition of James C. Davis, Director General of Railroads, to review an order of the referee approving appointment of William R. Coyle, as trustee, said petitioner appeals and petitions to revise. Affirmed.

See, also, 274 Fed. 1008, 1011; 280 Fed. 638.

Harry M. Daugherty, Atty. Gen., and William A. Riter, Asst. Atty. Gen. (William Hayward, U. S. Dist. Atty., of New York City, John F. Finerty, of St. Paul, Minn., and Evan Shelby and Claude A. Thompson, both of New York City, of counsel), for appellant.

James F. Curtis and Root, Clark, Buckner & Howland, all of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This cause comes here on petition to revise an order entered in the District Court on November 17, 1921, dismissing the petition of the Director General to review the order of the

referee approving the appointment of William R. Coyle as trustee of the bankrupt and refusing to set aside the order approving Mr. Coyle's appointment.

The order adjudicating the Exchange a bankrupt having been entered on July 27, 1921, the matter was referred to the referee in bankruptcy, who called a meeting of creditors on August 25, 1921. At that meeting of the creditors the Director General of Railroads attempted to vote for one Frank C. Wright as trustee, on the ground that as Director General of Railroads he represented the United States and had filed a proof of debt in favor of the United States in the sum of $971,611.70, and represented a debt (other than taxes) due the United States, through the Director General of Railroads, arising out of the operation of various railroads of the United States during the period of federal control.

Two other creditors, who had filed proofs of debt in an amount aggregating $10,746.76, voted for Wright as trustee. But 29 other creditors, who had filed proofs of debt in an amount aggregating $927,452.20, but who had not deducted $139,866.84 shown on the books of the Exchange and on the bankrupt's schedules as due from them, voted for William R. Coyle. Thereupon the referee, over the objection of the Director General, approved of the appointment of Coyle as trustee by an order dated August 25, 1921. Thereafter, on September 22, 1921, the Director General, proceeding in accordance with the provisions of the Bankruptcy Act (Comp. St. §§ 9585–9656) and General Order No. XXVII (89 Fed. xi, 32 C. C. A. xxvii), filed a petition to review the order of the referee approving the appointment of Coyle.

The referee, however, refused to permit the United States, through the Director General, to vote, basing his refusal on the ground that the United States, through the Director General, was a creditor holding a claim which had priority, and as such was not entitled to vote by virtue of the provisions of section 56b of the Bankruptcy Act (Comp. St. § 9640), which reads as follows:

"Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings."

The District Judge after a hearing dismissed the petition, and entered an order to that effect on November 17, 1921. And this is alleged to be error.

That the Director General represented the United States in matters growing out of and connected with the operation of the railroads during the period of federal control was decided by this court in Globe & Rutgers Fire Insurance Co. v. Hines, 273 Fed. 774. He was during the period involved a part of the government of the United States, and as such entitled to the rights, privileges, and immunities inherent in the sovereignty. Missouri Pacific Railroad Co. v. Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087, decided by the Supreme Court June 1, 1921. Moreover, at the argument it was conceded by all parties concerned in the present litigation that the Director General represents the United States respecting the matters herein involved, and may assert whatever rights and privileges the United States is entitled to exercise respecting the debt due from the Exchange to it.

[1] The United States, in operating the railroads during the period of federal control, was engaged in the performance of a governmental function, and was not carrying on a merely private commercial enterprise. See In re Western Implement Co. (D. C.) 166 Fed. 576. The Director General, in claiming on behalf of the United States the moneys arising out of the operation of the railroads, is seeking to recover public money, and he is acting in a governmental capacity, as much so as though the money to be recovered were taxes. See Chesapeake & Delaware Canal Co. v. United States, 250 U. S. 123, 126, 127, 39 Sup. Ct. 407, 63 L. Ed. 889.

[2] The Circuit Court of Appeals for the Seventh Circuit, in In re E. H. Hibner Oil Co., 264 Fed. 667, 14 A. L. R. 629, declared that unpaid freight charges for shipments by railroad during the period of federal control are the property of the United States, and the claim therefor is entitled to priority in bankruptcy under section 64b of the Bankruptcy Act (Comp. St. § 9648) and section 3466 of the Revised Statutes (Comp. St. § 6372). The Bankruptcy Acts of 1800 (Act April 4, 1800, c. 19, § 62 [2 Stat. 36]), of 1841 (Act Aug. 19, 1841 c. 9, § 5 [5 Stat. 444]), and of 1867 (Act March 2, 1867, c. 176, § 28 [14 Stat. 530]) expressly recognized the priority of debts due the United States, thus preserving in all its essential features the provision in the act of 1797, reproduced in section 3466 of the Revised Statutes, relating to priorities. The Bankruptcy Act of 1898 contains no similar express provision; and if, under that act, priority is given, it must be because of clause 5, subd. (b), § 64 (Comp. St. § 9648), which reads as follows:

"(5) Debts owing to any person who by the laws of the states or the United States is entitled to priority."

We have no doubt that the United States it to be regarded as a person within the meaning of the clause cited, and can assert its priority as given to it under section 3466 of the Revised Statutes (Comp. St. § 6372), which is reproduced in the margin.[1] The priority secured to the United States is priority over all creditors. The statutory provision referred to is simply declaratory of the common-law rule which entitles a sovereign to priority over other creditors of an insolvent. United States v. National Surety Co., 254 U. S. 73, 75, 41 Sup. Ct. 29, 65 L. Ed. 143.

[3, 4] It is necessary to determine whether the language of section 56b above cited, and which declares that creditors holding claims which have priority shall not be entitled to vote at creditors' meetings applies to the United States; the government not being expressly mentioned in the section. In the interpretation of statutes the principle is old and

[1] Sec. 3466. 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.

well established that the crown is not bound by a statute unless named in it. It seems to rest upon the theory that the law is prima facie presumed to be made for subjects only. Willion v. Berkley, Plowd. 236. In Maxwell on the Interpretation of Statutes (5th Ed.) 220, that writer declares that the crown is not reached, except by express words or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. "Where," he says, "the language of the statute in general, and in its wide and natural sense would divest or take away any prerogative or right from the crown, it is construed so as to exclude that effect. When the king has any prerogative estate, right, title, or interest, he shall not be barred of them by the general words of an Act of Parliament." See Bacon's Abr. "Prerogative" (E) 5 (c); Co. Litt. 43b; Chit. Prerogative, 382; Ascough's Case, Cro. Cas. 526; Magdalen College Case, 11 Rep. 74b.

In another way it is expressed by saying that in the construction of general words or dubious provisions there is a presumption against any intention to surrender public rights, or to affect the government. Lewis' Sutherland, Statutory Construction (2d Ed.) vol. 2, p. 931; Attorney General v. Donaldson, 10 M. & W. 117; Huggins v. Bambridge, Willes, 241; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec. 236; State v. Kinne, 41 N. H. 238.

Mr. Justice Story, in 1827, in United States v. Greene, 4 Mason, 427, 26 Fed. Cas. 33, No. 15,258, had before him the right of the United States to sue in the federal courts on a note as the indorsee, the maker and payee being citizens of the same state. The question arose under the Judiciary Act of 1789, c. 20, 1 Stat. 78. Section 11 of that act provided that no civil suit should be brought in either a District or Circuit Court to recover on a promissory note or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court if no assignment had been made, except in cases of foreign bills of exchange. If that provision applied to the United States, the suit could not be brought. It was held that the language of section 11 could not be construed as applicable to the United States as the government was not expressly named; and section 9 of the Act gave the District Courts jurisdiction of all suits at common law where the United States sues and the matter in controversy amounted, exclusive of costs, to the sum or value of $100.

In United States v. Hoar, 2 Mason, 311, 26 Fed. Cas. 329, No. 15,373, Mr. Justice Story, in 1821, declared that, where the government is not expressly or by necessary implication included, it ought to be clear, from the nature of the mischiefs to be redressed or the language used, that the government itself was in contemplation of the Legislature, before a court of law would be authorized to put such an interpretation upon any statute. He added:

"In general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary, force to the government itself."

And see United States v. Hewes, Crabbe, 307, 26 Fed. Cas. 297, No. 15,359.

In Dollar Savings Bank v. United States, 19 Wall. 227, 239, 22 L. Ed. 80, Mr. Justice Strong, speaking for the court, said:

"It is a familiar principle that the king is not bound by any act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests.[2] He may even take the benefit of any particular act, though not named.[3] The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts. It may be considered as settled that so much of the royal prerogatives as belonged to the king in his capacity of parens patriæ, or universal trustee, enters as much into our political status as it does into the principle of the British Constitution.[4]"

In United States v. Herron, 20 Wall. 251, 255, 22 L. Ed. 275, that court, again referring to the subject, said, speaking through Mr. Justice Clifford:

"Acts of Parliament, says Chitty, which would divest or abridge the king of his prerogatives, his interest, or his remedies in the slightest degree, do not in general extend to or bind the king, unless there be express words to that effect. Therefore, says the same learned author, the statutes of limitation, bankruptcy, insolvency, set-off, etc., are irrelevant in the case of the king, nor does the statute of frauds relate to him, which last proposition is doubted by high authority. Exceptions exist to that rule undoubtedly, as where the statute is passed for the general advancement of learning, morality, and justice, or to prevent fraud, injury, and wrong, or where an act of Parliament gives a new estate or right to the king, as in that case it will bind him as to the manner of enjoying or using the estate or right as well as the subject."

And in a subsequent portion of the opinion, again recurring to the subject (20 Wall. 262, 22 L. Ed. 275), Mr. Justice Clifford said:

"Greater unanimity of decision in the courts or of views among text-writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts, federal or state, nor among the text-writers of this country."

In Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 155, 32 Sup. Ct. 457, 56 L. Ed. 706, the rule is again stated, the foregoing cases are cited, and it is declared that "the proposition is established."

In applying the principle above discussed to the interpretation of section 56b, Bankruptcy Act (Comp. St. § 9640), it is to be observed that the right of the creditor to vote for the trustee is not a right which was possessed prior to and independent of the enactment of the statute involved. The right to vote at the creditors' meeting is a right created solely by the statute, and it exists only within the limits fixed by the statute. In providing that secured or priority creditors shall

[2] Magdalen College Case, 11 Reports, 74; King v. Allen, 15 East, 333.

[3] 7 Reports, 32; Potter's Dwarris on Statutes, 151, 152.

[4] Commonwealth v. Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33; People v. Rossiter, 4 Cow. (N. Y.) 143; United States v. Davis, 3 McLean, 483, Fed. Cas. No. 14,929; Same v. Williams, 5 McLean, 133, Fed. Cas. No. 16,721; Commonwealth v. Johnson, 6 Pa. 136; United States v. Greene, 4 Mason, 427, Fed. Cas. No. 15,258; Same v. Hoar, 2 Mason, 311, Fed. Cas. No. 15,373; Same v. Hewes, Crabbe, 307, Fed. Cas. No. 15,359.

not be entitled to vote at creditors' meetings, no creditor is deprived of any right with which he had been previously invested. To hold, as the court below did, that the United States, because it was a priority creditor, could not vote, did not deprive the United States of any existing prerogative or interest which it ever possessed. The rule that the United States as a sovereign is not bound by the general language of a statute, unless named therein, ordinarily applies where a statute tends to restrain or diminish existing powers, rights, or interests of the sovereign.

The rule which the Director General invokes is inapplicable to the facts of this case. To make it applicable it would be necessary, first, to show that the United States as a priority creditor possesses a right to vote, of which right it has been deprived by a statute which cannot be applied to the government, because it is not named. There is no right in any creditor to vote, except as that right is conferred by section 56, and that section expressly withholds the right from all priority or secured creditors, and gives it simply to all other creditors whose claims have been allowed and who are present. The claim of the Director General had not been allowed. For the reasons above stated we are compelled to hold that no error was committed in denying the right of the United States to vote for the trustee.

We may, in conclusion, point out that this court in the Matter of Anderson, 279 Fed. 525, decided at this term, while recognizing the general rule announced in Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513, held the United States bound by the terms of the Bankruptcy Act of 1898.

The order of November 17, 1921, dismissing the petition of James C. Davis, Director General of Railroads, is affirmed.

LUCADAMO et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 14, 1922.)

No. 165.

1. **Conspiracy ⊂=37—Not merged in completed offense.**
   The crime of conspiracy to commit an offense is not merged in the completed offense.
2. **Conspiracy ⊂=40—Mere acquiescence in unlawful act not sufficient to constitute.**
   The mere knowledge, acquiescence, or approval of an unlawful act, without co-operation or agreement to co-operate, is not sufficient to constitute one a party to a conspiracy to commit the act.
3. **Conspiracy ⊂=47—Conviction held sustained by evidence.**
   A conviction of conspiracy to commit an offense *held* sustained by evidence showing that each defendant intentionally participated in the attempt to commit the offense.
4. **Criminal law ⊂=37—Purchase of drugs by government agents held not entrapment.**
   The fact that government agents, who suspected defendants of dealing in prohibited drugs, went to them as purchasers, and after negotiations

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

purchased morphine from them, *held* not an entrapment, which invalidated defendants' conviction.

5. Criminal law ⊜1186(4)—Error in instruction held harmless.
Error in refusal of a requested instruction *held* not ground for reversal, under Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), prohibiting reversal for technical errors, where the guilt of defendants was clearly established.

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

Criminal prosecution by the United States against Vincent Lucadamo and others. Judgment of conviction, and defendants bring error. Affirmed.

Charles J. Buchner, of Brooklyn, N. Y., for plaintiffs in error Lucadamo and Damato.

Nash & Gottesman, of Brooklyn, N. Y. (Howard P. Nash and Sidney M. Gottesman, both of Brooklyn, N. Y., of counsel), for plaintiff in error D'Ambrosia.

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.

MANTON, Circuit Judge. By this indictment, the defendants below were charged with violation of section 37 of the United States Criminal Code (Comp. St. § 10201). In substance, the charge is that they unlawfully, willfully, and knowingly conspired and agreed together and with other persons to commit an offense against the United States; that is, to violate the Act of December 17, 1914, as amended by sections 1006–1008 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, §§ 6287g, 6287l, 6287r), in that they unlawfully sold and caused to be sold to one Milton Moffet 15 ounces of morphine, a derivative of opium. Four overt acts are charged in furtherance of the conspiracy: First, that the defendant Damato introduced Moffet, Spellman, and Meisenzahl to John Lavelle, for the purpose of bringing about a sale to Moffet; second, that John Lavelle introduced Spellman and Meisenzahl to Lucadamo and D'Ambrosia for the purpose of bringing about the sale; third, that the defendants below, Damato and Lucadamo, delivered the morphine to Moffet; fourth, that Lucadamo accepted from Moffet $300 for the morphine obtained by Moffet from Lucadamo and Damato. While writs of error were sued out by each of the defendants below, upon this appeal John and Gaetano Lavelle are not represented by counsel. Moffet and Meisenzahl were policemen, and Spellman was a drug addict. They were all engaged in detecting traffic of morphine and other drugs.

The defendants below urge here that the court below erred in denying their respective motions to dismiss the indictment or direct a verdict of acquittal, and this upon the ground that the evidence was insufficient to submit to the jury on the question of conspiracy to vio-

late the federal Criminal Code. It will be necessary, therefore, to examine briefly the testimony adduced on behalf of the government.

Moffet testified that he used Spellman as an investigator, and with his fellow policeman, Meisenzahl, went to Hudson avenue, near Johnson street, in the borough of Brooklyn, city of New York, and there met Damato through the introduction of Spellman. Damato invited Moffet to go with him to a poolroom at No. 57 Flatbush Avenue Extension, where they were introduced to John Lavelle. Damato explained to Lavelle that Moffet, Meisenzahl, and Spellman were "going to buy the stuff." Lavelle stated that he had given "the stuff to another fellow to peddle in Williamsburg," but that he thought he could get hold of the fellow, and told them to wait in the poolroom until he and Damato returned. About an hour later, Lavelle came back alone and said everything was all right, and that they would hear from them in about 10 minutes. Lavelle left and came back, and said that Damato was on the telephone, and had asked for Dinny (meaning Spellman), and wanted Moffet to come right down. Moffet waited at the poolroom, but John Lavelle, Meisenzahl, and Spellman left the room. Then Gaetano Lavelle went over to Moffet and said, "We got some good stuff," and "We handle good stuff." He took out of his right-hand shirt pocket a sample of white powder, which he showed to Moffet, and took Moffet to his own room upstairs. Moffet returned to the poolroom and remained there until Meisenzahl, Spellman, John Lavelle, and Damato returned. Moffet then said he didn't see "why they couldn't make the sale there," as they had promised, and they replied that "the fellow didn't want to bring it there." Moffet agreed to go with them. John Lavelle told Gaetano Lavelle to "mind the poolroom." John Lavelle and Damato left the poolroom with Moffet, Meisenzahl, and Spellman. They went to the corner of Concord and Hudson avenues, where they met Lucadamo and D'Ambrosia. Lucadamo said he could not bring them all up to his sister's house, but that he would take only Spellman and Moffet. Later he agreed to let Moffet and Spellman and Meisenzahl come up to the house, and he requested D'Ambrosia and Lavelle to wait on the corner. However, D'Ambrosia followed up to the door, where Lucadamo again told him to remain downstairs. Lucadamo went into a room and brought out a cigar box filled with white powder. A dispute about the price ensued. Moffet stated that he understood from Spellman the price to be $15 an ounce. Lucadamo said Spellman told him $20 an ounce. Moffet said the price would not make any difference, but that he had brought $300, and he wanted Lucadamo to save all over the 15 ounces, as he would be back for it on the next day. The powder was weighed, and 15 ounces were poured out in the box that Spellman had. The box was wrapped in a newspaper and Moffet handed Lucadamo $300, which the latter counted. In the meantime Spellman left with the powder at Moffet's direction. After Lucadamo had counted the money, Moffet said he had given him $10 too much. Then Lucadamo took it from him to count it again, and, while counting it, three police officers came into the room and took the money out of Lucadamo's hands, and, after comparing the marks on the money with the slip in the hand of one of the officers, Dama-

to and Lucadamo were arrested. While they were in the room, D'Ambrosia came in, and he was arrested. Later John Lavelle was arrested.

Spellman, who said he was a reformed drug addict, corroborated this testimony in substance. He said that, when the three were introduced to Lucadamo and D'Ambrosia, D'Ambrosia said, "Who has got the money?" Meisenzahl testified in corroboration, and further stated that, when Spellman and he left the poolroom and left Moffet behind, Lavelle went to the telephone and returned, saying that Damato wanted to see Spellman. Lavelle took them to another poolroom on Navy street and Park avenue; that Lavelle went inside, later coming back, and said that Damato would be right out, whereupon D'Ambrosia and Lucadamo came along, and Spellman and Meisenzahl were introduced to them. Lucadamo asked, Who had the money? and Spellman said Moffet had it. Lucadamo said, "Let us return to the poolroom and get the officer with the money," but later said he did not use the word "officer," because he did not know Moffet was an officer.

From the above, it is apparent that all of the defendants named were engaged in a conspiracy to violate the sections of the Revenue Act referred to. Damato and Lucadamo were the first to appear on the scene and introduce the two policemen, together with Spellman, to John Lavelle, with the statement that they were the men who were the buyers. After this, they proceeded to aid in and facilitate the sale of the prohibited drug. It was Damato who returned, after leaving with the officers to go to the place where the drug was to be obtained, and reported that it was necessary to take the policeman to the place where they met Lucadamo and D'Ambrosia. Lucadamo and D'Ambrosia went upstairs to Lucadamo's sister's rooms, and the bargain for the sale of the morphine was there effected and the money was passed. D'Ambrosia, after having been formally introduced, became a member of the party of sellers of the morphine, and when at the corner of Concord street and Hudson avenue asked, "Who has got the money?" He was insistent upon going upstairs with his co-conspirators, where the morphine was to be obtained, and remained downstairs only after Damato told him to do so, and then he and Lavelle waited on the corner. He waited around for a period of about an hour, during which time he was watched by other policemen, who were working with Moffet. He later walked into the place where the sale of morphine had taken place, and where the arrests of Damato and Lucadamo were made. The evidence is clear that the two Lavelles joined in the conspiracy and took an important part in it.

[1] A conspiracy to commit a crime is a different offense than the crime that is the object of the conspiracy, and it is punishable, though the attempted crime be accomplished. If the substantive offense of violation of the statute of selling were charged here, the evidence was sufficient to warrant the submission to the jury, and the fact that conspiracy to commit the crime is charged, instead of the intended crime, requires only that the conspiracy and some one overt act in furtherance of the conspiracy be proven. The conspiracy is not merged in the completed offense. The elements of the crime are: First, an object to be accomplished, which must be, in this instance, the

commission of an offense against the United States; second, an agreement or understanding between two or more persons, whereby they become committed to co-operate for the accomplishment of the object by means embodied in the scheme or by any effectual means, and a plan or scheme embodying means to accomplish the object; third, an overt act by one or more of the conspirators to effect the object of the conspiracy. It was sufficient to submit the evidence to the jury, since it appeared that the jury might find that the minds of the parties met understandingly, so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged. A defendant can be guilty of committing an offense, by consenting thereto, only where his consent is of that affirmative and express character which amounts to counseling, aiding, and abetting in the commission of the offense. Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604.

[2, 3] Unless the scheme, or some proposed scheme, is in fact consented to or concurred in by the parties in some manner, so that their minds met for the accomplishment of the proposed unlawful act, there is no conspiracy. United States v. Cole (D. C.) 153 Fed. 803. So the mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to co-operate, is not enough to constitute a party to a conspiracy. Patterson v. United States, 222 Fed. 599, 138 C. C. A. 123. To constitute a conspiracy, the evidence must show an intentional participation in the attempt to commit the offense. Marrash v. United States, 168 Fed. 225, 93 C. C. A. 511. When, as here, the evidence shows that the several defendants acted illegally with the same end in view, to wit, selling the morphine, and each performed some acts pursuant to the mutual understanding and agreement, the crime is complete. Mere presence on the occasion of the conspiracy is not sufficient to make one guilty. The person charged must incite, procure, or encourage the act, and if a person joins a conspiracy at any time after it is formed, he becomes a conspirator. So, if any of the defendants below joined the conspiracy any time after it was formed, he became a conspirator, and the acts of the others became his by adoption. Of course, one of the defendants below, not a party to the conspiracy, could not be convicted on an overt act.

It was not error to refuse to strike out the conversation of the witness Moffet with Lavelle at the poolroom in the absence of Damato. It is plain that the evidence warranted the claim of the government that at this time a conspiracy had originated, and all of the defendants below had become parties to it, and it was not terminated at the time of this conversation.

[4] It is urged on behalf of the defendants below that there was an entrapment by the agents of the government. It is unlawful for a public official or any person to induce a man to commit a crime in order to obtain a conviction. The courts have refused to lend aid or encouragement to officers who may, even under a mistaken sense of duty, encourage or assist parties to commit crime, in order that they may arrest and then punish them for so doing. So, where a scheme does not originate with a defendant, and he is lured into the conspiracy by an officer of the law, he cannot be held for the offense, for in the con-

templation of law no crime has been committed. Woo Wai v. United States, 223 Fed. 412, 137 C. C. A. 604; Butts v. United States (C. C. A.) 273 Fed. 35; United States v. Lynch (D. C.) 256 Fed. 983. But the evidence here indicates that the government agents suspected and knew that the defendants below were trafficking in drugs, and the government agents bargained with them for the sale of such drugs. This the defendants below were perfectly willing to do for apparent profit. They had the drugs, or knew where to get them, and wanted to sell them. No representations were made to them of any kind. They treated the officers of the law as if they were but ordinary purchasers. Under these circumstances, they cannot be heard to complain of entrapment, and escape from their unlawful intent to violate the law. Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; Goode v. United States, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297.

[5] The court was asked to charge the jury that the mere presence of any of the defendants below in or near the scene of the alleged transaction was simply a circumstance, from which they cannot infer that the crime of conspiracy was committed. In denying this request, the court charged:

"Well, I will not charge that they cannot infer it, because the circumstance is to be taken into account, and be given such weight as they find that as evidence in the case it should be given."

Abstractly, the defendants below were entitled to have charged their request. The response of the court to this request, in the language employed, did not correctly state the rule of law. But the case is not close, for the guilt of the defendants below is clear. The error is one which does not require reversal, and where harmless error is the subject of an exception, as is quite clearly shown from the record, the commission of an error is not cause for reversal. Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392. It is provided by section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, § 1246) that, on the hearing of an appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment after examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. Invoking this rule, we think that there was no error which requires our reversal of this judgment.

Judgment affirmed.

BALTIMORE TALKING BOARD CO., Inc., v. MILES, Internal Revenue Collector.

(Circuit Court of Appeals, Fourth Circuit. February 9, 1922.)

No. 1908.

1. Internal revenue ⟸11—Ouija boards taxable as "games."

Ouija boards *held* "games," within the meaning of Revenue Act 1918 (Act Feb. 24, 1919, § 900 [Comp. St. Ann. Supp. 1919, § 6309¼/5a5]), imposing a tax of "games and parts of games," in view of the facts that they are sold generally through retail stores, are used generally as means of

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

amusement, that the Patent Office has granted a patent for the board as a game, and that they have been so classified by the internal revenue department.

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

2. Evidence ⟸83(1)—Construction of statute by administrative officers presumed correct.

The findings and practice of the administrative officers of the internal revenue department are presumed to be based on fair conclusions as the result of the investigation required of them by Rev. St. §§ 3165, 3172, as amended by Revenue Act 1918, § 1317 (Comp. St. Ann. Supp. 1919, §§ 5885, 5S95).

Knapp, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by the Baltimore Talking Board Company, Incorporated, against Joshua W. Miles, Collector of Internal Revenue. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 273 Fed. 531.

Certiorari denied, 257 U. S. ——, 42 Sup. Ct. 590, 66 L. Ed. ——.

Allan H. Fisher and Washington Bowie, Jr., both of Baltimore, Md. (Fisher & Fisher, of Baltimore, Md., on the brief), for plaintiff in error.

George W. Lindsay, Asst. U. S. Atty., of Baltimore, Md. (Robert R. Carman, U. S. Atty., of Baltimore, Md., Carl A. Mapes, Solicitor of Internal Revenue, and J. G. Korner, Jr., Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., on the brief), for defendant in error.

Before KNAPP, WOODS, and WADDILL, Circuit Judges.

WOODS, Circuit Judge. Joshua W. Miles, collector of internal revenue, collected from Baltimore Talking Board Company $202.81, 10 per cent. of its gross sales of Ouija boards. In this action to recover the amount as illegally exacted the District Court, trying the case by consent without a jury, held the plaintiff's Ouija boards to be "games" within the meaning of the following federal revenue statute, and found for the defendant:

Revenue Act 1918, tit. IX, § 900, subd. 5: "Tennis rackets, nets, racket covers and presses, skates, snow-shoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly and commercially known as sporting goods, 10 per centum." Comp. St. Ann. Supp. 1919, § 6309½a5.

Evidently the word "games," used in the statute, does not mean the games themselves, but the instrumentalities used in playing them. The following testimony of the secretary of the plaintiff corporation is the only description found in the record of the Ouija boards and their purposes and uses:

"The witness further testified that the plaintiff made three different sizes; the tiniest one was called the 'wee' Ouija board. This board retails at 10 cents; its size is about 5x8 inches. The next size board retails from 50 cents to $1. It is sold to the dealer, and the dealer makes his own price, which varies between the amounts above. The size of that board is approximately 8x12 inches. The largest size Ouija board is 14x22 inches. The plaintiff made very few of that type of board. The witness further testified that the Ouija board is made entirely of cardboard and paper, and that there is nothing mysterious about it. He testified that the board contains the letters of the alphabet, the 10 numerals, and the words 'Yes' and 'No'; also that the little planchette is made of wood."

He further testified that sales were made chiefly to 5 and 10 cent stores, a few to department stores, but none to sporting goods stores; that plaintiff made no Ouija boards of wood and had no connection with William Fuld.

The defendant introduced without objection a patent granted William Fuld, June 19, 1915, for a Ouija board, which says:

"The object of the invention is to produce a game with which two or more persons can amuse themselves by asking questions and having them answered by the device used and operated by the touch of the hand, so that the answers are designated by the letters of the alphabet."

The defendant also introduced "certain envelopes, boxes, and boards," with the directions printed on the box or envelope setting out the well-known method of operating the board.

In its broadest sense a game is defined:

"A play or sport for amusement."

In its restricted and more generally applied sense it is:

"A contest for success or superiority in a trial of chance, skill, or endurance, or of any two or all three of these combined." Century Dictionary.

The definition of "Ouija" in the supplement to the New Century Dictionary is as follows:

"Formed as a trade-mark name, from F. oui, yes, and G. ja, yes. The name thus implies a thing that will answer 'yes' in any language. A good description of a well-managed planchette. A form of planchette, consisting of a board marked with the letters of the alphabet and the ten numerals and of the planchette proper, which (under the hand of the operator) moves over the board and touches certain letters and numerals and thus 'answers' questions."

The Popular Science Monthly, January, 1904, gives this description:

"The next higher grade of motor automotism, involving considerable subconscious action of the intelligence, is found in the various alphabet-using forms of amateur mediumship, such as table tipping, the 'Ouija board,' and certain other devices for making our muscles leaky and liable to escape from control."

It seems safe to say psychologists recognize the Ouija board as a real means of expression of automotism. The court knows in a general way that the Ouija board is seriously used by some persons in the belief that it affords mysterious spirit communication; by others as a means of personal observation of the control of muscular or nervous action by the subconscious or unconscious mind. But the court cannot pretend to be ignorant that it is very largely sold with the expecta-

tion that it is to be used merely as a means of social amusement or play, and is actually so used. It is true that automotism is the basis of this use, but phenomena of psychical as well as of physical nature may be the basis of amusement and games. In Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, the court says:

"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, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." Am. Net & Twine Co. v. Worthington, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821; Benziger v. United States, 192 U. S. 38, 55, 24 Sup. Ct. 189, 48 L. Ed. 331; United States v. Isham, 17 Wall. 496, 504, 21 L. Ed. 728.

But the doubt as to the meaning of the statute must be one which remains after all recognized rules for ascertaining its meaning have been tried. As to the analogous rule requiring strict construction of statutes exempting property from taxation the Supreme Court has said:

"Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute." Citizens' Bank v. Parker, 192 U. S. 73, 86, 24 Sup. Ct. 181, 186 (48 L. Ed. 346).

Doubt as to the meaning of a word is often removed by consideration of the legislative intent as shown by the entire statute. American Security Co. v. District of Columbia, 224 U. S. 491, 32 Sup. Ct. 553, 56 L. Ed. 856. Considering the comprehensive scheme of taxation which the statute was intended to provide its words should not be given a narrow meaning. The whole statute shows the intention to tax sales of all articles which were thought of and named and which could be embraced in words of general description known generally as luxuries: that is, articles not reasonably necessary to comfort according to the average standards of American life. Even when seriously used the Ouija board certainly comes within the general spirit and purpose of the statute.

On the whole the conclusion seems fair that the present chief purpose of the Ouija board is to supply amusement and diversion, and that it should be held to fall under the comprehensive term "games," within the meaning of the statute.

[2] The principle is also to be borne in mind in support of this conclusion that the findings and practice of the administrative officers of the government are presumed to be based on fair conclusions as the result of the investigation required of them by sections 3165 and 3172, Rev. St., as amended by the Revenue Statute of 1918 (Comp. St. Ann. Supp. 1919, §§ 5885, 5895). Edwards' Lessee v. Darby, 12 Wheat. 206, 212, 6 L. Ed. 603; Houghton v. Payne, 194 U. S. 88, 99, 24 Sup. Ct. 590, 48 L. Ed. 888; Komada v. United States, 215 U. S. 392, 396, 30 Sup. Ct. 136, 54 L. Ed. 249; Jacobs v. Prichard, 223 U. S. 200, 214, 32 Sup. Ct. 289, 56 L. Ed. 405.

In view of the comprehensive scope of the revenue act, the common knowledge that the Ouija board is so generally used as a means of

amusement, the fact that the Patent Office issued a patent describing it as a game, the presumption that the revenue officers correctly found it was so used after investigation, and the absence of any testimony to the contrary, we think the finding of the District Judge had adequate support in the testimony and therefore cannot be reversed by this court.

We are asked to hold on the mere appearance of a small Ouija board that it is a child's toy, and therefore comes within the exemption of the statute. The small board is like the large one in every respect except size, and there is not a particle of evidence that it is sold or used exclusively or mainly as a child's toy. The burden rested on the plaintiff to establish the differentiation by clear proof. Bank of Commerce v. Tennessee, 161 U. S. 146, 16 Sup. Ct. 456, 40 L. Ed. 645. We do not think the mere difference in size furnishes this proof.

Affirmed.

KNAPP, Circuit Judge (dissenting). I am not convinced that the Ouija board is a game, within the meaning of the Revenue Act or otherwise. The standard definition of the term, which reflects its common acceptation, namely, "A contest for success or superiority in a trial of chance, skill or endurance, or any two or all three of these combined," clearly does not include the device in question, since it has no relation to a contest of any sort. And if we take the term in its broadest sense, "A play or sport for amusement," we still have always the element or idea of winning, of success or superiority, of accomplishing a definite and desired result. In no substantial respect does the Ouija board answer this description. In short, it lacks the essential and ever-present characteristic of a game, under any accepted definition of the term.

The general clause of the section, "games and parts of games," must be construed, under the familiar doctrine of ejusdem generis, as embracing only articles of some similarity to those specifically mentioned. But the Ouija board has no real likeness in construction or use to any of the specified articles. It is unique, in a class by itself, plainly different and distinguishable from any of the enumerated games. If not strictly sui generis, it is more like the physical appliances used by those who pretend to predict the future. The crystal ball of a fortune teller or the paraphernalia of a magician could not properly be called a game. And quite obviously, as it seems to me, the other general phrase, "and all similar articles commonly and commercially known as sporting goods," cannot be held to include the Ouija board, because the proof shows that it is not commonly and commercially classed as sporting goods or sold in sporting goods houses. In other words, it is not known and designated by the trade generally as a game.

This being so, I do not see how we can escape the application of the ruling in Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, that statutes levying taxes are not to be extended by implication, and in case of doubt are to be construed most strongly in favor of the citizen. This ruling is recently repeated in United States v. Field, 255 U. S. 257, 262, 41 Sup. Ct. 256, 65 L. Ed. 617, in which, by the way, the Supreme Court reversed the administrative construction by the Treasury Department of the language there in dispute.

Conceding that this rule governs only when doubt as to the meaning of a statute remains, "after all recognized rules for ascertaining its meaning have been tried," I am not aware of any rule of construction which enables us to say that the Ouija board is a game. Surely doubt remains after every recognized test has been applied. And to hold that the Ouija board is included by implication, because "the whole statute shows the intention to tax sales of all articles thought of and named and which could be embraced in words of general description known generally as luxuries," appears to me simply to beg the question. It amounts to saying that the court will read the Ouija board into the section because the Congress might have put it there by specific mention, which would seem squarely against the doctrine of the Gould Case. Besides, in view of the peculiar character of the Ouija board and the serious use to which it is put by thousands of persons, it is by no means certain, if indeed it be probable, that the Congress would have included it by express mention if the matter had been brought to its attention. And this in turn brings us back to the Gould Case, with its explicit declaration that revenue statutes are to be construed most strongly against the government. I think the Ouija board should be held exempt.

CROMWELL et al. v. SIMONS.

(Circuit Court of Appeals, Second Circuit. January 18, 1922.)

No. 88.

1. **Wills ⟸58(2)—Proof of intention of testator not sufficient to establish contract to make bequest.**

   Evidence which tends to establish at the most nothing but an intention on the part of a testator to leave to another a specific sum of money by will is not evidence to support an allegation of an agreement to do so.

2. **Appeal and error ⟸1099(8)—Court is bound by former decision as law of case.**

   The decision of an appellate court in reversing a judgment for defendant, entered on a directed verdict, on the ground that plaintiff's evidence was sufficient to require submission of the case to the jury, becomes the law of the case, and on a subsequent review of a judgment for plaintiff, entered on a verdict based on the same evidence, the court is bound by its former decision.

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

Action at law by Annie S. Simons against William Nelson Cromwell and Louis J. Cramer, executors of the will of Mrs Frank Leslie, deceased. Judgment for plaintiff, and defendants bring error. Affirmed.

Certiorari denied, 257 U. S. ——, 42 Sup. Ct. 463, 66 L. Ed. ——.

See, also, 262 Fed. 680.

Sullivan & Cromwell, of New York City, for plaintiff in error Cromwell.

Edgar T. Brackett, of Saratoga Springs, N. Y. (Edgar T. Brackett and Philip L. Miller, both of New York City, of counsel), for plaintiff in error Cramer.

Roger Foster, of New York City (James A. Allen, of New York City, of counsel), for defendant in error.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. This is an action at law to recover the sum of $40,000 upon three separate causes of action; the action being brought against the executors of Mrs. Frank Leslie, who died a widow and childless at the age of 78 years. The first cause of action alleged a promise made by the decedent to the plaintiff in 1902 to bequeath to her by her last will and testament a legacy in the sum of $50,000, whereas she left her no more than the sum of $10,000. The consideration for this promise, it is alleged, was the performance of certain personal services as nurse and companion for Mrs. Leslie. The plaintiff, it is alleged, was the cousin german of the testatrix. The second cause of action alleged a promise, in consideration of the services aforesaid, to pay to the plaintiff the reasonable value of the said services, which was the sum of $50,000, no part of which the decedent paid, except by a legacy of $10,000. The third cause of action was a promise, in consideration of the services aforesaid, to bequeath the plaintiff a sum equal to the reasonable value thereof, which was $50,000, whereas the decedent left the plaintiff only a legacy of $10,000.

This case has been in the Supreme Court of the United States, and appears in Ex parte Simons, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. Ed. 1094. It was before the Supreme Court upon petition to that court for mandamus, or, if that should be denied, for prohibition or certiorari, to the District Court for the Southern District of New York. It appears that the District Judge, on motion of the defendants, ordered the first cause of action transferred to the equity side of the court and docketed as an equity cause, and to be stricken out of the complaint in the action at law, but only for the purpose of transfer, allowing the plaintiff to amend, etc. The ground disclosed was that by the law of New York the plaintiff could not sustain the first cause of action at law. The Supreme Court, in passing upon the application, said:

"We do not find sufficient ground for the opinion of the judge in the New York decisions. No doubt alleged contracts to make a provision by will must be approached with great caution in the matter of proof; but there is no doubt that, if proved, they are valid so far as no statute intervenes. So much seems to be assumed by the order of the judge, and is the law we believe of New York, as well as of other states and England. But, if valid, we see no reason why a contract to bequeath a certain sum should not give rise to an action for damages, if broken, as certainly as a contract to pay the same sum in the contractor's life, or at the moment of the contractor's death. * * * But we have seen nothing that suggests an arbitrary departure by the courts of New York from the common law in cases like the present. See Farmers' Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 295; De Cicco v. Schweizer, 221 N. Y. 431; Silvester's Case, Popham, 148, 2 Roll. R. 104; Fenton v. Emblers, 3 Burr. 1279; Van Houten v. Van Houten, 89 N. J. Law, 301; Krell v. Codman, 154 Mass. 454."

The Supreme Court therefore held that the order of the District Judge was wrong, in that it deprived the plaintiff of her right to a trial by jury. The mandamus was accordingly granted requiring the Dis-

trict Court to give the plaintiff her right to a trial at common law. The case accordingly came on for trial before a jury in the District Court in January, 1919, and the plaintiff introduced testimony to support her case and rested. The defendants introduced no testimony. The defendants then moved for the direction of a verdict and the dismissal of the complaint, and for a nonsuit on the ground that the plaintiff had failed to make out a cause of action, on the ground that there was no evidence that would authorize the jury to find a verdict in favor of the plaintiff on any of the three grounds of complaint; and the court directed the jury to return a verdict for the defendants upon all three causes of action. In accordance with the instructions so given the jury rendered a verdict for the defendants.

The case was then brought to this court upon writ of error, and our decision is in 262 Fed. 680. This court reversed the judgment, and held that the evidence was sufficient to require the submission of the issue to the jury. From that conclusion the present writer, who participated in the decision, dissented, as appears from the printed copies filed in the clerk's office, but did not write a separate opinion. Through a mistake when the opinion came to be officially printed, the fact of his dissent for some reason did not appear. But the ground of his dissent was that the evidence seemed insufficient to establish a legal claim for the legacy or to warrant the submission of the question to the jury. His associates, however, thought the evidence was sufficient to justify its submission to the jury upon the first cause of action. The court added that—

"No doubt it would be proper to instruct the jury as to the care and scrutiny with which they should weigh the testimony, in view of all the circumstances of the case, but in our opinion the question was for them."

The case accordingly was tried again, and in March, 1921. This time it was submitted to the jury, and a verdict was rendered in favor of the plaintiff for $40,000, with interest. Judgment was accordingly entered in favor of plaintiff for $53,898.84. To sustain this judgment it must appear in the record that there was evidence from which the jury might find that Mrs. Leslie promised or agreed to bequeath to the plaintiff $50,000 in consideration of the performance by the latter of future services for the former. There is no direct evidence that any such promise was made. If there is any evidence on that subject, it is found in the testimony of the plaintiff's husband. His testimony was that he had a talk with his wife, in which she told him of a conversation which had occurred between Mrs. Leslie and herself, and that he then went to Mrs. Leslie and told her what his wife had told him as to the conversation she had had with Mrs. Leslie, and that he told Mrs. Leslie he was very glad and wished to thank her, because she meant to leave $50,000 to his wife. The following is an excerpt from his testimony on that subject:

"I know that Mrs. Leslie gave Mrs. Simons $10,000 by will, which she received. So far as I know, at that time there was no indebtedness of Mrs. Leslie; only that promise made. As I recall the language of what Mrs. Leslie said, I said, 'Florence, my wife tells me you expect to leave her $50,000 in your will, and I wish to thank you,' and her reply was, 'Robert, I am due

Annie for what she has done for me, rendering many services in my present condition, and I intend to call on her in the future.' That is the language about as near as I can remember it."

It is to be observed that this statement is not that the plaintiff represented that Mrs. Leslie had agreed or promised her that she would leave her $50,000 in her will, but only that she expected to leave her that amount, and that there was no statement showing that there was any consideration whatever therefor in anything the wife reported. And it is said that a recognition of a contract can be spelled out or inferred from what Mrs. Leslie replied to Simons when he informed her of what his wife had said. The fact is that Mrs. Leslie's comment did not refer one way or the other as to what she expected to do. But counsel continued:

"Q. And she said—your language was, 'I am told you intend to leave $50,000 for Annie,' I think you said? A. 'I intend to leave in my will $50,000.'
"Q. What? A. 'I intend to leave in my will $50,000 to her;' yes."

The witness had not so testified in this case until counsel put the words into his mouth. Then he said that Mrs. Leslie told him that she intended to leave $50,000 for Annie in her will. His subsequent examination, however, shows that he was putting his own construction or interpretation on her words throughout. When the case was here before, this court quoted the testimony of Simons as to what he said to Mrs. Leslie and what she replied to him:

"I said, 'Cousin Florence, my wife tells me that you are going to leave her $50,000 in your will, and I wish to thank you for it.' Her reply was, 'Robert, I am due Annie that money for what she has done in many services rendered to me in my present condition, and I intend to call on her in the future.'"

The court said:

"This testimony, if believed, was evidence that the decedent had admitted a conversation with the plaintiff as to her services rendered and to be rendered, and as to the compensation to be paid for them in the decedent's will. A jury might find it to be, not language of expectation or intention, but of agreement. The details necessary to establish a contract appear specifically; the consideration, the amount, and manner of compensation are all stated. The decedent, perhaps in not technical language, but substantially, stated to the witness the consideration, viz. that there was 'due' by her to Annie the sum of $50,000 for services rendered in the past and for which she was going to call in the future. These services had been and were subsequently rendered by the plaintiff."

It is said that Mrs. Leslie's reply to the statement made to her might be regarded by the jury as an admission of the fact that she had promised Mrs. Simons to leave her $50,000 by her will. In the law of evidence an admission is a voluntary acknowledgement by a party of the existence of the truth of certain facts. But an admission arising from a failure to deny an assertion by a third person cannot be broader than the assertion made. If in this case Simons had said that his wife had told him that Mrs. Leslie had promised or agreed to leave her $50,000 by her will, there might be force in the suggestion that the jury might infer the fact of the promise. But that was not this case.

If the testimony of the husband at the second trial neither added anything to or took anything from what he testified to at the first trial, we should be, of course, concluded by the decision of this court when the case was here before, and should be obliged to hold that the question was one for the jury. At the second trial the cross-examination shows that the witness was putting his own construction or interpretation on what was said. He was asked whether Mrs. Leslie said she had agreed to give anything to Mrs. Simons. The witness avoided a direct answer to that question repeatedly put to him. Finally the court took the witness in hand, and the following occurred:

"Q. Did she say she had agreed to give your wife anything in her will? A. Yes; agreed to give her $50,000.

"Q. Have you ever on either trial up to this moment sworn that she said she had agreed to give Mrs. Simons anything? A. That is the interpretation.

"Q. Answer the question, Mr. Simons. A. There is my answer here.

"Q. Up to this moment? A. That is my answer.

"Mr. Foster: I submit that is a proper answer. That is the object of the question.

"The Court: Really, Mr. Foster, you must not interrupt the cross examination so frequently. It makes it quite impossible for the cross-examiner to proceed.

"Q. Have you ever, Mr. Simons, on either trial up to this moment, testified that Mrs. Leslie said she had agreed to give anything to Mrs. Simons A. Because I never was asked before. This is the first time I was asked it.

"Q. Did you testify a few minutes ago that you had given all that was said on the conversation? A. I interpreted that as 'agreed.'

"The Court: You see the difficulty is this: He asked you whether she said she agreed.

"The Witness: Just what I said, Judge; she said that.

"The Court: I cannot hear you.

"The Witness: I say, that is what she said to me.

"The Court: Did she use the word 'agreed'? That is the point.

"The Witness: Not the exact word 'agreed,' but I interpreted it to mean that way.

"The Court: That is not what he was getting at. He wanted to know whether she said she agreed. Did she use the words, 'I agree'?

"The Witness: No; she used exactly what I put there.

"Q. And nothing else in that regard? A. That is all that she said.

"Q. And you interpret the language 'I am due Annie that' as meaning that she had agreed to give it? A. She expected to give.

"Q. That she expected to give?

"Mr. Foster: I object to the interpretation, if your honor please.

"The Court: No; in cross-examination I cannot hold it quite so close. You may go on, Senator Brackett. This is the crux of the case, and he is entitled to great latitude.

"Q. And you have interpreted what you have given here on the stand as meaning that she had either agreed or expected to give? A. Intended to give.

"Q. $50,000? A. Yes.

"Q. Or intended to give $50,000 by her will? A. Yes; by her will.

"Q. Although she did not in the conversation use either the words that she had agreed to give, or that she intended to give, or that she expected to give, either one of those three interpretations? A. Just what she said, 'I intend to remember her in my will.'

"Q. She said, 'I am due Annie that for the many services she has rendered to me, and I am going to call on her for more'? A. Yes.

"Q. Did she use the word 'agree' in that conversation? A. I have said no.

"Q. Or 'intended'? A. Just as I have said here.

"Q. Did she use the word 'intended' in the conversation? A. What do you think (os) anyway?

"Q. Did she use the word 'intended'? A. Now, I said exactly all that I can remember about it. That is exactly what she did, and I am not going to deviate from it. That is my instruction—that is my construction of it.

"Q. I am asking you, did she use the word 'intended'? A. It is not there, is it?

"Q. What? A. It is not there. She didn't use it then.

"Q. Did she use the word 'expected'? A. It is not there.

"Q. When I have used the past of the words 'expected' or 'intended,' did she use the present of either of them? A. She had promised to leave it by her will.

"Q. Did she use the word 'promise'? Answer that by 'yes' or 'no.' I do not mean to be unfair. A. I know that, but you are asking such questions.

"Q. Did she use the word 'promise,' Mr. Simons? A. I thanked her; I said, 'I want to thank you.'

"Q. Did she in that conversation? A. 'My wife tells me you have promised to leave her.' That is what my wife said to me.

"Q. Did she use in that conversation either the word 'promise' or the word 'promised'? A. That her reply to me was, 'I am due Annie that money.'

"Q. Then, Mr. Simons, you mean by your answer that she did not use the word 'promise' or 'promised'? A. What other interpretation would you give it?

"Q. I am not giving the interpretation. I am giving a use of a particular word. Did these words pass her lips in that conversation, 'promise' or 'promised'? A. That she intended to do.

"Mr. Brackett: I move to strike that out.

"The Court: Yes; but it is not of any moment to continue that any further. He sticks to the words, and the words speak for themselves. Of course she didn't use the word 'promise,' because he says that is all she did use."

The testimony now shows that Mrs. Leslie did not say that she had agreed to give Mrs. Simons anything, or that she intended or expected to give her $50,000 in her will, or had promised it. This is entirely new testimony, and counsel claims differentiates the evidence in the second trial from that given at the first. The evidence on the first trial left the possible inference that Mrs. Leslie had agreed or promised to leave Mrs. Simons $50,000 in her will. The court does not agree that any such inference could properly have been drawn from the evidence at the first trial. But, if it could have been, this new evidence, given at the second trial, would not preclude the inference still being drawn. All that we have, however, is the husband's testimony that his wife told him that Mrs. Leslie was "going to leave her $50,000" in her will. Such language as this, this court said, when the case was here before, of certain like testimony relied upon to support the third cause of action, "is not the language of contract, but of pure intention or expectation, quite insufficient to prove an agreement to bequeath to the plaintiff a sum" of money. Mrs. Leslie's alleged reply, when she was told by Simons what his wife had reported to him was:

"Robert, I am due Annie that money for what she has done, rendering many services in my present condition, and I propose to call on her in the future."

So far as Mrs. Leslie's words go, they are evidence of an acknowledgement of an existing present indebtedness, and nothing more. They are not evidence of an acknowledgement of an indebtedness to be paid by a provision in her will. And the record is barren of any evidence

that Mrs. Leslie agreed or promised to leave $50,000, or any other sum, to the plaintiff by will. The allegation of the complaint was as follows:

"XII. In consideration of the performance of the said services by plaintiff as aforesaid, and of plaintiff's continuance in the performance of the same, said Mrs. Leslie promised to bequeath to this plaintiff by her last will and testament a legacy of the sum of $50,000. Said promise was made in or about the month of February, 1902, and was repeated on subsequent occasions. In consideration of said promise the services hereinbefore set forth were performed by plaintiff."

So far as Mrs. Leslie's words constituted an acknowledgement of an existing indebtedness the claim was hopelessly outlawed by the statue of limitations before the action was brought, the statute having been pleaded in the answer; and it sufficiently appears to point out that the plaintiff did not tell her husband that Mrs. Leslie had agreed or promised to leave her $50,000 by will. His testimony was that his wife told him that Mrs. Leslie was "going to leave" her $50,000 in her will.

The complaint, as stated at the beginning of this opinion, set forth three causes of action. The court below, however, dismissed the second and third counts, on the ground that there was no evidence to support them. The case went to the jury on the first count alone. That count alleged a promise to bequeath by will to the plaintiff the sum of $50,000. Under that count it was necessary that the jury should find that such a promise or agreement was made. The court below charged the jury that—

"The question here is not—as has been well said to you by counsel—any promise that Mrs. Frank Leslie made to Mr. Robert Simons at that time, for that would not be a contract, or at least the contract which we are suing on here; but the question is whether, when Mrs. Frank Leslie used those words in respect to what Mr. Robert Simons said to her, these words are sufficient evidence of a contract made earlier on that day, I think, or, if not, the day before, between Mrs. Frank Leslie and the plaintiff. Therefore you must find out what the contract was from the admissions that Mrs. Frank Leslie made at that time to the plaintiff's husband, and from the general setting of the parties at the time when the words were uttered. So you see that you must necessarily determine the case by what you think to be the reasonable inference from the language of the parties, and the circumstances in which they found themselves at that time."

The issue was correctly stated in the charge. If there was any evidence from which the jury could properly find that such a promise was made, the court was right in submitting the matter to the jury; but, if there was no such evidence, the case should not have gone to the jury, had it not been for the decision of this court when the case was here before. Simons' testimony was not that he told Mrs. Leslie his wife had informed him that Mrs. Leslie had promised to leave her $50,000 in her will, but that she "expected" to leave her that amount. He did not testify that Mrs. Leslie admitted or denied that she "expected" to leave his wife any amount by will. It was simply:

"I am due Annie for what she has done for me, rendering many services in my present condition, and I intend to call on her in the future."

And on his cross-examination he was compelled, as we have seen, to admit that Mrs. Leslie did not say that she had "promised" or "agreed," or even "intended" or "expected," to give his wife $50,000 by her will. So that the question comes to this: Can a jury infer that Mrs. Leslie had promised to leave Mrs. Simons $50,000 in her will because, when informed that his wife had told him that she expected to leave her that amount, she made the reply above quoted? The only possible deduction which a jury could be entitled to draw from this conversation between Simons and Mrs. Leslie would be one of the following inferences:

(1) That Mrs. Leslie recognized a moral or legal obligation resting upon her to pay Mrs. Simons the amount of money mentioned and that the sum was then "due." But that inference, if drawn, would not support the present suit as a cause of action for money then due, inasmuch, as already pointed out, such an action was barred by the statute of limitations.

(2) That Mrs. Leslie "expected" to leave Mrs. Simons $50,000 in her will, because of many services that individual had rendered her, and that she intended to call on her in the future. But there is no evidence of anything more than that Mrs. Leslie "expected" to do this. The jury could not infer a promise or an agreement from this statement of Mrs. Leslie's expectation, and particularly could not do so in the absence of any evidence that Mrs. Simons rendered services thereafter in reliance upon this expression by Mrs. Leslie as to what her expectation was, and the further fact that Simons was compelled to admit that Mrs. Leslie did not use the word "promised" or "agreed," or "intended" or "expected," to give her $50,000 by her will. Neither is there any direct evidence that Mrs. Simons, the plaintiff, understood the alleged conversation she had with Mrs. Leslie to be an offer, and rendered her services to Mrs. Leslie in acceptance thereof.

(3) That Mrs. Leslie, at the time the conversation occurred, expected to leave Mrs. Simons $50,000, but subsequently changed her intentions for reasons satisfactory to herself, and reduced the amount to $10,000.

[1] Evidence which tends to establish at the most nothing but an intention on the part of a testator to leave to another a specific sum of money by will certainly is not evidence to support an allegation of an agreement to do so. Reilly v. Burkelman, 149 App. Div. 548, 550, 134 N. Y. Supp. 13; Hoffman v. Condon, 134 App. Div. 205, 118 N. Y. Supp. 899; Wildman v. Jones, 150 App. Div. 514, 135 N. Y. Supp. 428; O'Brien v. Foley, 150 App. Div. 257, 259, 134 N. Y. Supp. 825. While it is true that the mere statement of intention is not proof of a contract or binding obligation, we do not overlook the cases which hold, and no doubt correctly, that a statement of intention may, because of attending circumstances, which give the other party a right to act upon it as an intended offer afford the basis of a binding agreement. In 40 Cyc., after stating that a person may make a valid contract to dispose of his property by will in a particular way, provided it is clearly established by the testimony of disinterested witnesses, if in parol, it is said at page 1065:

"However, mere statements, oral or written, of an intent to give property by will to another, do not amount to a contract to do so. * * *"

In Armstrong's Administrator v. Shannon, 177 Ky. 547, 550, 197 S. W. 950, 951, the Kentucky Court of Appeals in a late case said:

"Perhaps Mr. Armstrong intended to make a will devising his property to his niece and nephew. However that may be, no such instrument was executed, and the courts are without power to make one for him. To recover in a case like this, the claimant must show an express agreement and promise to pay; an implied promise will not support such a claim. The rule is well stated in the case of Bolling v. Bolling's Adm'r, 146 Ky. 316, where it is said: 'In a long line of decisions this court has held that, where the relationship of the parties was sufficient to raise the presumption that they lived together as a matter of mutual convenience, the law will not imply a promise to pay for the services so rendered. On the contrary, an express contract must be proven, and to establish such a contract stricter proof is required than in a case of an ordinary contract.' While this rule has generally been applied in cases between parent and child, brother and sister, it has also been extended to uncles and aunts on the one side, and nephews and nieces on the other. Wier v. Wier's Adm'r, 3 B. M. 645; Bolling et al. v. Bolling's Adm'r, 146 Ky. 316; Ballard v. Ballard, 177 Ky. 260."

In Nicholls v. Hodges, 1 Pet. 562, 566, 7 L. Ed. 263, a claim was made for services rendered by a nephew to his uncle, who had served as a clerk in his store for three or four years. The case came before the Supreme Court on an appeal from the Circuit Court in the District of Columbia. Mr. Justice Duval, speaking for the court, said:

"It is in proof * * * that it was distinctly understood between them that the testator had agreed to pay his board, to find him in clothing, and to pay his expenses generally; that it was customary among merchants to take young men, of a certain age, for their board and clothes; that the uncle had said that at a future day he intended to take him into partnership with him; and it was proved that the testator, at the time of making his will, observed that he had given his nephew a legacy as a consideration for his services, and that he had always intended to give him something. It is not denied that the testator had fully complied with his engagement to pay his board, supply him with clothes, and pay his expenses. On this testimony the claim rests. The evidence is too defective to require comment. It is the opinion of this court that it is too loose and indeterminate to sanction the claim, and it cannot be allowed."

If we concede that the relationship between Mrs. Simons and Mrs. Leslie—that of cousins german—was not sufficient to raise the presumption that they were living together as a matter of mutual convenience, and that the law would raise an implied promise to pay for the services so rendered, it is enough to say that the cause of action in the case at bar was not an implied promise which was barred by the statute of limitations, but upon an express promise, and that the express promise could no more be inferred from Mrs. Leslie's statements of her intentions than one could be inferred in the Shannon Case.

In Van Horn v. Demarest, 76 N. J. Eq. 386, 388, 77 Atl. 354, 359, Vice Chancellor Stevenson said:

"The declaration of testamentary intentions and purposes, even when the beneficiary of those intentions and purposes acts upon such declaration to his injury, does not necessarily constitute a contract."

It is sometimes said that the rule in this class of cases required a case to be proven by the clearest and most convincing evidence, and that the

courts look upon cases of this nature with suspicion, and that they must be establishesd by the testimony of absolutely disinterested witnesses. Thus in Rosseau v. Rouss, 180 N. Y. 116, 120, 72 N. E. 916, 918, Judge Vann, speaking for the Court of Appeals in a case of this nature, said:

"Thus the evidence relied upon to establish the contract is, first, the testimony of the mother, who tried to swear $100,000 into the pocket of her own child; and, second, the testimony of witnesses who swear to the admissions of a dead man. The former is dangerous, the latter is weak, and neither should be acted upon without great caution. We have repeatedly held that such a contract must not only be certain and definite, and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence. We have been emphatic in condemning these agreements, because they 'have become so frequent in recent years as to cause alarm.' We have been rigid and exacting as to the sufficiency of the evidence to establish them, and have condemned the proof thereof 'through parol evidence given by interested witnesses.' As 'such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is always dead when the question arises,' we have declared that they 'should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses.' Hamlin v. Stevens, 177 N. Y. 39; Mahaney v. Carr, 175 N. Y. 454; Ide v. Brown, 178 N. Y. 26; Edson v. Parsons, 155 N. Y. 555; Shakespeare v. Markham, 72 N. Y. 400."

It is very possible that in this class of cases courts have sometimes indulged in statements which, if unexplained, may easily be misunderstood and misapplied. We take it to be true that in civil cases a plaintiff is not only required to prove his case by a preponderance of evidence, but that the evidence should be clear and convincing. See McKeon v. Van Slyck, 223 N. Y. 392, 397, 119 N. E. 851. It is also true that a jury must always be the judges of whether the evidence is clear and convincing. We think it is the rule, supported by well-considered cases, that in actions of this sort very clear, strong, and convincing testimony should be required, but that the right to determine whether the evidence in any particular case fills these requirements is one for the triers of the facts to determine. Fitzpatrick v. Graham, 122 Fed. 401, 58 C. C. A. 619, which was decided by this court.

But, while this is the law, it is also equally well established that, if there is no evidence whatever in support of a plaintiff's claim, there is nothing to submit to the jury, and if such a case is submitted to the jury, and a verdict is rendered which there is no evidence to support, the judgment should be set aside. That a jury finds a verdict which there is no evidence to support sometimes happens, and the instances are not rare where appellate courts have been compelled to set aside judgments for that reason. That the jury in this case found for the plaintiff, after being instructed that they could not find such a verdict unless they found that an express promise had been made, is not convincing or conclusive that the evidence before them warranted their verdict.

The record is chiefly occupied with testimony as to the personal services rendered by the plaintiff to Mrs. Leslie for a number of years. This testimony would have been of importance, if the issue involved the right to recover on a quantum meruit, but on the real issue which

the jury was allowed to determine it shed no light. It is possible that the testimony as to these services influenced the jurors in the conclusion which they reached, notwithstanding the effort made by the trial judge in his charge to guard against it. At the beginning of his instructions he said:

"* * * It is always possible in a group of 12 men to go outside the case, and you may be disposed to decide it by considerations which are quite foreign to those that the law recognizes. For example, it is possible that the disposition of some of you, at least, will be to say that this was a rich old lady, and this plaintiff was a cousin, and she did not treat her cousin very kindly or very generously; that she had received a good deal from her in the past, and she had been courteous to her, and that she had received rather crabbed treatment; and that on the whole it is only a decent thing that she should have received $50,000, instead of $10,000.

"It is quite true, since we preserve the jury system, that there is no way by which we can prevent juries from taking that attitude in cases of this character. Yet I think you will observe (in so far as this seems to you a desirable thing) that the property of the individual should be divided in accordance with the law, and not in accordance with the generosity of 12 men who do not own it. It is of vital consequence that you should not adopt that attitude toward the case, but that you should attempt to decide it upon the issues which the law says are controlling.

"This is merely by way of caution which I feel bound to give you at the outset, not, of course, because I have any acquaintance with you, or think that any one of you has that disposition, but only because I think at times that is the disposition of all of us, particularly when we get together and talk collectively, and perhaps without time for reflection, which we otherwise might have when we might deliberate upon it alone. I think that under those circumstances it is possible that you may be disposed to disregard the very narrow issues of fact which I shall explain to you presently, and simply decide the question of what you suppose to be the general equities of the situation. In so doing you would not be in fact disposing of the matter according to the equities of the situation, unless you are prepared to go so far as to say that the general equities entitle 12 men who know nothing about the parties to take away the property from one person and give it to another person for reasons that the law does not recognize. Therefore, so far as you do it, you will deny to this old lady who is dead the right to dispose of her property in her own way, a right which I think you in your own circumstances would feel to be a very substantial right, as to which you are entitled to the protection of the law and not to the intervention of 12 men, who happen to have power to dispose of it otherwise than as the law permits."

He then referred to the history of the relations which existed between the plaintiff and Mrs. Leslie and said:

"Some time in March of 1902 took place the transaction between the two which is the contract relied on, and it is the transaction which occurred at that time which is the only talk or communication on which a contract can be based in this case, and on which the plaintiff can recover."

And he continued:

"If you do find that that was true, and then if you find that Mrs. Simons, relying on that promise given to her, continued to perform the services intended, the contract was made, and the contract was performed; but unless you do find that, if your minds are in doubt as to whether any such thing occurred, then you cannot bring in a verdict for the plaintiff, but must bring in a verdict for the defendant. That is a question of fact. On that question of fact the case turns, and on no other question of fact."

The charge was correct, and the testimony as to the services rendered under the issue on the pleadings became important only if the

jury thought the promise had been made. It was not evidence to establish a promise, but evidence that, if the promise was made, the plaintiff fulfilled her part of the agreement by rendering the future services which constituted the consideration for the promise.

I am authorized by Judge MAYER to say that he fully concurs in the views expressed herein that there is no evidence whatever that any promise or agreement was ever made by Mrs. Leslie to Mrs. Simons that she would leave $50,000 to her by will, and therefore that there was no question to be submitted to the jury under the cause of action pleaded.

[2] The majority of the court, as constituted at the present hearing, are convinced that the conclusion reached on the first hearing was erroneous, and one of the majority dissented at that time and the other of the two was not then a member of the court. The majority of the court as constituted at the former hearing took an exactly opposite view; one of that majority still sitting and adhering to the conclusion he then reached, while the other has since retired from the court. This change of personnel in the court, although it changed the minority view of the former hearing into the majority view at this hearing, does not in itself warrant the court in disregarding "the law of the case" as it was determined by the court when the case was here before. So far as this court's relation to the case is concerned, we recognize the rule that the former decision, under well-established law laid down in a multitude of cases extending over a long period of years, settled the question as between these immediate parties to this litigation. "Res judicata inter partes jus facit." The rule is undoubtedly based on sound considerations of public policy which we would not be justified in disregarding.

In Johnson v. Cadillac Motor Car Co., 261 Fed. 878, 8 A. L. R. 1023, this court declined to be bound by the decision rendered by the court when the same case was here on a former occasion, and we reversed the judgment obtained at the second trial, which involved only a fifth of the amount which is here involved. We have no desire to discredit in the least the decision then made, or to depart from the principle then laid down. That principle was that, under exceptional circumstances, where a former decision in the same case is clearly erroneous, and announces a wrong rule and one mischievous in its practical operations, or which might readily affect many persons adversely, the court should reverse its earlier decision.

It is not probable, and certainly cannot be foreseen, that exactly such a state of the evidence, as in the case now before us, will be presented again in some subsequent litigation. After the first decision in Johnson v. Cadillac Motor Car Co., it transpired that the New York Court of Appeals decided Macpherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C, 440, L. R. A. 1916F, 696, which established the law of the state in a manner contrary to the rule first announced. While we arrived at our conclusion quite independently of that decision, which was not controlling upon this court, the attitude of the New York court was of great importance. And in the case at bar, since the earlier decision, there has been no decision of the Supreme

Court of the United States or of the New York Court of Appeals having any bearing upon the question before us.

The Johnson v. Cadillac Motor Car Co. Case is clearly exceptional, and is easily distinguishable from the case now before the court. In the instant case, when it was here before, no rule or principle of law was laid down which can affect adversely other persons than those before the court; the only question being as to whether the particular evidence produced at the trial justified the submission of the case to the jury.

The majority of the court which heard the case on the second writ of error have felt it their duty, however, to state fully and frankly their view of the law, and to point out wherein and why we differ from the decision rendered when the case was here before. We may be in error, or the majority of the court at the former hearing may have been in error; we are certainly not both right. It may be that the learned counsel who argued this cause may still find in this unusual situation, involving as it does a considerable amount of money, some way of ascertaining which of these conflicting views is correct. But, however that may be, we have no alternative, and the judgment must be affirmed.

MANTON, Circuit Judge (concurring). On this writ the plaintiffs in error seek review of a judgment recovered on a cause of action resting on a promise made by the decedent, Mrs. Leslie, to the defendant in error in 1902, in consideration of personal services theretofore and to be thereafter rendered by her to bequeath her a legacy of $50,000, whereas Mrs. Leslie bequeathed her a legacy of only $10,000. The right to a jury trial of the basis of this claim and the sufficiency of the complaint was upheld in Ex parte Simons, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. Ed. 1094. This court reversed a judgment for plaintiffs in error upon a directed verdict, and held that on precisely the same proof offered on this trial, the question of whether there was an agreement or contract was for the jury. It was held that the details necessary to establish the contract appeared specifically—the consideration, the amount, and the manner of compensation. Simons v. Cromwell (C. C. A.) 262 Fed. 680. Overwhelming authority requires the law of the case, as thus declared, should be followed:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case." Thompson v. Maxwell, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539.

"The decree having been formally rendered in this cause, the court is now to determine whether that decree has been executed according to its true intent and meaning." Himely v. Rose, 9 U. S. (5 Cranch) 313, 3 L. Ed. 111.

On a second writ of error, the court cannot be compelled to review its own decision on the first. Roberts v. Cooper, 61 U. S. (20 How.) 467, 15 L. Ed. 969. There Justice Grier observed (61 U. S. 481, 15 L. Ed. 969):

"To allow a second writ of error or appeal to a court of last resort, and on the same questions which were open to dispute on the first, would lead to

endless litigation. * * * There would be no end to a suit, if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

See the same rule applied in the various circuits. Development Co. v. King, 170 Fed. 923, 96 C. C. A. 139; Linkous v. Va. Ry. Co., 242 Fed. 916, 155 C. C. A. 504; Woodruff v. Yazoo Co., 222 Fed. 29, 137 C. C. A. 567; Standard Co. v. Leslie, 118 Fed. 557, 55 C. C. A. 323; U. S. Press Ass'n v. Natl. Newspaper Ass'n, 254 Fed. 284, 165 C. C. A. 572; Nat. Bank v. U. S., 224 Fed. 679, 140 C. C. A. 219.

In Johnson v. Cadillac Co. (C. C. A.) 261 Fed. 878, 8 A. L. R. 1023, the writer of the majority opinion devoted some six printed pages to this subject, and recognized the full force and effect of the doctrine of stare decisis. The law of this case between the parties, having been settled on the former appeal, makes the law of the case in this respect res adjudicata.

Nowhere in the consideration of the evidence is error pointed out. Nor was mistake made in our former consideration of the case. The complaint in the majority opinion rests, not on the rule of law, but on the question of fact. The evidence was sufficient to require its submission to the jury to say whether a contract was proved. The plaintiff could not testify to her conversation with the decedent because of the statutory prohibition. Her husband testified:

"I recall a conversation with my wife, in which she mentioned something Mrs. Leslie had said to her. That was in March, 1902; it was a Friday night, when I had come home from a trip, that I had this conversation. * * * The next Saturday afternoon I had a conversation with Mrs. Leslie. I said, 'Cousin Florence, my wife tells me you are going to leave her $50,000 in your will, and I wish to thank you.' Her reply was, 'Robert, I am due Annie that money for what she has done, rendering many services in my present condition, and I propose to call on her in the future.'"

The jury was justified in finding that from this evidence the decedent admitted a conversation with the defendant in error as to her services rendered and to be rendered, and as to the compensation to be paid for them in her will. The jury could say that this was language of an agreement to pay her. There was ample evidence of the services performed, and the extraordinary and somwhat humiliating character of them, such as few women of refinement could be induced to perform. The decedent was 77 years of age when she died. She had suffered a stroke of paralysis. She could not dress or walk without assistance. She refused to provide a maid or nurse, and the defendant in error performed the services which such employees would perform. Decedent left an estate of $2,000,000. She had an income of $95,000 a year. The decedent spoke to a Mrs. Lawrence, and said she was going to make provision for the defendant in error. She mentioned that defendant in error's aunt had met with a great loss, and that she intended to compensate the defendant in error. The defendant in error's son, a lawyer, testified that he talked with Mrs. Leslie "as to what she intended to do for my mother by will," and Mrs. Leslie said, "I don't see why your mother worries so much about the future, as I have provided for her." Further, she said, "Robert, your mother is going to be well paid for what she is doing for me, and I don't wish her to go."

Reasonable minds may differ as to whether or not this was an agreement by the testatrix to pay, and not the language of mere expectation or intention. The difference of opinion on the former and this appeal as to the meaning and understanding of the language employed by Mrs. Leslie argues strongly for the existence of a question of fact. Under the circumstances, the defendant in error being incompetent to testify in the absence of a written agreement upon the subject, it was, in the language of the Supreme Court, almost impossible to prove a direct verbal promise from decedent to her in regard to this contract.

"Any such promise must be largely inferred from the situation and circumstances of the parties, and must depend almost wholly on verbal statements made by Mr. Kenyon [Mrs. Leslie] to others." Brown v. Sutton, 129 U. S. 239, 9 Sup. Ct. 274, 32 L. Ed. 664.

Even if inconsistency appeared (I fail to find it) in this proof on the cross-examination from that of the direct, such would have been a matter which only affected the credibility of the testimony. It is untimely now to quarrel with the result of the jury's findings. This was a matter for the trial court. We cannot consider the weight of evidence. Wilson v. Everett, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286; Canadian Ry. Co. v. Akre, 200 Fed. 955, 119 C. C. A. 250. The law as to the care and caution in considering claims of this character is well defined. McKeon v. Van Slyck, 223 N. Y. 392, 119 N. E. 851. These rules of law are beneficial and useful in instructions to the jury. Each case must be considered from the viewpoint of its own facts. The other danger must never be lost sight of:

"That advantage may be taken of the ignorant, confiding and helpless by those who promise, reap performance, and then procrastinate, dally, and die without living up to the great commandment of the law, to wit, to do justice and right, and to render to every one his due." McQuitty v. Wilhite, 247 Mo. 163, 152 S. W. 598.

I am satisfied that the command of the law required the submission of this proof to the jury. Because of this, and of our decision on the former appeal, I can conceive of no escape from an affirmance of this judgment.

AMERICAN ENGINEERING CO. v. METROPOLITAN BY-PRODUCTS CO., Inc. BAILEY et al. v. GARVIN, District Judge. MOFFETT v. SAME.

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

1. Appeal and error ⇐1199—Former decree held to prevent reopening of claims against receiver already adjudicated.

A decision on appeal from a decree directing the sale of corporate property on foreclosure of mortgages, and the distribution of the proceeds rendered after hearing in three suits, in the first of which a receiver was appointed at the request of general creditors, and in the other two of which foreclosure of mortgages was sought, that the court was without power to give general creditors of the receiver priority over the company's prior lien creditors without their express assent, though a charge

for actual preservation of the property from destruction or for insurance premiums might be given a preference, and directing the court below to enter a decree in accordance with the opinion, did not authorize the court to enter a decree permitting the creditors who had already proved their claims to offer proof that their claims were incurred for preservation of the property, so that it was error for the court to refuse a decree tendered by the lien creditors permitting application for priority on account of claims not already adjudicated, or disbursements for the preservation of the property from destruction, and to render a decree omitting the phrase "not already adjudicated."

2. Receivers ⟸154(1)—Have no preference for fees against fund in foreclosure suit in which they were not appointed.

Receivers appointed for a private corporation in a suit by a general creditor have no preference for their fees or the fees of their attorneys in the distribution of funds realized by foreclosure sale in other suits in which no receivers were asked, where the receivers' services were of no benefit to the mortgage lienholders.

3. Appeal and error ⟸1199—Receivers held not entitled to reopen claim for further proof as to services.

Where a decree giving receivers preference in the distribution of funds realized upon foreclosure sale in another suit was reversed because the services of the receivers resulted in no benefit to the mortgage lienholders, the receivers were not entitled to an opportunity to reopen the case for further proof as to the value of the services they rendered.

4. Mandamus ⟸4(1)—Issues when no other remedy is available, but not to subserve purpose of appeal.

The writ of mandamus is a prerogative writ, one of the highest known to our jurisprudence, and is issued when there is no other means of obtaining justice within the right of the petitioner; but it cannot be resorted to to serve the purpose of an appeal or writ of error.

5. Mandamus ⟸58—Not issued where decree below resulted from misapprehension of mandate which judge offered to correct.

A writ of mandamus will not be issued to compel the district judge to comply with the mandate of the Circuit Court of Appeals, where his return stated he had attempted to comply with the mandate as he understood it, and offered to modify his decree in any respect in which it did not conform to the mandate.

Three separate suits in equity were brought by the American Engineering Company against the Metropolitan By-Products Company, Inc., and by the Title Guarantee & Trust Company and by the Columbia Trust Company each against the Metropolitan By-Products Company, Inc., and others. On applications by Frank Bailey and others, as a committee of bondholders, and by George M. Moffett, as receiver, of the Metropolitan By-Products Company, Inc., for writs of mandamus against Edwin L. Garvin, District Judge, to require amendment of decrees in the above-entitled suits after a reversal therein and direction to enter new decrees in accordance with opinions of the Circuit Court of Appeals, Second Circuit, reported in 275 Fed. 34. Mandamus denied.

See, also, 267 Fed. 90; 275 Fed. 34, 40.

Davison & Underhill, of Brooklyn, N. Y., for petitioners Bailey and others.

Lewis & Kelsey, of New York City, for petitioner Moffett.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. Upon petition of George M. Moffett and upon a like application made on behalf of a committee of bondholders and preferred note holders, an order was issued on October 10, 1921, directing the Honorable Edwin L. Garvin, judge of the United States District Court for the Eastern District of New York, and the said United States District Court for the Eastern District of New York to show cause on a day named therein why a writ of mandamus should not issue as prayed; the purpose being to require the District Judge to insert in two decrees entered in said District Court on August 5, 1921, a certain provision hereinafter more fully referred to.

The order to show cause came in due time to be heard, and counsel representing all the various interests concerned appeared before us, and the matter was argued at length.

In announcing the disposition which we think should be made of the application for the writ it is necessary to refer to certain facts that the matter of this application may be better understood.

The United States District Court for the Eastern District of New York, acting on the application of the American Engineering Company, appointed receivers of all the property and assets of the Metropolitan By-Products Company on November 19, 1917. The court authorized the receivers to manage and operate the business of the Metropolitan Company and to continue the performance of its contract with the city of New York, which was a contract for the disposal of the garbage of the boroughs of Manhattan, the Bronx, and Brooklyn.

On September 27, 1918, the receiver petitioned for leave to discontinue the business, stating that he was unable to continue the business at a profit, and the business was discontinued. For some time prior to discontinuance the business had been carried on at a loss. But during the period the receivers were operating the plant they had borrowed considerable money with the approval of the court, and receivers' certificates had been issued under authority conferred by the court. The question then arose as to the power of that court to give to the holders of the receivers' certificates priority over prior lien creditors, and as to the rights of special and general creditors of the receivers and the general creditors of the Metropolitan Company.

On November 26, 1918, an order had been made and entered in the creditors' suit brought by the American Engineering Company against the Metropolitan By-Products Company, permitting the Title Guaranty & Trust Company to institute in the District Court as complainant a suit against the Metropolitan Company and others to foreclose a certain trust mortgage under which the said Title Guaranty & Trust Company was trustee. And a second foreclosure suit was also brought in the same court by the Columbia Trust Company against the Metropolitan Company.

The matters in controversy in these suits and the respective rights of the creditors were referred to a special master. On the coming in of his report the District Court entered an order decreeing the foreclosure of the mortgage, directed that the property of the Metropolitan Company be sold, fixed and determined the relative rank and priority of the various liens and charges affecting the property, and directed the

distribution of the proceeds of the sale in the manner set forth in the order. From that decree an appeal was taken to this court, and was determined by us in an opinion filed on June 23, 1921, 275 Fed. 34.

We held that the Metropolitan Company was a private, and not a quasi public, corporation, and that, being such, the lower court was without power to give the receivers' general creditors priority over the Metropolitan Company's prior lien creditors without their express consent. The lien creditors had a right to rely upon the liens they had contracted for. We held that debts contracted by the receiver, whether upon general credit or upon an express agreement with the receiver only for a lien prior to all other liens, were not entitled to priority; the theory being untenable that the indebtedness incurred was for the preservation of the property. And we indicated our belief that the indebtedness in this case was not incurred for the preservation of the property, but for the continued operation of the business, because the receivers believed it was about to become profitable. We indicated "that a charge for actual preservation (of the property) from destruction, as for watchmen," might be given a preference, "because such services could not in the nature of things be had on credit." A like intimation was made as to a charge for premiums of insurance if insurance could not be obtained except upon such terms.

The decree as entered was reversed, and the court below was directed to enter a decree in accordance with our opinion.

Thereafter the attorneys and solicitors for the respective parties noticed for settlement a decree purporting to correct, amend, and resettle the decree in the lower court in conformity with our opinion.

Thereafter, and on August 5, 1921, the District Judge entered two decrees, one in American Engineering Company v. Metropolitan By-Products Company, Inc. and one in Title Guaranty & Trust Company, as trustee, v. Metropolitan By-Products Company, Inc., no doubt intending that such decrees should in all respects conform with the decision of this court above referred to. At the time these new decrees of August 5th were settled counsel for the Columbia Trust Company proposed to the District Court decrees substantially the same as those entered except for a single paragraph in each of the decrees. The paragraph as proposed by counsel was as follows:

"Nothing herein contained shall prevent application at the foot of this decree on account of claims not already adjudicated for disbursements made solely for the actual preservation from destruction of the mortgaged property; but this court does not decide whether such claims, if any, should be allowed priority over the liens of the mortgages and preferred noteholders."

The court, however, modified the paragraph and made it read as follows:

"Nothing herein contained shall prevent application at the foot of this decree on account of claims for disbursements made solely for the actual preservation from destruction of the mortgaged property; such claims being hereby allowed priority over the liens of the mortgages and preferred noteholders."

Thereafter the receiver of the Metropolitan Company, believing that the decrees entered on August 5th did not in fact conform to this court's opinion, applied to one of the judges of this court for an order

requiring the District Judge to show cause before this court on a day and hour named why a writ of mandamus should not issue from this court directing him to correct and modify the decrees of August 5, 1921.

At the time the District Judge entered the modified decrees of August 5th, he stated that he did not know what this court intended to decide concerning the status of claims for actual preservation from destruction of the mortgaged property, but that he was inserting the provision last quoted for the reason that he conceived that there should be a definite adjudication that all such claims should be preferred even without proof of the facts and circumstances under which such claims arose.

The District Judge has misapprehended the opinion of this court. We did not undertake to decide the status of claims for actual preservation of the mortgaged property from destruction, and especially in the absence of proof that such preservation, whether by watchmen or by insurance, could not have been obtained except upon credit. And there was no such proof before us.

There was no intention on the part of this court to open up anew the adjudication of claims already adjudicated. The creditors have had their day in court, and they did not present any facts from which it could have been found that their claims were for actual preservation of the property from destruction, and no such claim was made either in the court below or in this court.

The above paragraph as proposed to the court by the counsel expressed the intention of this court as set forth in its opinion filed on June 23, 1921 (C. C. A.) 275 Fed. 40, and should have been incorporated in the decrees.

As no claims for actual preservation from destruction of the mortgaged property have been allowed priority, and therefore no decree has been entered by the District Court which is final so that an appeal can be taken therefrom the petitioners seek the writ of mandamus prayed for.

[1] The effect of the striking from the paragraph as submitted by the counsel for the Columbia Trust Company the words "not already adjudicated" is to permit the possible claim by all of the more than 100 creditors of the receivers whose claims were before this court when the case was heard by us, that their claims were for actual preservation, and thus open the way for a new adjudication of the claims. This certainly was not the intention of this court. Every one who had claims upon the foreclosure fund was duly cited to appear and file his claims. The creditors were heard before Judge Noyes, and their claims were all adjudicated on such evidence as they chose to present.

Under the opinion which this court filed the question left open was whether there were any charges of the nature of watchman's fees, which would be disbursements by the receiver that ought to have precedence over the liens. Some kinds of insurance might rank with watchman's fees. There had been no proof submitted that any of the insurance was of that kind. And this court had not the slightest intention

of ordering the taking of further proof and the reopening of the claims adjudicated.

The decrees as entered must be reopened and modified by amending paragraph 8 at the end thereof so that it shall read as follows:

"Nothing herein contained shall prevent application at the foot of this decree on account of claims not already adjudicated for disbursements made solely for the actual preservation from destruction of the mortgaged property; but this court does not decide whether such claims, if any, should be allowed priority over the liens of the mortgages and preferred noteholders."

And such modification is hereby directed to be made.

[2] The receiver, appointed in the general creditors' suit, joins in an application for the mandamus because he thinks the District Judge misunderstood the decision of this court in that in the decrees of August 5, 1921, no priority was accorded to the receiver and his counsel for their fees. At the time he signed the decrees the District Judge stated that in his opinion this court meant to hold that the receiver and his counsel could not claim priority out of the foreclosure fund for their fees and expenses. In this the judge was not in error. No receivership was necessary to protect the lienors, and the latter did not request their appointment, and in fact had nothing whatever to do with it, and the receivership was at no time extended to the foreclosure suit. The services of the receiver and of his counsel were not beneficial to the security holders, and this court would have committed a serious error had it undertaken to provide for their payment out of the funds of the lienors. See Louisville, etc., Railroad Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023; Spencer v. Taylor Creek Ditch Co., 194 Fed. 635, 114 C. C. A. 407; In re Benwood Brewing Co. (D. C.) 202 Fed. 326; Atkinson & Co. v. Aldrich-Clisbee Co. (D. C.) 248 Fed. 134; In re Regent's Canal, etc. (1875) C. A. 3 Ch. D. 411.

[3] If the receiver and his counsel when the case was in this court before did not present the matter of their claims as fully as they now think they should, the fact is no reason why the matter should be again reopened to enable them now to do so. They like the other creditors have had their day in court, and are, like them, concluded by our decision, which the District Court did not in the slightest degree misapprehend as respects them.

It is perhaps not undesirable that we should take this occasion to point out that in the opinion which this court rendered in these cases when they were before the court we were dealing with payment of claims out of a fund produced by a foreclosure sale. The question of the allowances to be made to a receiver and his counsel out of funds produced by operation of the receivership and in the course of its administration was not before us and was not decided. We think, too, that it was made apparent beyond mistake that we were dealing with the affairs of a private corporation, and not one of a quasi public character.

[4] We may be permitted to say that the writ of mandamus is a prerogative writ, and one of the highest known to our jurisprudence. It is issued where there is no other means of obtaining justice within the reach of the petitioner. It cannot be resorted to to subserve the

purpose of an appeal or writ of error. But it lies to compel a public officer to perform a duty arising out of his office, where the duty is ministerial and mandatory in its character. As the decrees which the District Judge entered were not thought to be final, and therefore not appealable, the writ of mandamus was applied for.

[5] In this case, however, the writ of mandamus will not be issued, and the application therefor will be denied. The refusal to issue it is due to the statement made by the District Judge in the return which he made to the order to show cause in which he informs the court that in entering the decrees as he did he intended to and believed that he had acted in accordance with the opinion of this court. He also informs the court that in the event that it is found that the decrees as entered do not conform to the opinion which the court rendered, and that decrees other than those signed should have been entered, indicating the change desired, he will forthwith take appropriate action.

For the reason stated, and for that alone, mandamus is denied.

GROSSMAN v. UNITED STATES ex rel. BRUNDAGE. SAME v. FRANK et al. SAME v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1922.)

Nos. 2991, 2992, 2930.

1. **Courts ⟸262(3)—Rules apply to suits under Prohibition Act, unless contrary to its provisions.**
   It was unnecessary for Congress to confer jurisdiction on a court of equity to abate nuisances and to restrain individuals from maintaining them, or to punish for violation of its restraining order, as was done by the National Prohibition Act, since federal courts of equity exercised such jurisdiction long before the adoption of that act, and equity rules applicable to federal court practice apply to equity suits under the National Prohibition Act, unless some contrary provision is found in the act.
2. **Equity ⟸204—Complainant need not be served with process to give jurisdiction over cross-complaint.**
   A decree entered on a cross-complaint is not invalid, because no process was issued and served on complainant, pursuant to the relief prayed for in the cross-complaint.
3. **Equity ⟸204—Answer to cross-complaint and trial on merits waived objections to want of service.**
   If service of process under the cross-complaint were necessary, the failure to make such service is waived by complainant's answer to the cross-complaint and by the trial on the merits.
4. **Equity ⟸195—Landlord can maintain cross-complaint to forfeit lease in suit to abate nuisance maintained by tenant.**
   In a suit brought against a tenant and his landlords to abate a liquor nuisance under the National Prohibition Act, a cross-complaint by the landlords, seeking a forfeiture of the lease under section 23 of that act, is germane to the subject-matter of the bill, and can be maintained, if the landlords are innocent of the wrongdoing of their tenant.
5. **Intoxicating liquors ⟸265—Landlords cannot close eyes to nuisance maintained by tenant.**
   The landlord of a tenant, who is maintaining a liquor nuisance on the premises, cannot close his eyes to obvious facts and still plead innocence,

but may be chargeable with knowledge of the use to which the premises are put, if the facts reasonably warrant such a conclusion, notwithstanding his profession of ignorance of such uses.

Appeals from and in Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the United States, on the relation of Edward J. Brundage, against Phillip Grossman, Milton R. Frank, and others to abate a nuisance. From a decree abating the nuisance, and also from a decree sustaining the counterclaim of defendants Frank and others for cancellation of the lease, the defendant Grossman separately appeals, and also brings error to review a judgment against him in proceedings for contempt for violation of the decree. Decrees and judgment affirmed.

Cameron Latter, of Chicago, Ill., for appellant and plaintiff in error.

C. W. Middlekauff and Jacob J. Grossman, both of Chicago, Ill., for appellee and defendant in error.

Before ALSCHULER and EVANS, Circuit Judges.

EVANS, Circuit Judge. The foregoing two appeals in 2991 and 2992 and the writ of error in 2930 can well be determined in one opinion. In No. 2930 plaintiff in error attacks a judgment pronounced against him in a contempt proceeding arising out of his alleged failure to obey the order of the court made in an equity suit to abate a nuisance. Nos. 2991 and 2992 are appeals from decrees rendered in such equity suit.

The decree thus entered is attacked: (a) Because of the relief accorded appellee the United States, the complainant in the District Court (No. 2991); and (b) because of the relief given the codefendants, Frank and Garmany (No. 2992), the owners of the premises. No assignment of error is presented in No. 2991 that was not determined adversely to appellant by the opinions in Lewinsohn v. U. S. (C. C. A.) 278 Fed. 421, and Allen v. U. S. (C. C. A.) 278 Fed. 429, and further discussion thereof is unnecessary.

As to the relief in favor of the codefendants, the owners of the property, it is urged that error was committed because the cross-complaint was insufficient to support the decree. The court found and decreed:

"And it is also found by the court that the cross-complainants named were not participators in the acts constituting such nuisance, and are the owners of the property described; that said Grossman was and is tenant holding under the lease described in the cross-bill and pleadings. * * * And it is further ordered that the lease heretofore held by said Grossman be delivered by the said Grossman to the said cross-complainants, Milton R. Frank, Seymour J. Frank and Perle Kemp-Garmany, to be canceled."

That the evidence supported the finding cannot be questioned. The issue is therefore limited to the contention that the cross-bill did not justify the entry of the decree.

[1] Much confusion might be avoided if counsel recognized that federal courts possessed and exercised equity jurisdiction long before the passage of the National Prohibition Act (41 Stat. 305). To illustrate: It needed no act of Congress to confer jurisdiction upon a court of equity to abate nuisances and to restrain individuals from maintain-

ing them. Nor did it require an enabling act that a court might punish those who violated its restraining order. Likewise the equity rules applicable to federal court practice apply in all equity suits, including those brought under the National Prohibition Act, unless some contrary provision may be found in the act.

In this suit the owners of the premises were made defendants in the equity suit along with the tenant, who, it was charged, was maintaining a nuisance on the leased premises. Not only did the complainant pray that the nuisance be abated, but it also sought to close the premises for the period of a year. To the granting of this last sought relief the landlords were opposed. They pleaded their ignorance of the actions and conduct of the tenant and the conditions existing in the leased premises. They set forth all of the facts showing ownership, lease, etc., and further alleged that, if the tenant was maintaining a nuisance or disobeying any injunctional order of the court, they desired the lease canceled. In their prayer for relief they asked "that the lease may be canceled and declared forfeited as against said Grossman." They also offered, in case appellant's lease was terminated, to give complainant a bond conditional upon their next tenant's respecting the law and conducting a lawful and orderly business in the premises. To this cross-complaint appellant Grossman answered fully. The last clause of section 23 of the National Prohibition Act provides:

"Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

[2, 3] In attacking the decree entered in favor of the cross-complainants against appellant, it is first urged that no process was issued and served upon Grossman pursuant to the relief prayed for in the cross-complaint. This was unnecessary. Kingsbury v. Buckner, 134 U. S. 676, 10 Sup. Ct. 638, 33 L. Ed. 1047. The answer of Grossman and the trial on the merits would in any case have overcome this failure.

[4] Coming to the allegation of the bill, we find the situation somewhat unusual. The owners were not in possession of the premises. The tenant Grossman was charged by the government with a violation of the National Prohibition Act and the maintenance of a nuisance. This charge he denied. The owners, professing to be law-abiding citizens, desirous of respecting the law, anxious to protect their property, but uncertain as to the facts, answered in the equity suit and asserted that they were innocent of any wrongdoing and that they wished the lease terminated, and prayed for its termination and the ouster of the codefendant Grossman.

[5] These facts, if established, would appeal favorably to a court of equity. The court might not conclude to dispossess the landlord, if it appeared that he was innocent of the uses to which his property was being put by the tenant and manifested a desire to co-operate in abating the nuisance. Of course, the landlord cannot close his eyes to the obvious and still plead innocence. He may be chargeable with knowledge concerning the character of, and the uses to which, the premises are put, if the facts reasonably warrant such a conclusion,

notwithstanding he professes his ignorance of such uses. His attitude toward the tenant, after being informed of the latter's misconduct, might, and probably would, be determinative of the state of his mind and his knowledge of the tenant's wrongdoing; for it is hardly conceivable that a law-respecting landlord would not avail himself of the above-quoted provision of the National Prohibition Act and seek to oust the tenant, upon discovering that his premises were being maintained as a nuisance by such tenant. On the other hand, the landlord who repudiates the tenant's action immediately upon learning of the facts, and who at the first opportunity avails himself of a remedy open to him to oust the tenant from the premises, necessarily places himself in a position of vantage when it comes to the terms of the decree finally entered.

We have, then, under consideration a cross-bill where the subject-matter is germane to that of the original bill. The relief sought was expressly provided for by the statute. Irrespective of the provisions of the National Prohibition Act, a landlord leasing premises for lawful purposes would be entitled to a termination of the lease, in case the tenant violated the law and maintained a nuisance upon the premises. The defendant Grossman was not deceived by the pleading, for he answered the cross-complaint as well as the original complaint fully, and denied the misconduct with which he was charged.

We conclude that the allegations in the cross-complaint were sufficient to support the decree; that it constituted an election to terminate the lease because of the tenant's violations of the law; that it was a relief which the court was permitted to grant in a suit of this character.

In No. 2930 plaintiff in error, in addition to those assignments determined in Lewinsohn v. U. S., charges the insufficiency of the evidence to support the order. Our examination of the record convinces us that this assignment is without merit, and the judgment in No. 2930 and the decrees in Nos. 2991 and 2992 must be and they are hereby affirmed.

LONG et al. v. UNION TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1922.)

No. 3000.

Perpetuities ⇐4(15)—Charitable gift held to vest at once in capable trustee.

A testamentary gift of property in fee to a trustee in part for the foundation of a school, the trustee to hold and manage the property and pay the income to the widow of the testator during her lifetime, and on her death to transfer the corpus to other trustees to be designated by persons named, who were to found, maintain, and manage the school, *held* not void under the Indiana statute of perpetuities (Burns' Ann. St. 1914, §§ 3998, 9723), as not vesting in a capable trustee within the lifetime of a person in being, but valid as vesting at once, both in possession and title, in the first trustee, and its validity not being affected by the fact that there was a succession of trustees.

Appeal from the District Court of the United States for the District of Indiana.

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

Suit in equity by Amelia S. Long and another against the Union Trust Company, trustee, and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 272 Fed. 699.

Morris M. Townley, of Chicago, Ill., for appellants.

William H. Thompson, of Indianapolis, Ind., for appellees.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This appeal is prosecuted to reverse an order of the District Court, dismissing, for want of equity, a bill filed to test the provisions of the will of Henry C. Long for the founding of a school or college for the higher education of women and girls. After several specific bequests, one of which provided for the "George Long Missionary Fund," the will gave the whole estate remaining to defendant Union Trust Company, as trustee, in fee simple, for purposes named. The testator recognized the right to, and the possibility that the widow might, within one year after his death, renounce the will, and the will was drawn so as to meet such a contingency. But the widow, Sarah C. W. Long, accepted under the will and enjoyed its provisions from testator's death in 1901 to 1916, when she died.

Neither testator's widow nor his heirs (so far as appears he had no heirs) could by any possibility take any interest in his estate otherwise than in accordance with that trust, and through and by delivery or conveyance from that trustee, save and except only the possibility that the widow might renounce. The law of Indiana controls in the determination of this case. It is not denied that it was intended to create a public charity. Under the Indiana law, provisions for such gifts are most liberally construed, so that the purpose of the donor may not be defeated. Richards v. Wilson, 185 Ind. 335, 112 N. E. 780; Dykeman v. Jenkines, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011; Erskine v. Whitehead, 84 Ind. 357; Board v. Dinwiddie, 139 Ind. 128, 37 N. E. 795.

It is admitted by appellants that the only question here for decision is: Did the intended gift for the school or college vest in a capable trustee within the life of a person in being? As to the estate in the Union Trust Company, trustee, the will made certain definite provisions, which were absolute and unchangeable except as to two matters: (1) The widow, within a year, might have renounced the provisions of the will and have taken under the law; but that could in no event have absorbed all the property intended for the school. (2) The income from certain real estate went to Henry W. Long for life, the course to be taken by the fee depending on whether he died leaving descendants. It did go to Amelia S. Long, his child, a plaintiff here, but it might have gone to the school. The same provision was made as to certain other real estate, the income from which went to Alice M. Long, now Jarrett, a plaintiff here. She is yet living, and was a person in being at the death of the testator.

Subject to those provisions, the income was to go to Sarah C. W. Long, while she was testator's widow, and the corpus of the estate in part to five specific money gifts to charity, and in part to the charity

in question. The five gifts, as well as the George Long Missionary Fund, were all to be paid or delivered by the trustee to established concerns that already had the machinery or organizations for handling such gifts, hence the language of item 8 of the will that the Union Trust Company was not to be trustee for those gifts after the several deliveries. As to the gift in question, the testator intended that the charity should be administered through an entirely new organization, made up in a way that would insure the carrying out of his plans. Therefore, to care for his widow from the income of the trusteed estate and preserve the body of it for the other trusts named, he made the simple arrangement of naming the Union Trust Company, with title in fee, trustee for all purposes until his obligation to his widow was discharged and until the several charitable gifts were lodged with those who were to administer them.

Under that appointment the trustee took the principal of the estate, other than the money gifts, in trust for the charity in question, with the duty to handle, manage, and preserve it by proper care and investments, so as to have it ready when the time for delivery to its succeeding trustee should arrive. When that time should arrive the testator evidently desired that there should be trustees or agents who, because of their then relation to religious and public affairs, could choose 10 trustees in their judgment fitted to establish and manage the school or college, so, for that purpose, he selected the church, city, and state officials designated. Testator had the same power and the right to select them for that purpose that he had to select any agent or trustee to effectuate any of his purposes. The possibility that they might not act is one that exists as to every testamentary appointment.

As the final step in administering the trust, the testator directed the founding, maintenance and management by the ten trustees of the school; hence the provision in item 8 that the Union Trust Company was not charged with the duty of founding, establishing and maintaining the school or college—that was merely the machinery; it was not the charity. There is nothing unusual or illegal in a succession of agents or trustees. There was an immediate gift to charity, that vested in the Union Trust Company as trustee. The trustee had not only the possession, but the title as well, and there was no contingency. Dykeman v. Jenkines, 179 Ind. 549, 563, 101 N. E. 1013, Ann. Cas. 1915D, 1011.

Testator had no one with any legal claim upon him, other than his wife, Sarah C. W. Long. Plaintiff, Mrs. Jarrett, and her twin brother, Henry W. Long, born in 1878, were provided for and actually took under the will. Mrs. Jarrett is still receiving income from real estate given her for life, and if she dies leaving children they will take the fee under the will. Henry W. Long took and enjoyed property under the will; but he is now dead, and the other plaintiff, Amelia S. Long, as his child, took real estate, the income of which was left to Henry W. Long for his life. The only right in plaintiffs to maintain this suit is based upon the adoption of Henry W. Long and Alice M. Jarrett by testator's widow, Sarah C. W. Long, after testator's death, and after they had reached their majorities. If the will as to the school was void,

the widow, the only person having any right to sue, stood by, accepting the provisions awarded her for 15 years, all the remaining years of her life.

Our holding that there was a capable trustee in whom the title vested at the death of the testator removes all necessity for considering the Indiana statute with reference to perpetuities (Burns' Ann. St. 1914, §§ 3998, 9723), which is not different from the common law or from other statutes, except that the period is limited to the life of a person or persons in being and cuts off the additional 21 years usual in most statutes; and it also makes unnecessary any extended discussion of the many legal questions presented and discussed in the briefs.

Much reliance is placed by plaintiffs upon Grimes v. Harmon, 35 Ind. 198, 9 Am. Rep. 690, as supporting their contention that the gift in this case for the establishment of the school must fail, but in Grimes v. Harmon, the only gift or attempted gift to any trustee was to a body of men that did not exist. Even if there were then persons in existence that might have been brought together to make up such a body, yet there was no rule or measure by which they could have been selected and no person named who could apply the rule had there been one prescribed. Generally speaking, the Indiana court seems to have followed the Supreme Court of the United States. Plaintiffs urge, and it probably is true, that Grimes v. Harmon was bottomed upon Baptist Ass'n v. Hart, 4 Wheat. 1, 4 L. Ed. 499, and Fontain v. Ravenel, 17 How. 369, 15 L. Ed. 80. However, after the Supreme Court of the United States found that Baptist Ass'n v. Hart had been decided upon an insufficient examination of the precedent authorities and had substantially overruled that case, the Indiana authorities seem to have followed the federal authorities, and notably in Erskine v. Whitehead, 84 Ind. 357, Board v. Dinwiddie, 139 Ind. 128, 140, 37 N. E. 795, and Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, took advanced ground and largely departed from Grimes v. Harmon as an authority. Fontain v. Ravenel, supra, is easily distinguished from the case at bar. There the executors were given discretionary power in the selection of the ultimate trustees and also in selecting and designating the persons who were to become beneficiaries. All of the executors died before exercising the discretion as to either matter, so that there never was any trustee. In Board v. Dinwiddie, supra, the Indiana court disposed of Grimes v. Harmon as an authority in that case by saying that the charity in Grimes v. Harmon failed for want of a trustee.

The decree of the District Court is affirmed.

BENCOE EXPORTING & IMPORTING CO., Inc., v. ERIE CITY IRON WORKS et al.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 169

1. Torts ⟸26(1)—**Complaint held not to state cause of action for preventing performance of contract.**

A complaint alleging that illegal acts of defendant were erroneously attributed to plaintiff by government agents, in consequence of which plaintiff was refused a license to export certain merchandise, the sale of which it had contracted, *held* not to state a cause of action against defendant for damages, in the absence of any allegation that defendant communicated with the government agents or in any way caused or contributed to their error.

2. Sales ⟸273(3)—**Contract for purchase of boiler plates "for export" to Japan held to entitle purchaser to plates legally exportable.**

A contract by plaintiff for the purchase of boiler plates for export to Japan *held* to entitle it to plates which could be legally exported, and a complaint alleging that defendants, with knowledge of the contract, fraudulently obtained, and delivered under the contract, and received payment for plates, exportation of which was prohibited by government order, *held* to state a cause of action for damages.

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

Action at law by the Bencoe Exporting & Importing Company, Inc., against the Erie City Iron Works and the John O'Brien Boiler Works Company. Judgment for defendants, and plaintiff brings error. Affirmed in part, and reversed in part.

Writ of error to judgment for defendant based on a general demurrer to the complaint. The complaint contains two causes of action. The first is as follows, stating it according to its legal effect:

In July, 1917, plaintiff took an order from a Japanese corporation for 300 tons of boiler plates, to be shipped to said company in Yokohama. In order to get the plates, plaintiff made a contract with Ætna, etc., Company, whereby that company agreed to sell and plaintiff agreed to buy and pay for "300 tons of boiler plates for export to Japan." The price as between plaintiff and Ætna was so much a pound "f. o. b. mill, Pittsburgh base, * * * shipping instructions to be given later."

Plaintiff then procured from Equitable Trust Company and delivered to Ætna Company "irrevocable letters of credit," addressed to Ætna Company and available up to December 31, 1917, by sight draft with bills of lading and invoices attached. Thereafter Ætna Company for the purpose of in part fulfilling its contract with plaintiff, further contracted with defendant Erie Works for 200 tons of boiler plates similar to those described in the contract between plaintiff and Ætna Company, and Erie Works accepted this contract knowing that the said 200 tons of plates "were for export." Payment to Erie Works was provided for by assigning enough of the aforesaid letters of credit issued by Equitable Trust Company to the Coal & Iron National Bank, by reason of which assignment said bank issued to defendant Erie Works another letter of credit, enabling said defendant to obtain payment for the 200 tons of boiler plates by drawing a sight draft with bills of lading and invoices attached showing shipment at the proper time.

Before any of the foregoing occurrences the defendant O'Brien Company had ordered from the Illinois Steel Company a large quantity of boiler plates, but the Illinois Company's acceptance of this order was in terms "subject to

diversion by the requirements of the United States government." A large part of this order remained undelivered to O'Brien Company in July, 1917. At the same time the two defendants O'Brien Company and Erie Works had a contract with each other, by which the latter was to procure from the former 500 tons of the boiler plates so as aforesaid obtainable from Illinois Steel Company, and this contract between the defendants was "contrary to, and known by both defendants to be contrary to, the agreement between O'Brien Company and Illinois Steel Company," because it was a part of O'Brien's agreement with Illinois Steel Company that the plates to be made by the latter were to be used in the construction of boilers by O'Brien Company itself as a governmental agency.

On or after August 2, 1917, the President of the United States, through proper officers, "notified and directed the Illinois Steel Company" that no boiler plates should be delivered for export after certain dates fixed by a proclamation of the President, wherefore it then became illegal for Illinois Steel Company to deliver for export any portion of the order of defendant O'Brien Company then remaining unfulfilled. Thereafter it is asserted that the defendants conspired to obtain 200 tons of plates from Illinois Steel Company under the latter's contract with O'Brien Company, by concealing the fact that they were intended to be shipped in fulfillment of an export contract and were not to be used by O'Brien Company itself in domestically manufacturing boilers; and defendants, having by these false representations and equally fraudulent suppressions obtained the plates, shipped the same to the order of defendant Erie Works in the form required by the irrevocable letter of credit written by Coal & Iron Bank. The plates, having been thus paid for, were delivered to plaintiff; but, owing to the governmental restrictions above referred to, they could not be exported, nor used to fulfill plaintiff's contract with the Japanese corporation, to the plaintiff's loss and damage in the sum of upwards of $45,000.

The substance of the second cause of action is that on and after October 2, 1917, the plaintiff sold for export divers articles which under the regulations then existing were exportable, providing a license therefor were obtained pursuant to the orders of the President of the United States. The complaint continues that the acts of defendants set forth in the first cause of action, "in procuring by fraud the manufacture and shipment of the boiler plates" aforesaid, were discovered "by government agents and reported to the Department of Commerce and by the latter attributed to the plaintiff," whereby said Department (acting for the President) "refused all licenses to plaintiff, whereby it lost" the sales aforesaid, to its damage in the sum of $50,000.

To the judgment dismissing both causes of action on demurrer plaintiff brought this writ.

Wellman, Smyth & Scofield, of New York City (Herbert C. Smyth and Ralph W. Thomas, both of New York City, of counsel), for plaintiff in error.

Geo. C. Franciscus and John A. Thompson, both of New York City, for defendants in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] We are of opinion that the court below rightly sustained demurrer to the second cause of action. The substance of this part of the complaint is that certain governmental agents, who had power to give or withhold export licenses during the late war, erroneously or stupidly imputed to plaintiff the wrongful deeds of defendants, and therefore punished plaintiff by preventing the procuring and/or fulfillment of export contracts. Let the defendants be assumed as guilty of all the wrongdoing charged, yet (1) it is nowhere asserted that defendants ever said or suggested to any one, much less the agents of the United States, that plain-

tiff had shared in or consented to the defendants' acts; and (2) especially, in the absence of any allegation of communication by defendants to the agents of the United States, it is not seen how defendants can be held responsible for the uninspired, and on the face of complaint inexcusable, mistake or stupidity of said governmental officers.

[2] The first cause of action is novel, and most interesting. There can be no doubt of the existence of the legal principle asserted as applicable to new and singular facts, viz. that when fraud is committed, and damage is thereby occasioned, a cause of action results to him who is damaged. Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; Parley v. Freeman, 3 T. R. 51. But we find it impossible profitably to discuss the application of the principle, because we are convinced that the court below too narrowly interpreted the language of the complaint, and what the facts will be when evidence is adduced cannot be certainly stated.

Every case, though heard on demurrer, must rest decision on facts: but the facts on demurrer often, if not usually, consist of inferences from the pleader's words, and such inferences are often of small value, when compared with the results of sworn evidence. Reading the complaint benevolently, as must be done on demurrer, we find plaintiff asserting that what he bought were plates "for export to Japan," and the knowledge that this was plaintiff's bargain, was passed on from Ætna Company to Erie Works and O'Brien.

Decision below, however, was rested on, and grew out of, a holding or finding that the "reference to export" was no more than a "description." From this holding logically flowed a reading of the pleaded contract as requiring no more than the delivery to plaintiff in the United States of plates physically complying with requirements as to quality, size, etc. Under such a contract, it would and did with equal logic result that, since plaintiff had gotten plates physically acceptable, he had no cause of complaint, for no fraud had been worked on him by any one, and (as was held) he got "exactly what he had contracted for." The fact that plaintiff's goods, exactly as contracted for, had been procured for him by frauds or falsehoods worked on Illinois Steel Company and the United States, was quite immaterial. In terms of the undoubted rule of law, there was no concurrence of fraud and damage to the hurt of plaintiff.

But we cannot read the complaint as making the exportable quality or attribute of these boiler plates no more than descriptive. Plaintiff is entitled to the reading we prefer, which is that it was part of the original bargain between plaintiff and Ætna Company, and part of the fractional bargain between Ætna Company and Erie Works, and something communicated to and known by O'Brien, that plaintiff was not getting what he was entitled to, and was not obtaining fulfillment of his contract, unless the plates tendered him had not only the stipulated physical qualities, but possessed also the political or legal and additional quality or attribute of exportability.

Whether there ever was such a singular and burdensome contract we do not know; but we hold it clear that an agreement of that kind is possible, and would be legal, and further that it is such a contract that

plaintiff has with reasonable clarity alleged. Therefore he is entitled to an opportunity of proving it before a jury. No further holding is now necessary. To lay down rules which now seem applicable to possible results of evidence only makes confusion.

It is ordered that the judgment on review be affirmed as to the second cause of action, and reversed as to the first; that there be no costs of this court, and the case be remanded with directions to require the defendants to answer the first cause of action within a time to be fixed by the District Court.

OSAGE OIL & REFINING CO. v. HALLER et al.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 207.

1. **Corporations ⟸121(5)—Evidence held not to show misrepresentation or actual mistake as to identity of corporate stock.**
   Evidence as to a sale of stock *held* to show there was no misrepresentation that the corporation was an Oklahoma corporation by the same name, and that there was no mutual mistake as to the identity of the corporation.

2. **Corporations ⟸99(1)—Stock exchanged by corporation for stock in other corporation presumed to be that already issued, so that exchange did not violate the South Dakota Constitution as to issue except for money, labor, or property.**
   Stock exchanged by a South Dakota corporation for stock of another corporation is presumed, where there was evidence that a block of the stock had been issued to its treasurer, and there was no evidence as to the issuance of the stock actually exchanged, to have been stock theretofore lawfully issued by the corporation, so that the exchange did not violate Const. S. D. art. 17, § 8, prohibiting the issue of corporate stocks except for money, labor done, or property actually received.

3. **Injunction ⟸241—Decree dismissing bill can authorize recovery by defendant on injunction bond.**
   Where a temporary injunction against the sale of corporate stock has been issued, the court had power to provide in its decree dismissing the bill that the defendant should recover on the injunction bond such damages as he could show.

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

Suit in equity by the Osage Oil & Refining Company against Alice E. Haller and W. R. Chandler. From a decree dismissing the bill, and directing that defendant Chandler recover of plaintiff and the sureties on an injunction bond such damage as he had suffered by reason of the issuance of a temporary injunction restraining him from transferring the stock in controversy, the plaintiff appeals. Affirmed.

Samuel H. Wandell, of New York City, for appellant.

Hedges, Ely & Frankel, of New York City (David Cohen and Louis Frankel, both of New York City, of counsel), for appellee Chandler.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

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

MAYER, Circuit Judge. On March 18, 1920, Chandler entered into an agreement with plaintiff to sell its stock on a commission of 25 per cent. cash.

In the early part of May, 1920, Chandler met defendant Alice Haller, whom he had known for a number of years, and she told him that her husband was ill, and that they had exhausted their resources, and she asked him to handle some stock that her husband had obtained for her. She offered to divide the proceeds if he would finance the stock, but he told her that he was not in a position financially so to do. She said she had 25,000 shares of oil stock, and he made a memorandum that the name of the company was American Oil & Refining Company, and told Mrs. Haller that he knew of an oil stock that was paying 5 per cent. dividends quarterly, and suggested that, if she could dispose of her oil stock and get the other stock, she would have a source of income. This was agreeable to Mrs. Haller, and Chandler then told her that he would see what he could do. Chandler testified that he had made no investigation in respect of the stock and knew nothing concerning the same.

Thereafter Chandler saw Wetmore, the sales manager of plaintiff, and told Wetmore that he knew "a party who has got about 25,000 shares of American Oil & Refining Company stock"; that he did not know anything about this stock, but the owner would "take Osage for it if it has a market." Wetmore told Chandler he would find out about the stock, and he did inquire of a broker named Lyon, and thereafter, on May 11, 1920, telegraphed Chandler that he could get 40 cents per share for the stock.

Chandler left a memorandum for Wetmore which at the trial had escaped the memory of both Wetmore and Chandler. This memorandum read as follows:

"I have a party who has 25,000 shares of American Oil & Refining Co., Okla. Par, $1,000.
Will sell for 50c if necessary and put proceeds in Osage. Can we do anything with it. "W. R. Chandler.
"Will get in touch with you on Monday. Still pretty hoarse from cold. Sat. 12M."

As May 8th was on a Saturday, the probability is that this memorandum preceded the conversation between Chandler and Wetmore above referred to; but the date is not important. There is a notation at the bottom of the memorandum in Wetmore's handwriting which refers to Lyon and a telephone number indicating, as Wetmore testified, that he had made inquiry of the broker Lyon.

The District Court found, and the evidence fully confirms the finding, that Chandler did not make any representation whatever as to the stock or whether or not the company was incorporated in Oklahoma or had any oil wells in Oklahoma; the only reference to Oklahoma being the abbreviated word "Okla." in the foregoing memorandum.

Wetmore testified that he did not understand from this letter that it had reference to American Oil & Refining Company of Oklahoma.

A few days after Wetmore's telegram to Chandler, the latter called on Wetmore who told him to bring in the oil stock. On May 21

Chandler brought 27,000 shares of American Oil & Refining Company stock represented by 32 certificates, and Wetmore receipted therefor.

The certificates bore plainly on their face the words "Incorporated under the Laws of the State of Delaware."

On the same day, Wetmore gave the stock to Whitehead, the president of the Osage company, who stated to Wetmore: "That is good stock. I know this company." Wetmore told Whitehead that he had called up Lyon, and that the latter said he could give seven sixteenths, to which Whitehead answered that he could hold the stock himself, and "if it was all straight, why, he would take and issue Osage stock $10,000 worth, and take this thing and sell it." Thereupon Whitehead called up some brokers and said that the transaction was all right. When Whitehead looked at the stock he said he knew the signature of the president and vice president. Wetmore procured from Whitehead $200 for Chandler as an advance on the commission, the balance to be paid as the stock was sold.

The transaction was closed as follows: Mrs. Haller was to take Osage stock on the basis of $1.50 per share for 25,000 shares of her oil stock, while the remaining 2,000 shares were to be paid for in cash at $.40 per share. The result was that she received $801 in cash and 6,666 shares of Osage stock and she and Chandler signed a receipt, reading:

"This check (meaning the check for $801.00) and 6,666 shares of Osage Oil & Refining Company stock is accepted in full payment for 27,000 shares American Oil & Refining stock."

There was a corporation known as American Oil & Refining Company organized under the laws of Oklahoma, and plaintiff's claim, briefly stated, is that what Chandler did amounted to a false representation that the stock was the stock of the Oklahoma corporation, whereas in fact it was the stock of the Delaware corporation.

[1] There were some contradictions in the testimony which the District Court resolved in favor of Chandler and against Whitehead. There is no need for us to analyze the testimony in detail, for we entirely agree with the conclusions arrived at by the District Court: First, that there were no representations and, in any event, no false representations; and, secondly, that the case was not one of a mutual mistake of fact.

[2] This leaves for consideration the question raised by appellant that the transfer or sale of the stock of the Osage Company was void because in violation of section 8, art. 17 of the Constitution of South Dakota, which provides in part as follows:

"No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void."

The facts, however, do not present this question. There is no evidence that the Osage Company issued these shares of stock for the purpose of buying the oil stock from Chandler. So far as the record discloses, it must be assumed that the stock had already been issued and had found its way back into the treasury of the company. The

proof is that on September 10, 1917, $2,000,000 worth of Osage Company stock was issued to one Hale, the treasurer of the company. It was sought to prove that this issue was made under a misunderstanding and then canceled, but this proof was wholly unsatisfactory because plaintiff was unable to show any action of the board of directors or of the stockholders of the Osage Company which rescinded the transaction. The situation then was that Osage Company had already issued stock which in the absence of proof to the contrary must be assumed to be stock which was validly issued, and it was 6,666 shares of validly issued stock which was transferred in exchange or payment for Mrs. Haller's 25,000 shares of oil stock.

In any event, the record is barren of proof that the 6,666 shares were an original issue, and, in view of this lack of proof, a discussion of the provision of the Constitution of South Dakota would be academic.

[3] That the court had power to provide in its decree that Chandler should recover on the injunction bond such damages as he could show is no longer a debatable question. West v. East Coast Cedar Co., 113 Fed. 742, 51 C. C. A. 416.

Decree affirmed, with costs.

JONES et al. v. OSAGE OIL & REFINING CO.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 208.

Corporations ⟸133—Suit to compel transfer of stock and action for conversion are alternative remedies for refusal to transfer.

Where a corporation which had assured purchasers of its stock the shares were transferable thereafter refused to transfer the stock to the puchasers, the latter had the alternative of bringing a bill in equity to compel the transfer, or bringing an action at law for the conversion of the stock, and it was not error, in a suit to compel the transfer, to refuse an amendment of the complaint whereby plaintiffs could claim damages for refusal to transfer in addition to their prayer for the transfer.

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

Suit in equity by William R. Jones and another, doing business under the firm name and style of Jones & Baker, against the Osage Oil & Refining Company. Decree for plaintiffs, and defendant appeals. Affirmed.

Samuel H. Wandell, of New York City, for appellant.

O'Brien, Boardman, Parker & Fox, of New York City (Clifford King Pullen, of New York City, of counsel), for appellees.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge. This was a suit to compel the Osage Company to transfer 3,333 shares of its stock to plaintiffs. This was half of the stock referred to in the case of Osage Oil & Refining Co. v. Alice

Haller and W. R. Chandler, 280 Fed. 693, decided herewith. The evidence shows, and the District Court found, that plaintiffs had purchased these shares and paid cash for them after being told by defendant that the shares were transferable. The decree of the District Court ordered the transfer of the stock, but the court declined to allow an amendment to the complaint, so that plaintiffs could claim damages for refusal to transfer in addition to their prayer to compel defendant to transfer the stock.

The District Court was of opinion that plaintiffs had the alternative of bringing a bill in equity to compel transfer or bringing an action at law for the conversion of the stock. In this conclusion the District Court is fully sustained by authority. Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387; Cook on Corporations (7th Ed.) vol. 2, § 391 et seq.; 14 C. J. §§ 1164–1166.

Decree affirmed, with costs.

HEATON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 27, 1922.)

No. 196.

1. **Bribery ⊂⊃6(4)—Indictment for accepting bribe as officer or agent held insufficient.**

An indictment charging that defendants, being "officers, agents, and employés of the United States, to wit, federal prohibition agents acting under the direction of the prohibition commissioner of the United States," asked and received a bribe, *held* not to charge an offense under Criminal Code, § 117 (Comp. St. § 10287), making it an offense for any officer "or a person acting for * * * the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof," to ask or receive a bribe, etc., there being no such office known to the law as "prohibition commissioner," or such officer or employé as "federal prohibition agent," and there being no allegation that defendants were acting "by virtue of the authority of any department or office of the Government."

2. **Criminal law ⊂⊃423(2)—Evidence as to acts of person giving bribe held incompetent.**

On trial of defendants, charged with accepting a bribe of $1,000, testimony of a bank employé that the person alleged to have given the bribe, about the time in question, drew $1,000 from the bank, defendants not being present, *held* incompetent, and its admission prejudicial error.

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

Criminal prosecution by the United States against Ralph Heaton and others. Judgment of conviction, and defendants bring error. Reversed.

The indictment was for violation of section 117 of the United States Criminal Code (Comp. St. § 10287), which, so far as applicable, reads: "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity under or by virtue of the authority

of any department or office of the government thereof, * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined * * * and imprisoned. * * *"

The indictment (briefly summarized) sets forth that the defendants and one Ahern on September 11, 1920, "being then and there officers, agents, and employees of the United States of America, to wit, federal prohibition agents, acting under the direction of the prohibition commissioner of the United States" knowingly, etc., asked and received $1,000 from one Van Auken to have their decision and action on a matter then pending before them in their official capacity influenced, the pending matter being the charge against Van Auken of selling and possessing intoxicating liquor contrary to the provisions of the act known as the National Prohibition Act (41 Stat. 305).

George W. Olvany and Thomas P. De Graffenried, both of New York City, for plaintiff in error Ertz.

Frank Wasserman, of New York City, and Hector McGowan Curren, of Brooklyn, N. Y., for plaintiffs in error Heaton, Jacobs, Daley, and Smith.

Shephen T. Lockwood, U. S. Atty., and William J. Donovan, Asst. U. S. Atty. (John T. Walsh, of Buffalo, N. Y., of counsel), for the United States.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). Motions to dismiss the indictment were made immediately after the jury was impaneled, again at the close of the government's case, and finally at the conclusion of the whole case; but the reasons specified did not state the grounds on which we base decision.

[1] The National Prohibition Act imposes various duties upon the Commissioner of Internal Revenue. Under title 2, § 1, subd. 7, it is provided:

"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."

Under section 38 of the same title it is provided:

"The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectivly authorized to appoint and employ such assistants, experts, clerks, and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the enforcement of the provisions of this act, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the Commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this act, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by the Civil Service Act. * * *"

It will thus be seen that there is no office created by statute known as "prohibition commissioner," and no such office or employment known as "federal prohibition enforcement agent." These may very well be convenient designations for departmental purposes, but the

point is there are no such offices created by statute. Who is an officer of the United States has been so frequently discussed that it is sufficient to refer to United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482, United States v. Smith, 124 U. S. 525, 8 Sup. Ct. 595, 31 L. Ed. 534, and United States v. Schlierholz (D. C.) 137 Fed. 616.

A "person acting for or on behalf of the United States in any official capacity" may be any employé, however minor his duties, who is so acting "under or by virtue of the authority of any department or office of the government." United States v. Birdsall, 233 U. S. 223, 34 Sup. Ct. 512, 58 L. Ed. 930. Whether the person charged with the offense denounced in section 117, supra, is one of the persons or class of persons described in the statute, is a fact which must be alleged in the indictment and proved upon the trial. The allegation, therefore, in the indictment that these defendants were officers of the United States is not correct upon its face. The allegation that they were agents and employés of the United States, to wit, "federal enforcement agents acting under the direction of the prohibition commissioner," refers to employés unknown to the statute by such designation, and also fails to set forth any facts showing in what official capacity and by virtue of the authority of what department or office of the government the defendants acted for or on behalf of the United States.

The indictment is thus vitally defective, and, if an appropriate motion shall be made, the District Court is instructed to quash the indictment. No question arises in the case as to whether or not the defect of the indictment could have been cured, because the only reference in the testimony adduced by the government and by defendants was that defendants were "prohibition agents." There was no proof as to their appointment, or for that matter that they were appointees of any department or office of the government. In Martin v. United States, 278 Fed. 913, recently decided by this court, where defendant was indicted under section 117, the prosecution proved the appointment of Martin and the official capacity in which he acted for the United States. Such has always been and necessarily must be the proper procedure upon a trial under an indictment of this section.

[2] 2. There is another ground for reversal to which we call attention. Van Auken, the hotel keeper, the alleged violator of the prohibition statute, testified for the prosecution that the five defendants and one Ahern, also a so-called prohibiton agent, who likewise testified for the prosecution, called upon him at his hotel in Cuba, N. Y., on September 11, 1920, and that one of the six men said "they would make it all right, * * * and after a while they said $1,000." He further testified that he "went and got $1,000, and took it in the sitting room, and laid it on the table, and walked out."

The witness called immediately prior to Van Auken was Henry P. Morgan, an employé of the First National Bank of Cuba, N. Y. He testified, over objection on behalf of all defendants, that he saw Van Auken, in the absence of defendants, in the bank on September 11, 1920; that Van Auken asked him for $1,000, and that he cashed Van Auken's check for that amount. On cross-examination, Morgan testified that Van Auken had a large deposit in the bank, and had drawn

$1,000 on other occasions. To the testimony of Morgan an exception was taken, which was available to all defendants.

Defendants testified in their own behalf, with the result that the jury was confronted with a sharp conflict in testimony, the details of which we need not recite. It may well be that the testimony of Morgan turned the scale against defendants, the principal witnesses against whom were Van Auken, the man who gave the bribe, and who had been convicted at least three times of violating the State Excise Law, and Ahern, a confessed bribe taker. This testimony of Morgan was clearly inadmissible, and its admission was prejudicial error, under People v. Bissert, 71 App. Div. 118, 75 N. Y. Supp. 630, affirmed 172 N. Y. 643, 65 N. E. 1120.

Finally, should there be another trial, Van Auken should not be permitted to testify that he went to the bank and brought back the money. Presumably, in view of the court's ruling, there was no objection to the following inadmissible testimony, which should be avoided in another trial:

"Q. When you came into that room after you had been to the bank and brought it [the money] in, there were at least four agents there, you say. A. Yes."

Judgment reversed.

KOKUSAI KISEN KABUSHIKI KAISHA v. ARGOS MERCANTILE CORPORATION.

SAME v. CROTOIS.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

Nos. 171, 172.

1. **Parties ⟸7(2)—Trustee under foreign law of the contract may sue in courts of the United States.**

The law of England, which makes the charterer, in a charter party providing that the owner shall pay a brokerage commission, trustee for the broker, with the right to sue in his behalf, gives a substantive and not a remedial right, and a charterer as such trustee, under a charter executed in England, may maintain an action thereon to recover the broker's commission in a court of the United States, in New York, under Code Civ. Proc. N. Y. § 449.

2. **Action ⟸27(1)—"Action on contract" defined.**

"Action on contract" means an action brought to enforce rights whereof the contract is the evidence, and usually the sufficient evidence.

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

3. **Trusts ⟸1—"Express trust" defined.**

An "express trust" is one raised and created by acts of the parties.

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

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

Actions at law by the Argos Mercantile Corporation, as trustee for L. French & Co., Limited, and by Frederick E. Crotois, trustee for

L. French & Co., Limited, against the Kokusai Kisen Kabushiki Kaisha. Judgments for plaintiffs, and defendant brings error. Affirmed.

Certiorari denied 257 U. S. —, 42 Sup. Ct. 463, 66 L. Ed. —.

One question, and only one, is presented by both these writs, which may therefore be treated as if there were but one case. Defendant below (Kokusai, etc.) owned two steamships, which were severally time-chartered to Argos, etc., Co. and Crotois. The general form of charter was usual, and to these cases immaterial, except that each charter was duly signed, and constituted a written contract between defendant below and one of the plaintiffs (Argos Company or Crotois).

L. French & Co., Limited, is a British joint-stock company engaged in the business of brokerage; it is substantially admitted that French acted as broker in respect of each chartering, or the making of both charter parties, and both charter parties contain clauses substantially alike, of which one reads as follows: "A commission of 5 per cent. upon the gross amount of this charter, payable by the steamship and the owners, due to L. French & Co., Limited, for division upon the signing hereof, steamship lost or not lost, and also upon any continuation or extension of this charter, or on sale of vessel."

Both charter parties were made in England. The commission to French was not wholly paid, and these suits were brought by the charterers to recover the balance of commissions, and each complaint contained the following allegation: "Under the law of United Kingdom of Great Britain and Ireland, where the said charter party was made, * * * the plaintiff, by virtue of the said charter party as charterer thereunder, is a trustee for the benefit of said L. French & Co., Limited, to recover for the benefit of said L. French & Co., Limited, the commissions in and by the said charter party provided to be paid to French."

The trial judge held that the action could be maintained by these plaintiffs in a court of the United States sitting in the state of New York, and directed verdict and judgment for plaintiffs, to which defendants took these writs.

Hunt, Hill & Betts, of New York City (George C. Sprague and E. Rapallo, both of New York City, of counsel), for plaintiff in error.

Smith, Townley & Chambers, of New York City (Walter C. Noyes, Alfred H. Townley, and Henry Siegrist, all of New York City, of counsel), for defendants in error.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [2] This action is *on* a contract—a common phrase, meaning, among other things, that it is brought to enforce rights whereof the contract is the evidence, and usually the sufficient evidence. But it is not upon any contract made between French, the broker, and the defendant. There may be such a contract, but the contract in suit is between charterer plaintiff and shipowner defendant, and no one else.

It has been assumed throughout, and is obviously true, that the lex loci contractus, or what is called in Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104, "the law of the contract," is the law of England. Therefore the lex fori applies only to matters of remedy. For the purposes of this action defendant denies nothing, except that these plaintiffs cannot here sue to recover the claim or demand of French.

The situation presented is new in this court; though Vellore, etc., Co. v. Steengrafe, 229 Fed. 394, 143 C. C. A. 514, exhibits quite sim-

ilar facts; but the broker there sued on a contract between himself and the shipowner. The law of England has been too recently and plainly laid down to be doubtful:

"Under long-established practice the broker in such cases in effect nominates the charterer to contract on his behalf. * * * In these cases the broker on ultimate analysis appoints the charterer to contract on his behalf, and therefore * * * in such cases charterers can sue as trustees on behalf of the broker." Les Affreteurs, etc., v. Walford, L. R. (1919) A. C. 801, 807.

And reasons assigned are that the charterer stipulates for payment of commission, and he does so with the full consent and concurrence of the broker. The charterer makes the charter party with regard to the broker's remuneration, for and on behalf of the broker. Page 812. This very recent decision fully adopted Robertson v. Wait, 8 Ex. 299, the summary ruling in which case was that under charter parties in this common form the charterers are trustees on behalf of the broker.

The ultimate and single question in this case is whether this relation established by the law of England—i. e., by the law of the contract—is substantive law or merely a remedial incident. Substantive law is that portion of the law which creates rights and obligations. 37 Cyc. 508. The difference between a substantive right (which, of course, is part of substantive law) and a remedy is incapable of exact definition, as was said by Lowell, J., in Dexter v. Edmands (C. C.) 89 Fed. 467. This means that what is a right and what is a remedy sometimes depends upon the peculiar circumstances of particular litigation. Yet this difficulty attaches but to a remnant; most cases are plain. Thus it is assuredly true that a theory of law, a legal framework, which as a matter of law produces title in a given person, is a substantive right, resulting from substantive law; and equally is it true that, when one is by law a trustee, the name imports a legal title.

[1] Applying that idea to the present case, it is the law of England, and the law of this contract, that the charterer is a trustee for the broker. As such trustee he has legal title to the brokerage, which in and by the contract between himself and the shipowner the latter agreed to pay. Therefore such trustee may assert his legal title by suit, not as a matter of favor, not as a matter of mere remedy, but because in the legal sense he owns that for which he chooses to sue. In this view it is clear that the decision below was right, and that, no matter what may be the law of New York or of the courts of the United States in respect of the mutual relation of charterer and broker under a charter party of which the law is not English, the plaintiffs herein may assert in any court recognizing the rule of lex loci contractus their substantive rights as trustees as aforesaid. This view of the case avoids the sole defense advanced, which is that under section 449, Code Civ. Proc., the real party in interest must sue, with an exception in favor of the "trustee of an express trust."

[3] In so far as this statute governs remedies, it is, under the various conformity acts, binding in the courts of the United States sitting in the state of New York. Albany, etc., Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982. But the statute does not define the

phrase "express trust"; much less does it define "trustee." It merely uses with a somewhat unusual context old terms of the law. An express trust is no more than one raised and created by the acts of the parties, as distinguished from an implied or resulting trust (Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896), and this description has not been doubted since Cook v. Fountain, 3 Swans. 586, decided in 1672.

It follows that if, as matter of substantive law, plaintiffs become trustees of express trusts in Great Britain, and are such trustees in respect of property not solely subject to New York regulation, then whatever rights vested in them as such express trustees they can enforce in New York, even under the state statute, provided, always, that such enforcement is not in contravention of sound morals or declared public policy. But we ground decision on the holding that plaintiff's position as trustees, and their rights as such are parts of the substantive law of England; and we make no declaration as to what would be plaintiffs' position had these charter parties been executed in New York.

Judgment affirmed, with one bill of costs.

HEITLER v. UNITED STATES.

WEINSTEIN v. SAME.

(Circuit Court of Appeals, Seventh Circuit. January 13, 1922.)

Nos. 2849, 2850.

1. **Intoxicating liquors ⊂⊃216—Indictment for sale held sufficient.**
An indictment charging the sale for beverage purposes of intoxicating liquor, further defined as distilled spirits containing more than one-half of 1 per cent. of alcoholic content, *held* sufficient, under National Prohibition Act, tit. 2, § 3.

2. **Criminal law ⊂⊃493—Indictment for sale of intoxicating liquor held supported by testimony that the beverage ordered and received was whisky.**
An indictment for sale for beverage purposes of intoxicating liquor *held* supported by testimony of witnesses, who stated that they were experienced in the use of whisky and that the beverage they ordered and received and drank was whisky.

3. **Intoxicating liquors ⊂⊃168, 169—Owner and manager of place where liquor was illegally sold held chargeable as principals.**
Where two persons were associated as owner and manager of a place where liquor was illegally sold and served by waiters, each is chargeable with the offense as principal.

4. **Indictment and information ⊂⊃175—Erroneous averment in indictment of place of sale held immaterial.**
An averment in an indictment that the place where an illegal sale of liquor was made was in Chicago *held* immaterial, where the sale proved, while not within the city, was in the same district.

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

Criminal prosecution by the United States against Coleman Heitler and Abraham Weinstein. Judgment of conviction, and defendants bring error. Affirmed.

Henry W. Freeman, of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and Charles J. Monahan, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

PAGE, Circuit Judge. Plaintiffs in error (herein known as defendants) were convicted in the District Court at Chicago under both counts of an indictment charging violation of the National Prohibition Act (41 U. S. Stats. at L. p. 305). Under the first count, charging unlawful possession of intoxicating liquor, defendants admitted guilt, but no sentence was imposed thereon.

[1] The second count charges that defendants, at Chicago, in said district, did unlawfully sell for beverage purposes certain intoxicating liquors, to wit, distilled spirits of more than one-half of 1 per cent. alcoholic content, etc. It is urged that this count is defective. Section 3 of title 2 of the Prohibition Act provides:

"No person shall * * * sell * * * any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Section 1 of title 2 of the act provides:

"The word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

The defendants are charged with the unlawful sale for beverage purposes of intoxicating liquor, further defined to be distilled spirits containing more than one-half of one per cent. of alcoholic content. As this court said in Jacobsen v. United States, 272 Fed. 399.

"The language of each count is substantially that of the statute, and properly charges a statutory offense. The meaning is clear. No injury growing out of any alleged insufficiency or uncertainty in the allegations appears from the record, and none is disclosed in the argument [citing Jelke v. United States, 255 Fed. 264]."

[2] It is contended that there was no evidence of the intoxicating character of the beverage sold. This is apparently based upon the fact that there was no chemical analysis of the beverage and that those testifying could not and did not undertake to tell the alcoholic content. Witnesses Somerville and Frazer ordered whisky from a waiter who said, "We have some very good whisky." When the witness Fisher arrived, the waiter asked him if he was going to have the same drink ordered by the others, and Fisher replied, "Yes, if they ordered whisky." The waiter filled the order by bringing back a beverage. By the very act of filling an order for whisky, whoever filled it must be held to have represented that it was whisky. Witnesses who gave the order for whisky drank that which was brought to them and pronounced it whisky. They were experienced in the use of whisky.

Distilled spirits containing less than one-half of 1 per cent. alcoholic

content, if known at all commercially, was never known as whisky, so that the experience of the witnesses, who said that they were familiar with the use of whisky, must have been gained by drinking beverages containing more than one-half of one per cent. of alcoholic content. Their opinion that the beverage served them was whisky was competent evidence that it was a liquor containing more than one-half of 1 per cent. alcoholic content. See opinion in Lewinsohn v. United States, 278 Fed. 421, of this court filed November 29, 1921.

[3] Defendants urge that the evidence is not such as to support a conviction as to either of them for the selling of whisky. The Wigwam Inn, where the liquor was sold, is in the town of Burr Oak, Cook county, Eastern division of the Northern district of Illiniois. On the ground floor of the Inn was an ordinary barroom, back of which was a cabaret, and on the rear of the lot was a building used for purposes of prostitution. Defendants had adjoining bedrooms upstairs, in one or both of which liquor was found while defendants were with the officers. Neither defendant testified, nor did any one on their behalf, so that the testimony was wholly uncontradicted.

On the night in question, when the officers came into the barroom, Weinstein was back of the bar, and when commanded to stand still did not do so, but stepped up to the bar and reached for or struck something. They heard something tumble, and found an ordinary mixer or shaker, tipped over. It smelled of whisky, and in it were a few drops of liquid that smelled and tasted like whisky. Weinstein said he owned the place, and the waiter said he worked for Weinstein. Heitler was about the premises, had a bedroom upstairs, and said that he was the manager of the place. The testimony does not indicate that he was a customer or a guest. The girls soliciting in the place where whisky was ordered and served said they paid a part of their earnings to defendants, Weinstein and Heitler. When the girls were arrested, Heitler negotiated for their release, and, not having money enough, went to the cash drawer of the place. Except for the house of prostitution on the rear of the lot the only business shown to have been carried on was the sale of drinks, and it seems, beyond a reasonable doubt, that Heitler was at least the manager of that business.

Where two or more parties join in an unlawful undertaking or enterprise, there is no master and no servant, but each is liable as principal in a criminal action to punishment for violation of the law. It does not matter whose hand gave out the whisky, or who served it; it was a common undertaking, participated in by Heitler, and a part of which was a violation of the law as charged, and all are guilty. U. S. Criminal Code, § 332 (Comp. St. § 10506); Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 249, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

It is urged that the testimony about the house of prostitution, of which there was considerable, was irrelevant and prejudicial to the defendants. It is difficult to see in what manner it was prejudicial, and, beyond the insistence that it was nothing is shown. On the contrary, the house and business seem to have been a part of the plant and business carried on in the Inn. The inmates were in the cabaret

soliciting business while the whisky was being ordered. When the inmates were arrested, they said that part of the money received for the purposes for which they were there had been given to the defendants.

[4] Complaint is made against the instructions, yet there was but one exception. Defendants excepted to the instruction that the averment that the sale took place in Chicago was immaterial. Chicago was only a place within the Northern district of Illinois; it was no part of the offense and was mere surplusage. It was not urged on the trial, nor is it shown, that defendants were prejudiced in any way by that averment. Such a sale as charged in the indictment would be unlawful anywhere in the United States. An examination of the instructions convinces us that they were fair and without error.

The judgment is affirmed.

JENS v. DAVIS.

(Circuit Court of Appeals, Eighth Circuit. May 15, 1922.)

No. 220.

Bankruptcy ⟸396(3)—Under Iowa statute, insurance for benefit of wife is exempt, notwithstanding right to change beneficiaries.

Under Code Iowa, § 1805, providing that a life insurance policy shall inure to the separate use of the husband, or wife and children, of insured, independently of his creditors, and making similar provisions concerning the proceeds of an endowment policy and other policies, a life insurance policy payable to the wife of insured is exempt, notwithstanding a provision in the policy permitting insured to change the beneficiary, and the trustee in bankruptcy is not entitled to the cash surrender value of the policy.

Petition to Revise Order of the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of Henry John Jens, bankrupt. On petition by the bankrupt, opposed by John W. Davis, as trustee, to revise an order of the District Court (273 Fed. 606) denying the bankrupt's claim of exemption in policies of life insurance. Reversed, and cause remanded, with instructions to allow the exemption.

Addison G. Kistle, of Council Bluffs, Iowa (George S. Wright and W. H. Schurz, both of Council Bluffs, Iowa, on the brief), for petitioner.

John M. Galvin, of Council Bluffs, Iowa (W. A. Byers and D. T. Sullivan, both of Council Bluffs, Iowa, on the brief), for respondent.

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

MUNGER, District Judge. The bankrupt has filed a petition to revise an order of the District Court denying the bankrupt's claim of exemption in policies of life insurance. At the time of filing his pe-

tition and at the time of the adjudication in bankruptcy the bankrupt was a married man and the head of a family, and resided in Iowa. The bankrupt was the owner of several policies of insurance upon his life in each of which his wife was named as beneficiary. By the terms of the policies the insured had the right to change the beneficiary at any time without the consent of the beneficiary. By another provision of the policies, the insurer agreed to pay its cash surrender value upon receipt of the policy and a full surrender of all claims under it. The insurer required a surrender under such policies to be signed by both husband and wife. Three months after the adjudication the bankrupt and his wife executed a written surrender of these policies to the insurer, but the surrender was not accepted by the insurer. The trial court was of the opinion that the trustee in bankruptcy was entitled to the surrender value of these policies. It has been settled, since the decision in Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, that the exemptions of such policies are to be determined by the laws of the state. Section 1805, Code of Iowa (1897), reads as follows:

"A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his creditors. The proceeds of an endowment policy payable to the assured on attaining a certain age shall be exempt from liability for any of his debts. Any benefit or indemnity paid under an accident policy shall be exempt to the assured, or in case of his death to the husband or wife and children of the assured, from his debts. The avails of all policies of life or accident insurance payable to the surviving widow shall be exempt from liability for all debts of such beneficiary contracted prior to the death of the assured, but the amount thus exempted shall not exceed five thousand dollars."

There is an absence of controlling decisions by the Supreme Court of Iowa interpreting this statute, but in the case of In re Steele (D. C.) 98 Fed. 78, the effect of this statute was involved as applied to a similar claim of exemption of policies of life insurance, some of them upon the life of a husband and others upon the life of his wife both husband and wife being bankrupt. One of the policies was payable to one of the bankrupts or to his personal representatives or assigns. It had a surrender value payable to the insured. Two other policies were issued to one of the bankrupts upon the life of the other and the holder was entitled to the surrender value. Another policy, in the nature of an endowment policy, was payable at the end of a term of years to the husband, if then living, or to his wife, if he died before the end of the term. The surrender value was payable to the husband. These policies were held not to be exempt to the bankrupts, but this decision was reversed by this court in the case of Steele v. Buel, 104 Fed. 968, 44 C. C. A. 287, upon a comparison of the section of the Iowa statute which has been quoted and of the terms of the Bankruptcy Act (Comp. St. §§ 9585–9656), and the policies of insurance were held to be exempt.

Counsel for the trustee admit the applicability of this decision to the facts involved in this case, but contend that the question of the right of the bankrupts was not controverted, but accepted as a conceded fact. There has been some difference of opinion in the decisions on the prop-

er interpretation of state statutes relating to the exemption of insurance policies and their proceeds as against the trustee in bankruptcy of the insured. The terms of the exemption statutes also differ, but under some statutes exempting policies of insurance or their proceeds, where the policies were taken out for, or assigned for the benefit of, the wife or children of the insured, it has been held that the fact that the insured can change the beneficiary, and can collect the surrender value of the policy, takes such a policy without the statute, as it is not solely for the benefit of the wife or children. In re Jamison Bros. & Co. (D. C.) 222 Fed. 92; In re Shoemaker (D. C.) 225 Fed. 329; In re Jones (D. C.) 249 Fed. 487.

Other decisions have held that the fact that the insured could change the beneficiary or could receive the surrender value does not avoid the exemption of a policy on the bankrupt's life payable to a married woman, under statutes providing that a policy of insurance payable to, or for the benefit of, a married woman inures to her benefit free from the claims of creditors. In re Whelpley (D. C.) 169 Fed. 1019; In re Johnson (D. C.) 176 Fed. 591; In re Carlon (D. C.) 189 Fed. 815; In re Morse (D. C.) 206 Fed. 350; In re Young (D. C.) 208 Fed. 373; In re Fetterman (D. C.) 243 Fed. 975; Black on Bankruptcy (3d Ed.) § 243.

The same question was presented to this court, and was decided in In re Orear, 189 Fed. 888, 111 C. C. A. 150. A statute of Missouri provided that a policy of life insurance "expressed to be for the benefit of the wife of the insured shall inure to her separate benefit independently of the creditors" (Rev. St. 1909, § 6944) of the husband. A policy of insurance on the life of a husband, payable at his death to his wife, allowed him to change the beneficiary, to obtain its surrender value, or to obtain loans upon it as collateral security. The insured became a bankrupt without having exercised any of these rights. The decision in that case held that such a policy did not pass to the trustee in bankruptcy, because its primary purpose was the insurance of the wife, and the right to make a change of beneficiary or to surrender the policy was but incidental to its main purpose, and the rights of the parties were fixed at the time of the adjudication. It was also pointed out that, in the modern conduct of the life insurance business, practically all policies contain such provisions, and the exemption statute would have almost no field of operation, if it applied only to policies without such privileges to the insured.

The principles announced in that decision determine the questions presented in this case. They are in harmony with decisions of other courts, accord with the liberal construction usually given to exemption laws (Smith v. Thompson, 213 Fed. 335, 129 C. C. A. 637; Hills v. Joseph, 229 Fed. 865, 144 C. C. A. 147; 25 Corp. Jur. 10), apply to the situation at the time of the filing of the petition (Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. [N. S.] 154), and as so applied to the Iowa statute in the case of Steele v. Buel, supra, they give effect to the words of the statute, that the policy of insurance itself inures to the separate use of the husband or wife and children of the insured, independently of his creditors. The Iowa stat-

ute does not say that the exemption is contingent upon the absence from the policy of a right to accept a surrender value or of the right to change the beneficiary, but the construction placed upon the statute by the trustee requires the inadmissible interpolation of conditions to that effect.

The judgment of the lower court will be reversed, and the cause remanded, with instructions to allow the exemption of the policies of insurance.

DAVIS, Federal Agent, v. WADFORD.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1922.)

No. 1914.

Railroads ⇐350(11, 14)—Negligence in speed and contributory negligence of child held for jury.

In an action for the death of a boy 11 years old, who was struck by a train while crossing the track of defendant's railroad in a town on a dark and stormy evening, the question whether or not the train was running at unlawful speed, on which the testimony was in direct conflict, and the question of contributory negligence of deceased *held* properly submitted to the jury.

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

Action at law by F. N. Wadford, administratrix of Creston Wadford, deceased, against James C. Davis, Federal Agent. Judgment for plaintiff and defendant brings error. Affirmed.

P. A. Willcox, of Florence, S. C., and Simeon Hyde, of Charleston, S. C. (Benj. H. Rutledge, of Charleston, S. C., on the brief), for plaintiff in error.

Louis M. Shimel, of Charleston, S. C. (Sidney Rittenberg, of Charleston, S. C., on the brief), for defendant in error.

Before WOODS and WADDILL, Circuit Judges, and WEBB, District Judge.

WADDILL, Circuit Judge. Plaintiff in error, defendant in the court below hereinafter called the defendant, brings this writ of error to review the judgment of the District Court of the United States for the Eastern District of South Carolina, rendered on the 5th day of July, 1921, in favor of the defendant in error, hereinafter called the plaintiff. The action is at law, brought to recover damages for the wrongful death of the plaintiff's intestate, Creston Wadford, by the alleged negligent act of the defendant. The facts are briefly these:

Creston Wadford, a small boy, 11 years old, on the evening of the 21st of December, 1918, while crossing the tracks of the Atlantic Coast Line Railway, in the town of St. Stephens, S. C., was struck by a train of the defendant, and instantly killed. The plaintiff averred that her intestate sustained his death while lawfully proceeding over

and along a well-traveled place across the tracks of the company, which were then, and had for many years theretofore, with the knowledge of the defendant, been used constantly as a place of crossing by many people and the public generally in passing from one side of the town to the other, and to and from the defendant's depot at St. Stephens. The night was dark, and a heavy rain falling, and a special train, consisting of an engine cab and one coach, passed about 6 o'clock, running at a high rate of speed, without stopping or slacking, while passing through said town, in violation of the town ordinances limiting the speed of trains to 20 miles an hour, and without sounding proper whistles, ringing the bell, or giving other signal as required by the laws of the state in passing over the railroad crossings, without efficient headlight, and without exercising due and proper care for the safety of persons crossing the track, with the result that the defendant negligently and carelessly ran over and killed the plaintiff's intestate, while lawfully passing over its tracks upon and along the streets of said town.

Issue was joined between the parties, the defendant denying the several allegations of negligence made by the plaintiff, and a jury was impaneled and returned a verdict for the plaintiff, on which judgment was entered, from which this writ of error is sued out.

The assignments of erorr present two questions: First, that the court erred in refusing to instruct a verdict for the defendant made at the conclusion of the testimony; and, second, that the verdict rendered by the jury was not supported by, and was directly contrary to, the weight of the testimony adduced, and that no judgment should be rendered thereon. The evidence on the several questions of fact was in direct conflict. The trial court instructed the jury that no recovery could be had against the defendant by reason of the failure to sound whistles, ring the bell, or give other signal of the train's approach, because, under the laws of South Carolina, such signals were required only at a lawful traveled way or road crossing, and the evidence in the case showed that the deceased was not killed at such a place.

The court, however, submitted to the jury the determination of the defendant's negligence in the matter of the speed at which the train was moving under the town ordinances on the subject, limiting the same to 20 miles an hour, and whether such fact was the proximate cause of the accident. The question of whether or not the plaintiff's intestate was guilty of contributory negligence, affecting the result, under the facts and circumstances of the case, taking into account his age, information, knowledge, and opportunity of knowledge, was likewise submitted to the jury. Whether the court erred in taking the case from the jury, except in the particulars mentioned, need not be especially passed upon, since there is no exception on the part of the plaintiff with respect thereto, and the court's action was as favorable to the defendant as it could reasonably have asked, and it likewise took no exception.

This leaves for consideration only whether there was error in not taking the case from the jury entirely, and in entering judgment on the verdict, and upon those two questions we have no difficulty in arriving at a conclusion. The case manifestly should have been left to the

jury to determine whether the train was proceeding at an unlawful speed, and also to pass upon the defense of contributory negligence on the part of the plaintiff's intestate in the circumstances. The evidence was positive, on the one side, that the train was not exceeding 20 miles an hour; on the other, intelligent and experienced witnesses testified that it was proceeding at 30 to 35 miles an hour. The jury saw and heard the witnesses, who testified as well to the speed of the train and circumstances surrounding the happening of the accident, as to the intelligence of the deceased, and his ability to care for himself in a position of existing danger, and passed upon the same in favor of the plaintiff, which finding on their part we think the facts fully warranted; and we can hence neither say that the court erred in submitting the case to the jury in the particulars mentioned, or in entering its judgment on the verdict. On the contrary, we hold the action taken was plainly right. Authorities to support this conclusion are numerous, and only the following need be cited: Baltimore & Potomac R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; and the following decisions of this court: Sealey v. Southern Ry. Co., 151 Fed. 736, 81 C. C. A. 282; Director General v. Zanzinger (C. C. A.) 269 Fed. 552; also Strother v. S. C. & Ga. R. Co., 47 S. C. 375, 381, 25 S. E. 272; Bamberg v. R. Co., 72 S. C. 389, 51 S. E. 988; Tucker v. Buffalo Mills, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957; Ghaner v. Leaphart Lumber Co., 85 S. C. 90, 67 S. E. 242.

The judgment of the lower court will be affirmed.

THE EASTERN.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

No. 135.

1. **Towage ⇐11(3, 4)—Tug not insurer of tow; mere error of judgment of master of tug not negligence.**
   A tug is not an insurer of her tow, and her navigators are not to be charged with negligence in management unless their decision is one that nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances.

2. **Towage ⇐11(10)—A tug held not liable for damage to tow.**
   A tug *held* not liable for damage to barges in tow, which she was obliged to cast loose during a very severe storm because of the failure of the master to sooner start for a port of refuge where the immediate cause of the disaster was a change in the direction and great increase in the violence of the winds.

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

Suit in admiralty by F. Dougherty & Co. against the steam tug Eastern; the Eastern Transportation Company, claimant. Decree for respondent, and libelant appeals. Affirmed.

Leonard J. Matteson, Harrington, Bigham & Englar, and T. Catesby Jones, all of New York City, for appellant.

Pierre M. Brown, and Macklin, Brown, Purdy & Van Wyck, all of New York City, for appellee.

Before ROGERS, HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Libelant owns the barges Severn and Merrimac, which were the second and third vessels in a tandem tow of three which left New York on the afternoon of April 8, 1918, bound for Norfolk, Va., in charge of claimant's tug Eastern.

Twenty-four hours later the tow was off Delaware Entrance, when, owing to stress of weather, the Eastern endeavored to make the Breakwater. At 5:30 p. m. the tow was about passing the Five Fathom Lightship. It continued on a course substantially S. W. ½ S. until 6:45 p. m., when the tug turned and steered for the Breakwater. At about 9:30 p. m. the weather became worse, and from thence on for more than 24 hours one of the worst storms ever recorded prevailed in the neighborhood of Delaware Entrance.

The tug persisted with her tow of three boats until between 4 and 5 a. m., when signal was given to "Let go stern barge," which meant that the third boat in tow should anchor. A little later another and similar signal was given, and when relieved of two barges the Eastern ultimately managed to get herself and what was left of her tow into the Breakwater.

The barges left behind belonged to libelant. The Merrimac anchored, but could not hold, and was ultimately driven on Rehoboth Beach. The Severn, in the opinion of her master, could not anchor until it could "get astern of the Merrimac, * * * and by the time I got astern the barge was in the breakers," and thus this vessel went ashore at substantially the same place without anchoring at all.

The definite charges of fault made in the libel are in substance that the tug left New York harbor in the face of such threatening weather as to make it negligent to enter upon the voyage. These charges wholly failed, and after all the testimony had been adduced before the trial judge libelant obtained leave to add two more charges of fault:

(1) In that the steam tug Eastern failed to put into Delaware Breakwater when the master decided that the weather conditions were such that he should put in.

(2) In that the steam tug Eastern failed to make any allowance for leeway after the Eastern headed for Delaware Breakwater.

As explained in very careful argument, these allegations mean that it was negligence producing liability for the Eastern to fail to turn sharply at the Five Fathom Lightship and make for the Breakwater. It was negligence to continue to the south for about an hour and a quarter because the danger conditions were so manifest when off the Lightship that the time spent in going further south made the difference between getting into the Breakwater and not getting in before the violent storm broke. In other words, the complaint is that the tug did not soon enough turn and run for a harbor of refuge.

[1] There is no doubt about the law; the tug was not an insurer,

negligence must be affirmatively shown, not presumed, and navigators are not to be charged with negligence unless their decision is one that nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances. The Clarence L. Blakeslee, 243 Fed. 365, 156 C. C. A. 145, and cases cited. To the same effect the later cases of Aldrich v. Pennsylvania, etc., Co., 255 Fed. 330, 166 C. C. A. 500, and The W. H. Baldwin (C. C. A.) 271 Fed. 411. The matter was summed up by this court in The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519:

"The disaster which befell the voyage supplies the knowledge that comes after the event, but it does not necessarily impeach the judgment of those who decided previously that it was safe to start [on the voyage in question]. They are not to be charged with negligence unless they made a decision which nautical experience and good seamanship would condemn as presumably inexpedient and unjustifiable at the time and under the particular circumstances. * * * They are not to be vindicated merely because they may have erred honestly. They are to be exonerated if they acted with an honest intent to do their duty, and in the exercise of the reasonable discretion of experienced navigators."

[2] It would serve no purpose to go over the evidence in detail in the light of these decisions; it has been done by the District Judge, with whose conclusions we agree. Suffice it to say that in our judgment it was a matter fairly within the discretion of the master of the Eastern whether (at Five Fathom Light) to continue going south for Chesapeake, or to turn in for the Delaware Breakwater. Action depended upon which way the wind would shift, for all agreed that had it shifted to the N. of E. it was safer to keep on south. Again, nothing appeared at the Lightship to show that it would be any more difficult to get into the Breakwater from a point an hour to the southward than it was from the Lightship itself. Decision was doubtful, as is sufficiently shown by the opinion of the master of the Merrimac, a sailing master of more than 40 years' experience, who testified frankly that he did not know what he would have done if he had been called on to decide whether to turn in at Five Fathom Bank or not.

Particularly do we agree with the lower court in finding that the immediate cause of disaster was a change in the direction of and great increase in volume of wind between 9:30 and 10 p. m. We discover no reason why the Eastern's master should have expected such a stormburst either when he was off the Lightship or when he turned for Delaware Entrance.

The decree appealed from is affirmed, with costs.

REUCKHEIM BROS. & ECKSTEIN v. D. L. CLARK CO.

(Circuit Court of Appeals, Third Circuit. December 29, 1921. Rehearing Denied June 29, 1922.)

No. 2714.

Patents ⟸328—881,561, for waxed candy labels, held anticipated.

The Eckstein patent, No. 881,561, for a paper supersaturated with wax in which to wrap candy and pop corn, was void for anticipation, in view of the provision of the specification that the quantity of the paper and the per cent. of wax might be varied, even if a patent for the particular kind and weight of paper and the fixed per cent. of wax used by the patentee could have been sustained.

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

Suit for infringement of patent by Reuckheim Bros. & Eckstein against the D. L. Clark Company. Decree for defendant, and complainants appeal. Affirmed.

Fisher, Towle, Clapp & Soans, of Chicago, Ill., and Kay, Totten & Brown, all of Pittsburgh, Pa. (George P. Fisher, Russell Wiles, and Harry L. Clapp, all of Chicago, Ill., of counsel), for appellant.

S. T. Cameron, of Washington, D. C., F. W. Winter, of Pittsburgh, Pa., and Frederick A. Blount, of Philadelphia, Pa. (W. B. Kerkam, of Washington, D. C., of counsel), for appellee.

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

DAVIS, Circuit Judge. This is an appeal from a decree of the District Court for the Western District of Pennsylvania holding letters patent No. 881,561 invalid for want of invention. The patentee sought to make a paper in which to wrap candy and pop corn, so that the package, when sealed, would be moisture proof and air-tight. The paper was made by supersaturating it with wax, so that it was impregnated throughout and had a surface coat sufficiently heavy to seal the folded portions when heated.

Application for the patent was made December 6, 1904, and it was issued March 10, 1908. As a matter of fact, long before application was made by Eckstein for the patent in question, numerous persons had made and used waxed paper for wrapping candy, pop corn, and other articles, in order to protect them from moisture and air. At Chicago F. A. Michelman in 1876 was in the pop corn business, and put up ground pop corn in boxes wrapped in waxed paper sealed by hot plates. The Garden City Pop Corn Works, of Chicago, nine years before the patent was issued, wrapped pop corn bricks in waxed paper and sealed them by machine. The evidence shows that bread and other articles were wrapped in waxed paper in many parts of the country, for the purpose of protecting them against moisture and air, so that they would be preserved in a fresh condition.

It is apparent that the patentee did not originate the idea of preserving candy and pop corn by protecting them from moisture and air by wrapping them in waxed paper and sealing them. If the patent discloses invention, it is in the kind of paper selected and the quantity of wax used to saturate it. The patentee says:

"I prefer a manila or parchment paper weighing, when unwaxed, from 25 to 40 pounds per standard ream, and after waxing about 60 to 80 pounds, so that it is about half wax."

The patentee alleges that this is the proper ratio in weight between the paper and wax and will give the best results. He is the first to suggest this proportion. If he had planted himself in his application for a patent upon this definite ratio, or a trifling variation therefrom, and stood on it, the patent might have been valid. Macomber & Whyte Rope Co. v. Hazard Manufacturing Co., 211 Fed. 976, 128 C. C. A. 474; American Steel & Wire Company v. Macomber & Whyte Rope Co., 276 Fed. 286 (decided by this court, March term, 1921). But we are not called upon to decide, and do not decide, that question, for, after disclosing the preferred paper and the ratio in weight between it and the wax, the patentee, in the last paragraph of his specification, said:

"Obviously, the package may be formed by aid of any suitable means, and ordinary stiff and flexible papers may be employed, respectively, for the inner supporting carton and the flexible sealing wrapper. The details set forth of waxing the latter and the percentage of wax, is given for guidance only, and may be varied to suit different circumstances, and other details may be changed without departure from the essential of the invention."

As we view it, "the essential of the invention" was the definite ratio between the preferred paper and the wax. The patentee thus abandoned the necessity for the preferred paper and the ratio between it and the wax, and thus lost whatever he gained or might have gained by adherence to the definite ratio, so that, according to his final contention, if a person uses any kind of stiff and flexible paper and any percentage of wax in making a moisture and air-tight package, he still comes within the disclosure of the patent and infringes. We cannot agree with this conclusion. The patent as thus broadened was anticipated and is invalid.

The order of the district court will be affirmed.

In re BERNARD.

(Circuit Court of Appeals, Second Circuit. March 27, 1922.)

No. 251.

1. Bankruptcy ⇐⇒31—Debt cannot be expunged from schedule, because not dischargeable.

It is beyond the power of a court in bankruptcy to expunge from the debts scheduled by the bankrupt, as required by Bankruptcy Act, § 7 (8) being Comp. St. § 9591, a debt which would not be released by the discharge in bankruptcy.

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2. Bankruptcy ⟨⟩404(1)—Order enjoining any future application for discharge from particular debt is beyond power of bankruptcy court.

Under Bankruptcy Act, § 14 (Comp. St. § 9598), authorizing a bankrupt to apply for discharge, and section 17 (Comp. St. § 9601), providing such discharge shall release him from all provable debts and the prescribed form of discharge releasing him from all debts provable against his estate, it is beyond the power of a bankruptcy court to enjoin the bankrupt from applying in the future for a discharge as to a particular debt; but the question whether the debt is released by the discharge is one to be determined by the court before which an attempt is made to enforce the debt.

3. Bankruptcy ⟨⟩391(3)—Proceeding on a nondischargeable debt cannot be stayed.

Under Bankruptcy Act, § 11 (Comp. St. § 9595), the stay of proceedings to enforce a scheduled debt or the lifting thereof is largely discretionary with the court; but proceedings on a plainly nondischargeable debt cannot be stayed.

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

In the matter of William Bernard, bankrupt. Petition by the bankrupt to revise an order (278 Fed. 734) expunging a debt from a schedule, permitting the creditor to proceed to collect the debt, and enjoining the bankrupt from applying for a discharge. Order reversed, without prejudice to further proceedings in respect of a stay.

Bernard filed a voluntary petition, and scheduled a debt to Frank et al. After adjudication, but before application for discharge, Frank moved in the District Court for an order "expunging from the schedules heretofore filed" the said debt due by Bernard to Frank. Before motion made the court had apparently issued the usual injunction or stay order under Bankruptcy Act, § 11a (Comp. St. § 9595), and the notice of motion asked also for an order permitting him "to proceed upon and enforce the collection of" said debt.

The court ordered: (1) That the debt so listed in Bernard's schedules be expunged therefrom; (2) that Frank et al. be permitted to proceed to attempt to collect said debt, and that all stays then existing against such suit or proceeding be abrogated; (3) that Bernard be enjoined from applying for a discharge from the debt so as aforesaid expunged. To this order Bernard filed this petition to revise.

Wilson E. Tipple and Tipple & Plitt, all of New York City, for bankrupt petitioner.

Milton P. Kupfer and Leo Oppenheimer, both of New York City, for creditors respondents.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. [1, 2] To expunge a debt or the statement of a debt from a bankrupt's schedules, and to enjoin him from applying for a discharge in respect of such debt, is a novel procedure, for which no authority has been produced. It is opposed to the theory of the Bankruptcy Act. The lower court evidently thought the debt not dischargeable, and for this reason entered the order above recited. But it is the duty of a bankrupt (section 7 [8], being Comp. St. § 9591) to file schedules containing "a list of his creditors," and one to whom he owes an undischargeable debt is as much a creditor as is one whose claim may be discharged under the act.

A bankrupt is lawfully entitled to apply for a discharge under section 14 (Comp. St. § 9598), and by section 17 (Comp. St. § 9601) such discharge shall release him "from all of his provable debts" with the exceptions there enumerated; and the prescribed form of discharge (No. 59) merely orders that the bankrupt "be discharged from all debts and claims which are made provable by said acts against his estate," etc. To strike out from a schedule what the bankrupt swears is a debt is a power nowhere given to the District Court, and by anticipatory order to prevent application for discharge in respect thereof is (1) an implied departure from the statutory procedure which contemplates a discharge in the form laid down by the Supreme Court; and (2) an assumption of power to declare what shall be the effect of a discharge which as pointed out in Re Havens (C. C. A.) 272 Fed. 975, is a function of the court in which any given claim or debt or demand is advanced, and not of the bankruptcy court. The latter tribunal issues the discharge; the effect thereof is to be passed upon in the court in which it may be pleaded.

[3] Thus the major and more important portions of the order complained of are erroneous and must be reversed. As to the stay or the lifting thereof, that under section 11 (and see Collier on section 11a) is largely discretionary. Proceedings on a plainly nondischargeable debt cannot be stayed; yet, where the question is debatable, a stay may be granted until the bankrupt shall have had a reasonable time within which to procure that discharge, which he must have in order to present to the proper tribunal the status of the debt in suit.

It is therefore directed that the order appealed from be reversed, with costs, without prejudice to any further proceedings in the court below in respect of a stay under section 11.

VICTOR TALKING MACH. CO. et al. v. STRAUS et al.

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

Appeal and error ⟸728(3)—Proposed excluded evidence cannot be stated in assignment without offer of it at trial.

Circuit Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) requiring the assignments of error to quote the full substance of the evidence admitted or rejected, does not apply where an objection to a question was sustained, so that the witness made no answer, and where there was no offer of evidence made by the excepting party and rejected by the trial court, and statements in assignments of error as to what it was expected the witness would have stated in answer to the question should be stricken out.

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

Action at Law by Jesse I. Straus and others against the Victor Talking Machine Company and others. Judgment for plaintiffs, and defendants bring error. On motion by defendants in error to strike from the assignment of errors certain statements, and for a direction that said statements be omitted from the printed record herein. Motion granted.

See, also, 222 Fed. 524; 225 Fed. 535, 140 C. C. A. 519; 230 Fed. 449, 144 C. C. A. 591.

Wise & Seligsberg, of New York City, for the motion.

Rounds, Schurman & Dwight and Gilbert H. Montague, all of New York City, opposed.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. At trial plaintiffs in error asked certain witnesses certain questions; objections being made, the questions were disallowed. In assigning these rulings for error there has been added to each assignment a statement (in substance) of what it was hoped or expected the witness would have said, had he been permitted to answer. These are the statements against which this motion is directed.

At no time did plaintiffs in error present to the trial court any "offer of proof" or "offer of evidence" covering the substance of what it was hoped or expected to prove by answer to the questions rejected. The statements in question have been inserted in assumed compliance with rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii), which declares that—

"When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected."

This language is found in the rule of most, if not all, of the Circuit Courts of Appeals, and is taken almost word for word from rule 21 of the Supreme Court of the United States (32 Sup. Ct. x). It has been construed in Smith v. Hopkins, 120 Fed. 921, 57 C. C. A. 193, and cases cited; and the twenty-first rule of the Supreme Court is treated in Buckstaff v. Russell, 151 U. S. at 636, 14 Sup. Ct. 448, 38 L. Ed. 292. The substance of these rulings is that, where the evidence rejected is documentary, or an offer of evidence is made by the excepting party and rejected by the trial court, such document or offer must be embodied in the assignment of errors based upon the rejection. But where a question is asked, and no answer is permitted, there is no evidence to "quote," and the question for the reviewing court is whether the excluded question was "so framed as to clearly admit of an answer favorable to the claim or defence" of the interrogating party. The statements complained of are clearly not rendered necessary by the rule and should be stricken out.

Motion granted.

LAND DEVELOPMENT & LIVE STOCK CO. v. HOLMES et al.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1922.)

No. 2989.

Specific performance ⊂⊃33—Decree refusing specific enforcement of contract to convey land to foreign corporation not authorized to do business in state held within discretion of court.

A decree refusing to require conveyance of land in Illinois to a foreign corporation not authorized to do business in the state, under a contract which it had no legal right to make, and which would not be recognized by the courts of the state, and which had no right under the laws of the state to take or use the land for the purpose intended, *held* within the discretion of the court.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit in equity by the Land Development & Live Stock Company against W. W. Holmes and Elizabeth Holmes. Decree for defendants, and complainant appeals. Affirmed.

W. H. Haight, of Chicago, Ill., and W. K. Amick, of St. Joseph, Mo., for appellant.

Walter L. Wenger, of Chicago, Ill., for appellees.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. On May 10, 1917, appellees, by written instrument, leased to appellant (asserted in the lease to be an Illinois corporation) for a term ending March 1, 1922, a farm in Lake county, Ill. In and as a part of clause 9 thereof was inserted the following:

"The lessee is hereby granted an option to purchase said farm at or at any time prior to March 1, 1920, at the total purchase price of two hundred twenty-five dollars ($225.00) per acre."

Appellant went into possession of the farm, and on February 28, 1920, attempted to exercise its option. Appellees refused to convey, and appellant filed the bill in this case to compel specific performance. It was dismissed for want of equity.

The bill avers appellant to be a citizen and a resident of the state of South Dakota, and it is stipulated in the record that appellant never obtained a license to do business in the state of Illinois, as required by the statutes of Illinois relating to foreign corporations. The record shows that the purposes for which appellant took the lease of the real estate and now desires the title under the option are not purposes for which a foreign corporation not authorized to do business in Illinois may take real estate in Illinois.

A bill for specific performance always rests in the sound judicial discretion of the court. So far as appellant has done business in Illinois it has done it in violation of the prohibition in the statute, and in so far as the contract in question is concerned appellant cannot, under the Illinois law, procure any license that will enable it now to have recourse

to the courts of Illinois for the purpose of adjudicating any matter growing out of any business already done.

All the above matters the court had the right to take into consideration, and doubtless did so in reaching its conclusion. We cannot hold that there was any abuse of judicial discretion in refusing to compel appellees to convey to appellant Illinois real estate; that, under the circumstances shown, it had no legal right to take or use, under a contract that it had no legal right to make, and that will not be recognized by the courts of Illinois.

Decree affirmed.

In re FEDERAL SNAP FASTENER CORPORATION.

Petition of M. J. CROSS & CO.

(Circuit Court of Appeals, Second Circuit. March 6, 1922.)

Nos. 219, 220.

Bankruptcy ⟸444—Rule of Second circuit limiting time for filing petition to revise.

Under rule 15, subd. 3, of the Circuit Court of Appeals, Second Circuit (235 Fed. vii, 148 C. C. A. vii) requiring petitions to revise to be filed within 10 days of the order sought to be revised unless the time is previously enlarged by the judge, a petition filed after such time will not be considered.

Petition to Revise Orders of the District Court of the United States for the Southern District of New York.

In the matter of the Federal Snap Fastener Corporation, bankrupt. Petition of M. J. Cross & Co. to revise order of District Court. Petition dismissed.

Otterbourg, Steindler & Houston, of New York City (Edwin M. Otterbourg and Charles A. Houston, both of New York City, of counsel), for petitioner.

David Michelsohn, of New York City, for trustee.

Before ROGERS, HOUGH, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. This is a petition to revise an order entered in the District Court on August 8, 1921, denying an application to vacate an order entered in that court by District Judge Knox on July 12, 1921, which order of August 8, 1921, also permanently restrained the petitioner from prosecuting an action in the Supreme Court of the State of New York, County of New York, against Milton Dammann, as trustee for the Federal Snap Fastener Corporation.

The petition to revise was not filed until August 30, 1921. Neither the Bankruptcy Act (Comp. St. §§ 9585–9656) nor the General Orders (89 Fed. iv–xiv, 32 C. C. A. v–xxxvii) prescribe any limitation of time within which a petition for revision must be filed. But under rule 15, subdivision 3, of this court (235 Fed. vii, 148 C. C. A. vii), petitions to revise orders in bankruptcy filed under section 24b of the

Bankruptcy Act (Comp. St. § 9608) must be filed and served within 10 days of the order sought to be revised, unless the judge of the bankruptcy court for good cause shown enlarges the time, and said order is made before the time for filing has expired, and such order of enlargement is duly filed with the clerk of the District Court and transmitted to this court with the transcript of record. It is not claimed that any such order of enlargement was granted below. As the petition to revise was not filed within the 10 days allowed, the case is not properly in this court, and under our decisions it cannot be considered. In re Strobel, 160 Fed. 916, 88 C. C. A. 98; In re Brown, 174 Fed. 339, 98 C. C. A. 211; In re Light, 174 Fed. 341, 98 C. C. A. 213.

The petition is dismissed, without costs.

UNITED STATES v. REED.

(Circuit Court of Appeals, Second Circuit. March 13, 1922.)

No. 173.

Appeal and error ⊜833(3)—Time for applying for rehearing extended until Supreme Court decides ruling case.

Where a judgment of the District Court is affirmed on the authority of a prior decision by the Circuit Court of Appeals, to review which the Supreme Court had issued a writ of certiorari, the mandate in the case at bar will issue in the usual manner, but the term of the court and the time within which plaintiff in error can apply for a rehearing will be extended until 30 days after the decision of the Supreme Court in the ruling case.

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

Action at law by the United States against John Reed to recover penalties for violations of the customs laws. Judgment for defendant (274 Fed. 724), and the United States brings error. Affirmed, but time to apply for rehearing extended.

Wallace E. Collins, U. S. Atty., of Jamaica, N. Y., and Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N. Y.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Cletus Keating and Harry D. Thirkield, both of New York City, of counsel), for defendant in error.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed, on the authority of United States v. Sischo (C. C. A.) 270 Fed. 958.

It appearing, however, that the decision above cited is now under review upon certiorari in the Supreme Court, and that it has been set for argument in October, 1922, it is ordered: (1) That the mandate herein issue in the usual manner; (2) that the term of October, 1921,

in this court be extended, and the time of the plaintiff in error to apply for a rehearing be likewise extended, until 30 days after the decision of the Supreme Court of the United States in the above-entitled cause of United States v. Sischo.

PLANT v. WALSH, Collector of Internal Revenue.

(District Court, D. Connecticut. April 12, 1922.)

No. 2053.

1. **Internal revenue ⟹7—Owner of corporate stock not liable for income tax on dividends declared before March 1, 1913.**
   Income tax could not be assessed on corporate dividends declared prior to March 1, 1913, and paid subsequent to such date to stockholders of record at dates prior to that time, under Act Oct. 3, 1913, § 2A, subd. 1.

2. **Internal revenue ⟹7—Owner of corporate bonds not liable for income tax on interest due March 1, 1913.**
   Corporate bondholder was not liable to assessment of income tax on interest due March 1, 1913, payable for the 6 months ending February 28, 1913, under Act Oct. 3, 1913, § 2A, subd. 1.

3. **Internal revenue ⟹4—Doubts construed in favor of taxpayer.**
   In case of doubt, a tax law should be construed in favor of the taxpayer.

4. **Internal revenue ⟹7—Income taxpayer held entitled to deduct amount of worthless bonds charged off.**
   Under Act Oct. 3, 1913, § 2B, subd. 5, and section 2D, income taxpayer was entitled to take as a deduction on his return for the year 1913 five-sixths of the amount at which corporate bonds charged off on December 31st of that year stood on taxpayer's books of March 1, 1913, regardless of what the bonds were actually worth on March 1, 1913, and though the loss accrued prior to such day.

5. **Internal revenue ⟹7—Income taxpayer entitled to deduct losses from farming operation carried on for pleasure; "business."**
   Farming, when engaged in as a regular occupation and in accordance with recognized business principles and practices, is a "business," within the meaning of Act Oct. 3, 1913, allowing income taxpayer to deduct necessary expenses actually paid in carrying on any business, though the person engaging in it is willing to do so, without regard to its profitableness, because of the pleasure derived from it.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

At Law. Action by Morton F. Plant against James J. Walsh, Collector of Internal Revenue. Decree ordered for plaintiff.

George L. Shearer, of New York City, and Edward M. Day, of Hartford, Conn., for plaintiff.

Edward L. Smith, U. S. Atty., and George H. Cohen, Asst. U. S. Atty., both of Hartford, Conn., for defendant.

THOMAS, District Judge. This action was brought by Morton F. Plant to recover income taxes assessed in 1916 for the years 1913 and 1914 and paid under protest to avoid penalties. Before the case was ready for trial Mr. Plant died and the executors of his estate have been substituted as plaintiffs.

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[1] One of the questions presented is whether the taxpayer was rightly assessed on the sum of $60,455.61 representing corporate dividends declared prior to March 1, 1913, and payable subsequent to March 1, 1913, to stockholders of record at dates prior to that time.

The Act of October 3, 1913 (38 Stat. 166), provides (section 2A, subdivision 1):

"That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States * * * a tax of one per centum per annum upon such income."

It becomes unnecessary to discuss the arguments submitted in the able briefs submitted by counsel, because the question now under consideration has been answered by a very recent decision of the Circuit Court of Appeals for the Second Circuit in United States v. Guinzburg, decided December 14, 1921, and reported in 278 Fed. 363. It was held there that corporate dividends declared February 17, 1913, payable July 1, 1913, to stockholders of record on January 30, 1913, were income when declared and not when paid. Judge Manton said:

"By the declaration of a dividend, the earnings of the company to the extent declared were separated from the property of the corporation, and were appropriated by that action to the then stockholders, who became creditors of the corporation for the amount of the dividend. The relation then created was that of debtor and creditor. * * * It is the separation of the earnings from the balance of the corporate property, together with the promise to pay arising from the declaration of the dividend, that works this change. The holder of stock, with respect to the dividends, is on a par with the other creditors of the corporation. Staats v. Biograph Co., 236 Fed. 454, 149 C. C. A. 506, L. R. A. 1917B, 728. The fact that the dividend is payable at a future date does not alter the rights thus created. The obligation of the corporation as debtor commences with the declaration of the dividend, although the payment is postponed for the convenience of the company. The rights of the stockholders are immediately vested the moment the dividend is declared."

It follows, therefore, that the ruling in the Guinzburg Case must be followed in the instant case.

[2] Another question is whether the taxpayer was rightly assessed on the sum of $95,820, representing interest due March 1, 1913, on certain corporate bonds. This question was argued by both sides on the assumption that the interest was payable for the 6 months' period ending February 28, 1913. I think that as to this question United States v. Guinzburg, supra, is conclusive. The basis of that decision was that money owing to the taxpayer is income accrued from the time when the liability to pay becomes absolute, though it is not yet due. If the interest was payable for the 6 months ending February 28, 1913, the liability to pay became absolute before the commencement of the taxable period, though payment was not due until the first day of that period. I see no ground on which money owing by a corporation for interest on its bonds can be distinguished from money owing it for a dividend which has been declared on its stock, and therefore hold that on this item also the taxpayer was improperly assessed.

The next question arises in the following manner: The taxpayer took as a deduction on his return for the year 1913, the sum of $43,-

749.16, alleged to be five-sixths of the amount at which certain corporate bonds, ascertained to be worthless during the year 1913 and charged off on December 31st of that year, stood on the taxpayer's books on March 1, 1913. The plaintiff contends that this deduction was justified under section 2B, subdivision 5, of the Act of October 3, 1913, which provided that in computing net income for the purpose of the normal tax, there should be allowed as a deduction:

"Fifth, debts due to the taxpayer actually ascertained to be worthless and charged off within the year."

Section 2D provides in part that the income tax shall be computed upon the remainder of the net income of each person subject thereto accruing during each preceding calendar year ending December 31st. after making the deductions allowed by law:

"Provided, however, that for the year ending December 31, 1913, said tax shall be computed on the net income accruing from March first to December 31, 1913, both dates inclusive, after deducting five-sixths only of the specific exemptions and deductions herein provided for."

The defendant contends that the taxpayer is entitled to charge off only the amount of the actual value of the bonds on March 1, 1913; that the burden is on the taxpayer to establish this amount, and since there is no evidence to show what the bonds were actually worth on that date the entire deduction should be disallowed.

[3, 4] The plaintiff contends that all the statute requires him to prove is that the debt was ascertained to be worthless and charged off within the year 1913. This he has done by the undisputed evidence. The effect of so construing the statute may be to permit the taxpayer to deduct five-sixths of a loss accruing prior to the commencement of the taxable period, so that the return will not reflect his entire income for that period. But Congress has the right to do this, and has done it if the statute is to be literally construed. In case of doubt a tax law should be construed in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211. Therefore I conclude that the taxpayer's contention should be sustained. But, even if the burden is on him to prove the value of the bonds on March 1, 1913, I think he has met the burden, because the amount at which the bonds stood on his books on March 1, 1913, is at least prima facie evidence of their actual value at that time.

The plaintiff also complains of the refusal to allow as deductions the losses sustained by Mr. Plant in the years 1913 and 1914 in the business of farming. This deduction is claimed under the provisions of section 2B of the Act of October 3, 1913, that—

"In computing net income for the purpose of the normal tax there shall be allowed as deductions;

"First, the necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses."

[5] The only question involved in connection with this claim is whether Mr. Plant was engaged in farming as a business or merely for pleasure. The evidence shows that he had been engaged in farming since 1904 or 1905. He kept increasing the size of his farm, until in

1912 it numbered several hundred acres. He had not made any profit on his farm prior to or during 1914, but in 1912 he formed an organization of experts for the purpose of putting the farm on a business basis, and installed an elaborate accounting system under the supervision of a comptroller. Large quantities of farm produce were marketed at prevailing prices, and every effort was made to establish the farm's reputation as a high-class modern farm. Mr. Plant gave a good deal of his time to bringing about efficiency and putting the farm on a paying basis. Notwithstanding these efforts, the operation of the farm resulted in a loss for 1913 of $107,680.70, or about 200 per cent. of the receipts, and in 1914 of $106,431.98, including depreciation, or about 150 per cent. of the receipts.

The defendant argues that the great excess of expenses over receipts proves that "farming was a pleasure or hobby with Mr. Plant, and not a source of profit, and that his farm was not conducted on a commercial basis"; that he engaged in farming, not for the purpose of making a profit, but because of the pleasure he derived from that occupation; and that therefore the expense of conducting the farm was not a business expense, but a personal expense, and not deductible.

I think, however, that the evidence establishes clearly that Mr. Plant's farm was conducted as a business enterprise and with the expectation that it would eventually become profitable. The mere fact that a heavy loss was incurred in the initial stages of so large an enterprise does not necessarily show the contrary. But, even though this is not so, I do not believe that farming, when engaged in as a regular occupation and in accordance with recognized business principles and practices, is any the less a business within the meaning of the statute, because the person engaging in it is willing to do so without regard to its profitableness, because of the pleasure derived from it.

The defendant does not dispute that taxes for 1913 were erroneously assessed on $507.97, supposed to represent one-third of the rental for the first quarter of 1913 of the taxpayer's residence at 25 West Fifty-Fourth street, New York City, and actually received by him in January, 1913, and on the sum of $3,000, consisting of two dividends of 1½ per cent. each on 1,000 shares of New York, New Haven & Hartford Railroad Company stock standing in the name of Mr. Plant, but actually owned by the Southern Express Company, and paid over by him to said company.

There may be a decree for plaintiff in accordance with this opinion, and counsel can doubtless compute the amount due and later submit the decree to the court, incorporating in it the correct amount for which judgment should be entered. In the event that counsel cannot agree, the settlement of the decree may be noticed for hearing; and it is so ordered.

THE CLIFTWOOD.

POWERY v. EMERGENCY FLEET CORPORATION.

(District Court, S. D. Alabama. April 28, 1922.)

1. Seamen ⇐17—Wages allowed injured seamen only for term and at rate agreed.
Where a seaman has been injured, so as to prevent his working on a voyage, his wages cannot be allowed for a longer term than the voyage agreed on, nor at a rate different from that agreed on.

2. Seamen ⇐11—Maintenance and cure are allowable after term of voyage.
Since the right of an injured seaman to maintenance and cure is not fixed by the contract, but is one developed by the admiralty courts out of the relationship existing between the ship and the seaman, such allowance can be made for a term longer than the voyage on which he was injured.

3. Seamen ⇐16—Seaman injured before signing articles cannot recover wages for voyage he expected to make.
Where a seaman was injured while working on a ship at port wages, before he had signed articles to accompany the ship on her next voyage, although he intended to do so, and before the wages had been agreed on, he cannot recover his wages for the period of the voyage subsequently made by the ship.

In Admiralty. Libel by Rollin Powery against the Emergency Fleet Corporation, as owner of the steamship Cliftwood. Libel dismissed.

Alex Howard, of Mobile, Ala., for libelant.

Pillians, Cowley & Gresham and Aubrey Boyles, Dist. Atty., all of Mobile, Ala., for the United States.

ERVIN, District Judge. In this case the steamship Cliftwood, being in the port of Mobile and contemplating a trip to Europe and return, and being in need of seamen, applied to the Shipping Bureau for seamen. No special trip was named, though it was commonly understood the trip was to be made to Europe. The Shipping Bureau notified the Seamen's Union that a certain number of A. B. seamen were wanted on the vessel, and libelant was sent by the union and reported to the vessel, where he was put to work at what was denominated "port wages." When libelant reported to the vessel, he held a conversation with the mate, who told him they could give him work and agreed on the rate of wages at which he was to be paid, but no particular time was agreed upon, nor was any voyage mentioned. He was paid his wages at the rate of wages paid A. B. seamen for two weeks on what was denominated the "port pay roll," and during the third week's work on the boat libelant suffered a serious injury, which prevented him from working any further and also from going on the cruise which the vessel undertook some week or ten days after his injury. He was paid the full week's time, notwithstanding his having been injured before the week was up, and he was sent to the hospital by the vessel, where his expenses and medical treatment were paid by the vessel. He remained in the hospital some three months, and was discharged just about the time the vessel returned to Mobile from the trip on which she had departed.

The shipping articles for the voyage were never signed by the libelant, and were not in fact signed by any of the seamen until several days after libelant suffered his injury, when, just before the vessel left, the men who were carried on the trip signed the articles. The vessel had a number of seamen working on her just as libelant was during the time she was in port, but who were not taken on the trip, and who never signed the shipping articles.

It was shown that, from a number of men employed on the vessel at the same rate of wages they would have received on the voyage, the mate selected the particular men he wanted to take on the cruise, and these men signed the shipping articles, and the others were paid off and discharged. It was further shown that libelant expected, when he went aboard, to go on the cruise, and he prepared for it by getting such luggage as he would need on the cruise.

[1] Upon the return of the vessel the libel was filed, and the question is whether the vessel, or the United States, as owner, under the act forbidding the seizing of Shipping Board vessels, is liable to libelant for the wages during the voyage. In no case I have examined have I found, where a seaman has been injured so as to prevent his working on a voyage, have wages been allowed for a longer term than the voyage agreed upon. In all the cases the wage allowed has been at the rate agreed upon. I therefore conclude that the right to wages is based upon and grows out of the contract as agreed on, and in the absence of an agreement concerning wages for a voyage none can be allowed.

[2] Maintenance and cure, however, have been allowed for a longer term than the voyage, and it is manifest that this right to maintenance and cure is one not fixed by the contract at all, because it is never mentioned in the contract, but is one developed by the admiralty courts out of the relation existing between the ship and the seamen.

[3] In this case, there having been no agreement entered into for wages on any particular voyage, there is nothing on which I can base a decree for libelant as to wages. Libelant went upon the vessel, expecting to go upon a voyage; he worked during the time the vessel was in port at the rate of wages which he expected to be paid on the contemplated voyage, but no agreement was ever entered into for the voyage, nor did libelant sign the shipping articles, and the articles between the ship and the other seamen were not signed until after libelant was injured. In the absence of any agreement fixing any wages for any particular voyage, I do not see how I can allow any wages for any particular voyage.

A decree will therefore be entered, dismissing the libel.

PERKINS GLUE CO. v. GOULD MFG. CO. et al.

SAME v. WISCONSIN CHAIR CO. et al.

(District Court, E. D. Wisconsin. May 3, 1922.)

Nos. 1117, 1118.

Patents ⊂=328—Reissue 13,436, claims 28, 30, and 31, for glue from starch base, held limited to product of described process.

The Perkins reissue patent, No. 13,436, claims 28, 30, and 31, for a glue made from a starch base having substantially the properties of animal glue, *held* limited by prior construction of other claims in the patent and by the patentee's disclaimer of claims for the glue base per se, and of the process of making glue, except where the starch is degenerated to the extent described in the reissue patent, to the glue made by the process described, and not to include all glue having properties of animal glue made from a starch base, so as not to be infringed by defendants' glue, which admittedly was made by a different process.

In Equity. Separate suits for infringement of a patent by the Perkins Glue Company against the Gould Manufacturing Company and others and against the Wisconsin Chair Company and others. Decrees directed, dismissing the bills.

Gorham Crosby, of New York City, and Lines, Spooner & Quarles, of Milwaukee, Wis., for plaintiff.

Pennie, Davis, Marvin & Edmonds, of New York City, James A. Watson, of Washington, D. C., and Quarles, Spence & Quarles of Milwaukee, Wis., for defendant.

GEIGER, District Judge. These two cases rest upon the reissue patent to Perkins which was the subject of consideration in Perkins Glue Co. v. Solva Waterproof Co. (D. C.) reported in 223 Fed. 792 (D. C. N. D. Ill.) and Id. (C. C. A. 7th Cir.) 251 Fed. 64. Claims Nos. 28, 30, and 31 are in issue:

"28. A glue comprising cassava carbohydrate rendered semifluid by digestion and having substantially the properties of animal glue."

"30. A wood and fiber glue formed of a starchy carbohydrate or its equivalent by union therewith of about three parts or less by weight of water and alkali metal hydroxid.

"31. A wood and fiber glue containing amylaceous material as a base dissolved without acid in about three parts of water or less, and being viscous, semifluid and unjellified."

It will be assumed that, nominally, at least, the above three claims were comprehended within the decree in the Solva Case as valid, and therein held infringed. But the present case, in view of the determination by the Circuit Court of Appeals, presents sharply the question whether, in the light of the determination by said court upon other claims of the patent, these three claims can be or were intended to be held valid, without any limitation whatsoever. The plaintiff contends that such claims were recognized as broadly valid, covering a new product, and therefore the product—i. e., "a glue comprising cassava carbohydrate rendered semifluid by digestion and having substantially the properties of animal glue"—cannot be made by any process without

leave or license of the plaintiff. The defendant contends that the determination by the Circuit Court of Appeals limited the validity of the three claims in question to a product made according to processes held valid by the Circuit Court of Appeals, but do not cover a product made according to other processes and particularly processes, claims for which were held invalid in the identical case determined by the Circuit Court of Appeals, or claims which plaintiff "disclaimed," as hereinafter noted.

In the Solva Case process claims were held valid, among them:

"19. In the process of making good glue, the combination of the following steps: Agitating a cassava carbohydrate with a digestive agent to decrease its water absorptive properties, without rendering the carbohydrate materially soluble in cold water, and then putting the product thus produced into a solution containing about three parts or less by weight of water to produce a glue for application.

"20. The process of making glue, which consists in agitating a starchy carbohydrate with water and a digesting agent to reduce the water absorptive properties of the carbohydrate without rendering it materially soluble in water, then mixing the carbohydrate with water and caustic alkali, the amount of water used being about three parts or less by weight of dry carbohydrate, the amount of caustic used being about ten per cent. or less by weight of dry carbohydrate to form the glue as distinguished from mucilages, sizes, and paste."

See, also, other two-step claims in patent.

Claims 10, 12, and 13 of the patent are pertinent to the questions now presented:

"10. The process of making glue which consists in dissolving cassava carbohydrate in caustic alkali until a glue is formed as distinguished from mucilages, sizes and pastes."

"12. The process of making a glue, which consists in mixing starch with water and caustic alkali to dissolve the carbohydrate, the amount of water used being about three parts or less by weight of dry carbohydrate so that a wood glue is formed as distinguished from mucilages, sizes and paste.

"13. The process of making a wood glue which consists in treating a suitable starchy product a material portion of which is substantially insoluble in water with a solvent of cellulose and about three parts or less by weight of water, to produce a glue having adhesive powers substantially as great as those of good animal glue."

The Circuit Court of Appeals dealt thus with the decree of the District Court:

"The decree of the District Court sustaining the claims for a glue base process and product and for the so-called 'second step' as such is reversed, and that part of it which upholds the claims of the patent for the final process and the resultant product respectively is affirmed. * * *"

When the case was remitted to the District Court for entry of a decree upon this mandate, the parties appeared to be at variance respecting the effect of the appellate ruling, and Judge Sanborn expressed himself in a memorandum:

"The opinion of the Circuit Court of Appeals is said by counsel for all parties to be perfectly clear, but they differ radically as to its meaning and submit totally different forms of decrees. The opinion of Judge Kohlsaat requires very careful study, as well as the patents, and even then the opinion is obscure and another appeal may be necessary to fully determine its meaning. To the best of my ability I will endeavor to state that meaning as I

understand it. 'The first process or step of the patent is for the purpose of creating a suitable starch paste and then applying to that base the second step in order to produce the final product or starch glue. These are the only steps or processes described and they may be taken singly or together. Both are old and unpatentable when taken separately, but when joined together to produce starch glue which has the properties described by Mr. Perkins and which is as good or better than animal glue, they are new and make patentable subject-matter both as a process and as producing a patentable product consisting of glue. * * *' From these quotations it seems probable that the appellate court intended to sustain only those claims of the patent which included only the two steps and only when their use results in the Perkins glue together with such additional claims which count on such glue as a product of the two steps and no others."

"The result of the foregoing is that the argument of counsel for defendants is adopted so far as construction of the decree is concerned, and that of plaintiff's counsel rejected."

This opinion was filed and the decree pursuant to the mandate entered on August 5, 1918. On February 6, 1919, the plaintiff herein, as assignee of the patentee, filed a disclaimer—undoubtedly obediently to its conception of the ruling of the appellate court and Judge Sanborn's interpretation thereof, as above noted—which disclaimer is abstracted thus:

"Enters its disclaimer of claims 1, 3, 4, 6, 7, 8, 16, 24, 25, 26, and 27 thereof (to wit, the claims for the glue base per se and for the process of making the glue base per se). And further it hereby disclaims, from claims 9, 10, 11, 12, 13, 14, and 38 of said reissued letters patent numbered 13,436, any process of making glue, excepting where the starch or starchy product of carbohydrate subjected to the process is degenerated to the extent described in said reissued letters patent No. 13,436, whereby the process results in the good as animal glue described in said reissued letters patent. * * *"

The plaintiff, upon the motion for rehearing in the appellate court, observed:

"As the opinion plainly indicates, the final glue product may be made by suitably creating a suitable base, whether previously degenerated by the alkali treatment, or by the acid treatment, or obtained by intermixture, or simply found in the market—provided only that the base is in the proper state or condition of degeneration when treated to make this final glue product."

Now the query at once arises, if the patent in suit, and particularly claims 28, 30 and 31, cover any good as animal glue made from starch, if processes cut no figure, if degeneration be of no consequence, except that it may be said that the final product contains starch, in some way, somehow, degenerated or converted, then why the necessity of holding any process claims invalid? If the claims here in suit are thus all-embracing, then why *disclaim from* any of the process claims? If, for example, the product of claim 28 may be made by the processes noted in claims 10, 12, or 13, then why disclaim from the latter "any process of making glue excepting where the starch or starchy product is degenerated to the extent described * * * *whereby* the process results," etc. Surely the disclaimer indicates that if glue, made according to the processes broadly described in claims 10, 12, and 13, resulting in making the product noted in claim 28, then Perkins will not claim it unless the starch *subjected to the process* is degenerated to the extent described. And if, as must be conceded, all starches, whether used in

glue, sizes, or pastes, undergo degeneration or conversion, and if, as claimed on rehearing, the degeneration may take place or may be obtained by "intermixture" with other ingredients, then, again, why the necessity of claims 10, 12, or 13, why the necessity of the more specific two-step claims, and why the necessity of any disclaimer out of claims 10, 12, and 13?

Surely these disclaimers proceed upon the hypothesis that glue may be made, as in such disclaimed claims directed, even if the starch is not degenerated *as specified in the patent*; and it will not do to argue that, merely because a glue so made turns out to be good as animal glue, therefore the *precise degeneration reserved* by the disclaimer *must be assumed* to have entered into the process *in the manner specified,* and therefore into the product. If the result in the Solva Case is not as Judge Sanborn states it; if, notwithstanding the language of the court, any starch glue, good as animal glue, is within the Perkins monopoly—then the entire patent, as Judge Sanborn considered and upheld it, is now *re*claimed, not only from the decree of the appellate court, but also from the plaintiff's express disclaimer. True, in considering two-step processes, it is entirely proper to assert that an alleged infringer equivalently followed one or the other step. But after the Circuit Court of Appeals expressly held that each step per se was old, that their combination exhibited the patentable novelty, it was no longer possible for Perkins to claim that *each step equivalently comprehended* the other. And when, therefore, the plaintiff in this case conceded, at the opening, that the defendant's base was not within the reservation of the disclaimer, it conceded—in connection with the clear proof in the case—that the defendants in making their glue were in the disclaimed field. It would be simply paradoxical to allow that, after exempting to the public the right thus to process (see, for example, claim 10), every resultant product was still within the protection of claim 28.

It is my judgment that the result in the appellate court, when considered with the subsequent disclaimer, gives to patents such as Gerard (Belgian patent No. 34,869) and Dornemann (French, No. 232,781), a significance which was necessarily denied them when Judge Sanborn in the Solva Case accorded broad validity to practically the whole of the Perkins patent. The proofs in the case respecting practice of the processes of each of those two patents seem to me a perfect demonstration that the plaintiff's disclaimer of claims 10, 12 and 13 was in effect a disclaimer of Gerard and Dornemann, and it would be absurd upon the proofs now here to say that the processes and product practiced and produced by defendants' witnesses were permissible if the product be called "sizing" or "paste," but not permissible, if upon practice of the process—the disclaimed process—good veneering glue resulted.

Plaintiff's witness, Grosvenor, admitted, though somewhat reluctantly, that, though his experimental use of Gerard or Dornemann gave an unsatisfactory product, he would not deny that, had he practiced such processes by using defendant's base, he would have had defendant's glue as a resultant. On the other hand, the defendants' witnesses leave no doubt upon the matter, unless such doubt is arbitrarily inject-

ed by *assuming* that every base is, or sooner or later will be, degenerated *as specified* by Perkins. But, as noted, this assumption should have resulted unhesitatingly in an affirmance of the decree in the Solva Case and a validating of the Perkins patent in its entirety, and, of course, dispense with the necessity of any disclaimer.

It is my judgment that, upon the issue as defendants clearly tender it, the Perkins patent—in view of the result in the Solva Case and the plaintiff's disclaimer—must now be regarded as embodying processes and product clearly apprehendable by workers in the art, and apparently the Circuit Court of Appeals aimed to point out an invention thus apprehendable. Else it would not have been necessary to observe that "there seems to have been great difficulty in getting at the correct *formula*: that Perkins labored years to get the latter *just right*"; that, quoting from the witness Carmichael, "he [Perkins] proportioned the *various steps* to one another according to the selection of raw material, in the conversion of the raw material, and in the solution of the material, being particular about the various substeps by which, in the main step effecting the solution, he obtained a uniform and homogeneous product."

Therefore it is not possible, after crediting Perkins with discovering a correct formula, one that is "just right," to assume that every formula which he discarded, and that every product made by a discarded formula, is none the less within his monopoly, nor to extend the latter over products resultant upon the practice of Gerard or Dornemann, even though the latter failed or were not interested in apprehending the efficacy of their processes to produce a veneering glue satisfactory to others than to Perkins.

Further, Perkins' monopoly cannot be left within vague, undetermined or undeterminable boundaries by the mere suggestion that "by proper adjustment of conditions" raw starches "may be used without the first-step treatment." Such "proper adjustment" must in any event appear as clear legal equivalency, and, as noted, the proof of such equivalency is not adduced by mere statement that an alleged infringer is making good veneering glue out of starch, wherefore he must have availed himself of Perkins' discovery.

I am well satisfied to interpret the result in the Solva Case as did Judge Sanborn. Indeed, his estimate, when considered in the light of his exhaustive research at the original trial, is most persuasive; and upon such view the proofs in this case clearly absolve the defendants from any charge of infringement.

A decree dismissing the bills may be entered accordingly.

GULF & S. I. R. CO. v. DUCKWORTH, Sheriff, etc., et al.

(District Court, S. D. Mississippi, Jackson Division. March 29, 1922.)

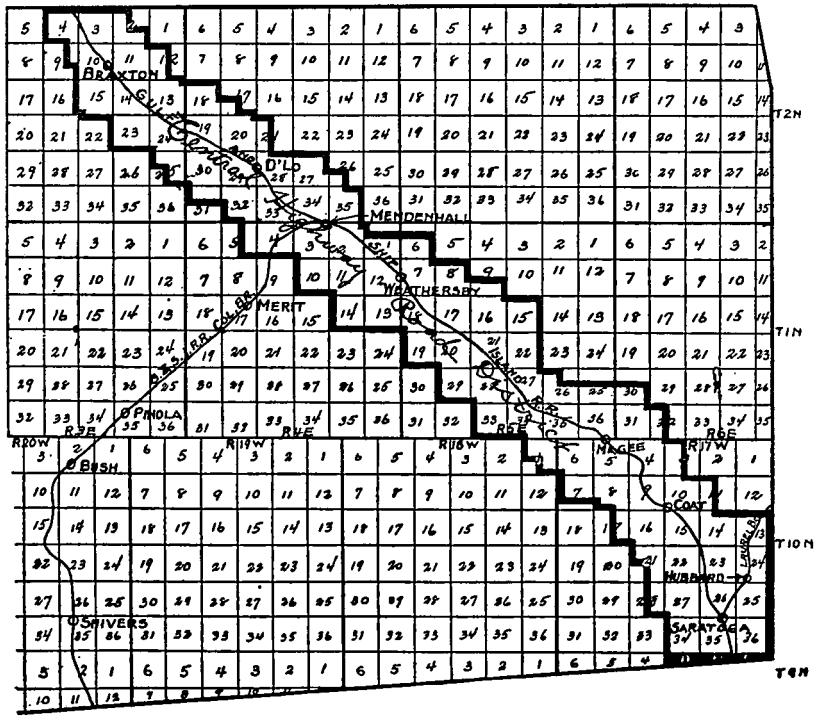
No. 165.

Constitutional law ⟸229(1), 283—Highways ⟸90—Formation of road district to be taxed for highway held not unconstitutional, as denying the railroad company due process or equal protection of law.

The creation by the supervisors of a county, acting under Laws Miss. 1914, c. 176, of a road district to be taxed for the building of a highway near, and substantially parallel to, the line of complainant's railroad, *held* not to deprive complainant of its property without due process of law, or deny it the equal protection of the laws, because the district as formed was narrow in width as compared with its length along the proposed highway and included defendant's line of road throughout its length, where all property, within the district was taxed equally, according to assessed value, for the cost of the road, and no fraud or intentional imposition was charged.

In Equity. Suit by the Gulf & Ship Island Railroad Company against D. W. Duckworth, Sheriff and Tax Collector of Simpson County, Miss., and the Board of Supervisors of said Simpson County. On motions by complainant for preliminary injunction, and by defendants to dismiss bill. Motion to dismiss granted.

The map herewith shows the boundaries of Central Highway Road District:



B. E. Eaton, of Gulfport, Miss., and T. J. Wills, of Hattiesburg, Miss., for complainant.

R. C. Russell, of McGee, Miss., for defendants.

HOLMES, District Judge. The Gulf & Ship Island Railroad Company, a corporation organized under the laws of the state of Mississippi, filed its bill against the defendants, the sheriff and tax collector and board of supervisors of Simpson county, Miss., to restrain the collection of an ad valorem tax levied by the board to pay for the construction and maintenance of a graveled highway through the Central Highway road district established under the provisions of chapter 176 of the Laws of 1914.

The bill alleges that the board of supervisors is the legally constituted governmental agency created by law within the state of Mississippi for establishing road districts and levying taxes thereon, which taxes when levied constitute liens against the property located in said districts. It avers that the said board of supervisors, pretending to act under the authority granted by law, fixed and established in said county a separate road district, which is characterized as the Central Highway road district of Simpson county, Miss., and that said district is meant to, and does, comprise in its area a portion of the property of said county which is designed to bear the expense of the construction and maintenance of a highway which has been built through said district.

It alleges that the board caused to be built through said district a main thoroughfare or graveled highway which parallels the right of way of the complainant's main line of railroad through the entire district, and is distant from said right of way from a few hundred feet to not more than a mile. It further shows that for the year 1921 the board levied a special tax upon the property of the road district to pay for the construction of said road and the interest on the bonded debt created for the purpose of building it. The tax so levied was 10 mills, which is in addition to all other taxes imposed by the county, and is imposed upon all of the property in said road district, but is an additional burden not imposed upon other property in the county outside of the district.

It alleges that in addition to the special tax of 10 mills the board for 1921 levied a general tax of 3 mills, which was to be expended upon roads generally in the county, and that in addition to the special tax of 10 mills which has been levied upon property of the complainant it has been taxed with the general county road levy of 3 mills. This tax of 3 mills is levied upon all other property, not only within the said road district, but within the county.

It alleges that it receives from the highway so constructed no special advantages, but that it constitutes a direct competitor in the transaction of its business, for the reason that it is a thoroughfare for automobile traffic throughout the county, and for trucks engaged in the hauling of freight. It alleges that the collection of the special tax for the construction of said road would deprive it of its property without due process of law, and deny to it the equal protection of the law

vouchsafed to it by the Fourteenth Amendment, and would constitute the taking of its property for public use without just compensation, contrary to the rights guaranteed to it in the Fifth Amendment of the Constitution of the United States.

The bill is expressly stated to be predicated "upon rights and privileges granted to the complainant under the Fifth and Fourteenth Amendments of the Constitution of the United States." But it is apparent from reading the bill that it can lay no just claims to any provisions of the Constitution of the United States, except those provisions of the Fourteenth Amendment which forbid any state to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, the Fifth Amendment being a limitation on the power of Congress and not of the states.

The sole ground of jurisdiction here, therefore, depends upon whether the defendant is being deprived of its property without due process of law, or denied the equal protection of the laws, within the meaning of the Fourteenth Amendment. No attack is made in the bill on the assessed valuation of complainant's property within the district, or upon the road levy by which the special tax is calculated. It is apparently conceded that all property within the district is fairly assessed according to value, and that the rate is the same for complainant as for all other taxpayers.

The complainant here does not put its claim for equitable relief upon any allegation that, in the proceedings for the formation of the Central Highway road district, the board of supervisors departed from the provisions of the statute, or that the statute properly construed and administered is unconstitutional and void, or that there has been any discrimination against it or its property as compared with the property of other taxpayers embraced within the district. Neither do the allegations go to the extent of charging intentional fraud or bad faith prejudicial to the interests of complainant in the formation of the district. There is an allegation that the district as located—

"whether intentionally so devised or not * * * is in law and in fact a fraud prejudicial to the interests of the complainant, in that it was proposed to lay upon this complainant the burden of paying for said roadway taxes in excess of any benefits secured from the construction of said road, and in excess of any just or equitable tax which should have been imposed for the construction of the road."

This is a mere conclusion of the pleader and falls far short of alleging facts which show fraud by the board of supervisors in laying out the district and determining its boundaries. The complaint charges that in establishing the district it was so laid out as to have a width varying from 2 to 4 miles, but a length of approximately 30 miles, and was shaped so as to exclude therefrom many persons opposing its creation, and—

"that wherever any serious objection would arise there was an omission of the property of such persons as might interfere with the creation of the district, provided the omission did not result in the omission of the railroad lines of complainant."

It is not stated upon what grounds the objections were based, or whether there was any merit in them. For all that appears in the bill, the objections may have been legally and equitably well taken, and the board's decision thereon not only free from fraud, but fair and wise from a legislative standpoint. The complainant's position is summed up in the averment that—

"The irregular shape and the omissions are sufficient to, and do, condemn the said district as improperly laid out and void."

The defendants filed an answer in which they deny the main allegations of the bill, except those with regard to the creation of the district, the assessment and levy, admitting its creation with the dimensions claimed in the bill, and admitting the assessment and levy. In the answer is set up also much new matter, which would be proper for me to consider on the motion for a preliminary injunction, but which, as the case will be disposed of on the motion to dismiss, need not be adverted to here.

The case is before me now on the motion of complainant for a preliminary injunction, which has been heard on bill, answer, and proof, and also on the motion of the defendants to dismiss the bill, because insufficient in point of law to justify the relief prayed for. The latter motion involves a consideration solely of the sufficiency of the bill to justify the relief therein sought.

This is not the case of a local assessment or betterment tax, charging the cost of a local improvement upon individual property in proportion to benefits estimated to accrue thereto, but is the case of the creation by authority of the Legislature of a separate special taxing district, which is made to bear the entire cost of a local improvement, to wit, a public highway traversing the entire length of the same. This cost is distributed equally upon the property in the district upon an ad valorem basis. If this distinction is kept in mind, it will serve to differentiate most of the cases cited by attorneys for complainant, notably, Kansas City Southern Railway Co. v. Road Improvement District No. 6, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, which is their main authority.

In that case the board assessed benefits to railroad property from the construction of a public highway at $7,000 per mile, but divided the farming lands into five zones, determined by distance from the highway, and assessed uniform benefits upon all within the zone, without regard to improvement or value, in the first, $12 per acre; second, $10; third, $8; fourth, $6; and fifth, $4. Town lots were likewise assessed, without reference to value or improvements, at $10, $15, $20, and $25 each, according to location. The court recognized that a state Legislature may create special taxing districts to meet the expense of local improvements, and fix the basis of taxation without violating the Fourteenth Amendment, unless its action is palpably arbitrary or a plain abuse of power; also that the levy may be upon the lands specially benefited according to value, possession, area, or the front-foot rule, but held that if, under the statute, there was no reasonable presumption that substantial justice would generally be done, and that probably parties would be taxed disproportionately to each other and to benefits

conferred, the law could not be upheld. Not one of the grounds of condemning the assessment there exists here. The emphasis of the distinguishing features of the two cases is helped by quoting from the opinion:

"The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position, and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs in error without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value, considered as a component part of the system. Obviously, the railroad companies have not been treated like individual owners, and we think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results. To say that 9.7 miles of railroad in a purely farming section, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible. Classification, of course, is permissible, but we can find no adequate reason for what has been attempted in the present case. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415, 64 L. Ed. 989, 990, 40 Sup. Ct. 560. 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."

Here there is a definite standard for determining the benefits of the proposed improvement. The basis for ascertaining the contribution demanded of individual owners is the same as that of the railroad; all property in the district is assessed according to value. The levy of 10 mills is the same for corporate and individual owners. Equal protection of the law is extended to all within the district.

The question, therefore, narrows itself to whether the creation of the district was a denial of due process or equal protection of the law to complainant, because of the amount of its property embraced in it and because of the boundaries and irregular shape. The statute in question (Laws 1914, c. 176) has been upheld by the Supreme Court of Mississippi in Prather v. Googe, 108 Miss. 670, 67 South. 156. Neither is the statute here assailed generally, upon the ground of its unconstitutionality, and palpably upon the hearing which has taken place no relief could be granted upon that ground. 37 Stat. 1013, c. 160, Act March 4, 1913 (Comp. St. § 1243). There is no allegation that the complainant ever objected, or was denied the right to object, to the creation of the district, or the inclusion of its property in it, or to the assessment or levy.

This reduces the matter to whether the creation, under a valid statute, of a special taxing district, with the dimensions named, which includes property fairly assessed at $2,511,800, for the construction and

maintenance of a road at a cost necessitating a 10-mill annual tax on the assessment, about one-fifth of which will be paid by the complainant, is such an arbitrary legislative act and plain abuse of power that it is tantamount to taking complainant's property therein without due process of law, and denying to it the equal protection of the law under the federal Constitution. Clearly the Legislature has a large discretion in defining the territory to be deemed specially benefited by a public highway or other local improvement. This court has no power to trespass upon that discretion, or to enlarge or contract the boundaries of the district when formed. The limit of its power is to declare void an arbitrary act, which is so palpably an abuse of that discretion as to be violative of rights protected by the Fourteenth Amendment.

The bill does not state such a case, and the motion to dismiss will be sustained.

THE ALABAMA.

THE BRANDYWINE.

(District Court, S. D. Texas, at Houston. March 14, 1922.)

No. 1091.

1. **Salvage ⟸1—Service must be voluntary and to some extent effective.**
   To constitute a salvage service, for which recovery is allowable, it must be voluntary and to some extent effective.

2. **Salvage ⟸26—Elements determining salvage award.**
   The circumstances of danger and peril in which the salved vessel was, the imminence of that danger, and the necessity for immediate rescue therefrom, are to be considered in making a salvage award.

3. **Salvage ⟸26—Conditions at time of service important in making award.**
   In determining award for salvage services, the view which the persons engaged in the operation of saving and being saved took of the matter under the facts and circumstances then known to them is the important one, and not the view which might later be taken.

4. **Salvage ⟸26—Elements of salvage award include peril and injury to salving vessel.**
   Important elements in fixing salvage compensation are the perils to the salving vessel, the time consumed, and the efficiency and promptness of the service, and in addition the actual damage and loss to such vessel directly traceable to the salving operation.

5. **Salvage ⟸30—Amount of award considered.**
   A salvage award of $45,000, made to a steamship and a tug for services in releasing a steamship worth $1,000,000, stranded in the Gulf of Mexico and seriously imperiled by threatening weather, the steamship, which worked for more than two days under dangerous conditions and suffered actual injuries, repair of which cost over $17,000, being given $35,000, with $10,000 awarded to the tug, which arrived on the third day, and whose efficient help rendered the service successful.

6. **Salvage ⟸26—Actual damage sustained by salving vessel recoverable.**
   Where a salvage operation is accompanied by peril to the salving vessel, which in fact suffers injury, the item of recovery due to the peril may properly be measured by the actual damage sustained, if the amount is within a reasonable award for the service received by the salved vessel.

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

In Admiralty. Suit for salvage by the Texas Company, owner of steamship Alabama, against the United States, owner of the steamship Brandywine. Decree for libelant and for intervening owner of the tug El Aguila.

Bigham, Englar & Jones, of New York City, and Mart H. Royston, of Galveston, Tex., for libelant.

H. C. Hughes, of Galveston, Tex., for intervener.

D. E. Simmons, U. S. Dist. Atty., of Houston, Tex., for respondent.

HUTCHESON, District Judge. About 10 o'clock on the morning of April 1, 1920, the Shipping Board's vessel Brandywine, bound for Pablo Blanco, a port about 16 miles south of Lobos Island, went aground on Medio reef just off of Lobos Island. The captain made every effort with his own power and anchors to come clear of the reef, but was unable to do so. The reef at this point was about 200 feet long and from 30 to 50 feet wide, and the vessel lay fully aground on the southeast portion of it.

The captain then commenced to use his wireless, and in response to such calls the Alabama, a Texas Company tanker, which was loading oil at Port Lobos, Mexico, suspended loading operations and came to the Brandywine's rescue, arriving at the place of grounding at 2 o'clock on April 1st, accompanied by the Texas Company's launch, Meteles. She immediately began her attempts to pull the Brandywine free. These attempts were persisted in, but unsuccessfully, until April 3, at which time the tug El Aguila, a large and powerful tug thoroughly equipped for salvage service, had come up, and, lines having been made fast to the Brandywine from both the El Aguila and the Alabama, the Brandywine came off clear, except as to her anchors, at 12:14. At this time the lines of the El Aguila were parted, but the Alabama continued to hold on and prevented the vessel from going back on the reef. The Alabama continued to pull until 3 o'clock, when the anchors came clear, and all lines were let go and the Brandywine steamed away, having suffered no damage.

During the course of the operations the Alabama grounded, and as was subsequently ascertained suffered damage to her plates which required her being laid up for several days for repairs, which actually cost $17,000. In addition the Alabama sustained other expenses, for surveying, loss of hawsers, demurrage for several days, which made the salving operation cost her in actual money loss, in excess of $17,000. I find that this damage to the Alabama was not caused by her fault, but was an incident to the service under the circumstances.

During the time of this salving operation the barometer commenced to fall, and after the Brandywine went aground it became apparent on shore that a norther was blowing up. When the captain got the information from the shore that a norther was coming, he commenced to send urgent wireless messages for help. Among those answering was the Shipping Board's ship Rheems, which advised that it would reach Medio reef at 5 o'clock, April 3. While the Glenpool wired:

"As you have assistance and I will be running a big risk, drawing 28 feet, I do not think I am justified losing any more time."

The barometer on April 3 was low, registering 29.50, and on the 4th there was a strong wind from the northwest, with a very heavy sea.

The Alabama asserts her right to salvage award in which she includes the damage and loss sustained by her, and the El Aguila claims a salvage award based upon the efficiency of her service. The United States, for the Brandywine and the Shipping Board, admits that salvage service was rendered, but denies that the Alabama sustained damage from the salvage service, and further denies her right to recover therefor, if she did sustain damage, and asserts that the service of both vessels was of a nature which would justify only a small award.

[1] To constitute a salvage service, it is essential that the service for which claim is made be voluntary and to some extent effective. If these two elements exist, a recovery is allowable. If there is a failure of either to exist, there is no allowable recovery.

[2] These two principles constitute the skeleton which supports the body of the salvage law. Granting these, the amount of the award depends upon other circumstances, the value of the vessel salved and of the salving vessel, the circumstances of danger and peril in which the salved vessel was at the time of her rescue, the imminence of that danger, and the necessity for immediate rescue therefrom; and these are to be judged, not in the light of subsequent, but in the light of the then transpiring events.

[3, 4] In short, the view which the persons engaged in the operation of saving and being saved took of the matter under the facts and circumstances then known to them is the important one, and not the view which might later be taken. Other important elements of salvage are the perils to the salving vessel, the time consumed, and the efficiency and promptness of the service. The efficiency, through proper equipment, to a large extent, offsets the absence of danger which often attends salving enterprises where the salvor is not properly equipped. In addition to these elements, as some courts say, or included in them, as others put it, is the actual damage to the salving vessel and the loss and injury directly traceable to the salving operation.

[5] In the case at bar the following elements are established overwhelmingly: First, that the Brandywine was in peril. That the Master of the Brandywine felt that the peril was imminent and great is abundantly shown by the wireless messages passing from ship to ship and from ship to shore. Second, that the Alabama volunteered and in every way within her power endeavored to effect the salvage. Third, that the position in which the Brandywine lay on the reef made attempts to salve her attendant with danger to the salving vessel. This is shown by the fact that the Bonita refused to approach the reef close enough to render assistance, and is put beyond peradventure by the fact that the Alabama scraped in the operation which she performed. The evidence shows that the Alabama's services were persistent and faithful, and, had her equipment been of the kind which the service needed—in short, had the efficiency measured up to the other elements present—she should, in view of the admitted value of the Brandywine, to wit, $1,000,000, receive a very substantial award. The fact that she struggled for three days to perform the operation, and then did not

perform it, except through the assistance of El Aguila, must, of course, diminish the return to which she is entitled.

Now, what importance should the court give to that fact? I attach considerable importance to the pending norther, and I believe that the fact of its approach is the explanation of the great anxiety displayed by the vessel on the reef. I do not attach much importance to the contention that the Rheems would have arrived there at 5 o'clock on that same day to take her off. The Rheems was a large ship, and not easily maneuvered in such waters. Nor is there any reason to suppose that she would have certainly reached there in time to have finished the operation that day, while it is clear that on the next day she could not have safely attempted to move the vessel.

Nor do I believe the theory of the master of the Brandywine that the norther would have lifted him off the reef. I believe the norther would have more likely dashed him to pieces on the reef than moved him off it. I think the case, then, must be viewed as one in which, had not the Alabama and the El Aguila brought the Brandywine clear of the reef when they did, she would have in all probability suffered heavy damages. Under this view, if the case were not complicated by the question of the actual damage to and loss of time of the Alabama consequent thereon, I should have no difficulty in rendering a reasonable award and apportioning it between the El Aguila and the Alabama. The difficult question of the case is as to what influence the actual damages sustained should have.

I am of the opinion that, in the light of the authorities, which require the court to view with a liberal eye the voluntary efforts of the salvor, the evidence sufficiently establishes that the Alabama received direct damage during and because of the salving operation, and I think it clear that the authorities justify—in fact, require—the taking into consideration in the salvage award the loss and damages sustained by the salving ship. My opinion is that the true rule ought to be that, though a salving ship sustains no damage, evidence of her subjection to peril, danger, and risk increases her reward, and that, when the existence of the danger and peril is made certain by an actual ascertained damage, the court should be guided by the same principles, and should, in awarding a salvage recovery, let the item of recovery due to peril be approximately measured by the actual damage which was sustained.

[6] In short, the only difference is that, while in the one case the probability of damage influences the court to increase the award upon an estimate of the probabilities, the evidence of actual damage should enable the court to fix its award in the light, not of probabilities, but of actualities. Of course, in no case should the salvage award exceed the proper amount of recovery—that is, the benefits bestowed by the service—and no principle should be recognized which would enable a salving ship to recover such a heavy award, due to her own damages, as that the owner of the salvaged ship would be penalized, rather than benefited, by the operation. 24 Ruling Case Law, p. 544, and cases cited; also The Ship Nanna, 14 Ann. Cas. 83, and note.

It is my view, then, that not as a specific allowance, but as influencing it, the loss of the hawsers, the amount of the damage, and the de-

murrage, due to time laid up because of repairs of the damage, should be taken into consideration by the court in fixing the award, and that there should be a total award to the two ships of $45,000. To the El Aguila, which incurred neither danger nor substantial damage, but rendered efficient service, $10,000; to the Alabama, in view of the peril incurred by her, as proven by the damages sustained, $35,000. The amount awarded to the El Aguila to be divided between the crew and the vessel according to the rule prevailing in this circuit, two-thirds and one-third; while as to the Alabama, the danger being to the craft and not to the crew, and the craft having actually sustained loss and damage, it is the judgment of the court that the division between the crew and the Alabama should be four-fifths to the vessel and one-fifth to the crew.

VAUGHAN et al. v. RIORDAN, Internal Revenue Collector.

(District Court, W. D. New York. October 17, 1921.)

1. **Internal revenue ⟸8—Evidence held to rebut presumption gift of bonds nine days before death was in contemplation of death.**

   Evidence that a husband, in order to reduce his income tax, had intended for some time to give his wife bonds, from whose income he paid her allowance, and that he executed the gift while recovering from an attack of pneumonia, but after he had been pronounced out of danger, *held* sufficient to rebut the presumption created by Revenue Act 1916, § 202(b), that a transfer without consideration made within two years of death was made in contemplation of death, though within a few days after executing the gift the husband was attacked by a new disease and died within nine days thereafter.

2. **Internal revenue ⟸8—Gift of bonds to wife held not to pay household expenses for which donor was chargeable.**

   Where a husband gave to his wife bonds, the income of which he had previously paid her for maintenance of the household, to relieve him of the income tax on such bonds, but did not restrict the use of the income from the gift to the payment of household expenses, and continued thereafter to give his wife money required in addition to the income from the bonds for the payment of such expenses, the bonds were not taxable as part of his estate on the theory they were still to be used for the payment of obligations of the husband.

3. **Internal revenue ⟸38—Application of rebate on other taxes to tax on omitted bonds is not voluntary payment by taxpayer.**

   Where the executors of an estate had paid an estate tax on an amount which included a testamentary gift to a library, the fact that the collector, on making a rebate of the tax because of such gift, applied an amount of the rebate to the payment of the tax on bonds given by testator to his wife which the executors protested against paying, did not make the payment of the tax on the bonds voluntary to the extent of such application so as to prevent recovery by the executors, since the act of the collector in making such application of the rebate was unauthorized, arbitrary, and coercive.

At Law. Action by William W. Vaughan and another, as executors of the will of William Austin Wadsworth, deceased, against Vincent

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

H. Riordan, as United States Internal Revenue Collector for the Twenty-Eighth District of New York. Judgment directed for plaintiffs.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (Romney Spring, of Boston, Mass., of counsel), for plaintiffs.

Stephen T. Lockwood, U. S. Atty., and John H. O'Day, Asst. U. S. Atty., both of Buffalo, N. Y. (Carl A. Mapes, Solicitor of Internal Revenue, and Newton K. Fox, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., of counsel), for defendant.

HAZEL, District Judge. This is an action by the executors of the will of William Austin Wadsworth, deceased, to recover from Vincent H. Riordan, collector of internal revenue, federal estate taxes amounting to $38,310, with interest, illegally collected under the acts of March 3 and October 3, 1917. The principal question is whether a gift of bonds of the admitted value of $273,649.17, made by the deceased to his wife nine days before his death, is properly included as part of his gross estate under section 202 (b) of the act of 1916 (39 Stat. 777) as a gift "made in contemplation of death." The parts of the statute involved herein provide for imposing a tax on the transfer of the net estate of every person dying after the passage of the act, and, after specifying the manner of determining the gross estate, reads:

"(b) Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

The salient facts as proven at the trial are as follows: Maj. Wadsworth died on May 2, 1918, at the age of 71 years, and the value of his estate approximated $2,500,000, not including the bonds which are the subject of this controversy; and thereafter, on November 25, 1918, his executors filed an estate tax return with the commissioner and paid a tax of $249,475.51. The bonds transferred to his wife were not included in the tax return, but, had they been, the estate tax would have been larger by the amount of $38,310.89. There was an overpayment of $9,294.12 on the tax paid by the executors, arising from a deduction or allowance of a testamentary gift to the Wadsworth Library amounting to $100,000. The commissioner retained the overpayment, applying it on the tax which he claimed the estate owed for the gift of the bonds to Mrs. Wadsworth. The executors protested, and the additional balance required by the commissioner was paid, and this action brought for a refund of the amount assessed on the bonds.

[1] I find there is no substantial evidence that the transfer or gift in question by the deceased was in contemplation of death within the meaning of the statute, but that in fact it was given in good faith and at a time when the deceased had no expectation or anticipation of death in either the immediate or reasonably distant future. The evidence discloses the state of mind of the deceased long before the consummation of the gift as well as at the time thereof. It is shown that he had been afflicted with diabetes for a period of 20 years, and up to the time of his

death was continuously treated therefor by physicians of skill and experience. The disease was controlled from time to time, and Maj. Wadsworth's general health throughout was regarded as good notwithstanding his affliction and the inconvenience resulting therefrom. In March, 1918, he had pneumonia and bronchitis, which required the active attention of his physician and nurse, but his recovery was confidently assured; indeed, he was free from the effects of pneumonia and bronchial disturbance on April 23, the date when the bonds were transferred in writing—the writing being prepared by his counsel—and delivered to Mrs. Wadsworth. But two days afterwards he was seized with a streptococcus infection of the throat which admittedly aggravated his diabetic condition and caused his death. At various times in February and March, 1918, he was visited by his bookkeeper at his home in Boston for the purpose of obtaining counsel and assistance in making out income tax returns, and in relation to the affairs of the Wadsworth estate, comprising more than 16,000 acres of farm land in Livingston county, N. Y. At such times he spoke of future repairs that were to be made on the estate, and on an occasion in April he remarked cheerfully to his bookkeeper that he would see him in Geneseo the ensuing week. At such times, as the witness Sutton testified, Maj. Wadsworth looked well and was in apparent good spirits. At his request he prepared a list of securities which were afterwards transferred. Mrs. Wadsworth testified that her husband had long intended giving her the securities or their equivalent; that he had been giving her an allowance of $1,000 a month to partly meet household expenses, additional amounts being used from her independent income of $15,000 a year. At various times, she testified, prior to her husband's death, he stated that he intended giving her the securities from which the monthly allowances were made, and later, when the income taxes increased by surtaxes, he said he believed it wiser that she should have the principal for her own use, and he would discontinue the monthly allowance. He several times recurred to the subject, always saying that he intended turning the bonds over to her. In February, 1918, the list of bonds which had previously been obtained from his bookkeeper was given by the deceased to his counsel, with instructions to prepare an assignment to his wife, saying that he meant to give her enough bonds to cover the $12,000 he was annually giving her for household expenses, and that he did not wish to pay an income tax any longer on the securities from which the dividends were derived that were applied to her allowance. Similar statements had previously been made by him to his bookkeeper, and in October, 1915, when an allowance was payable, he again said to the bookkeeper that he intended giving Mrs. Wadsworth the bonds outright, and then he would not have the trouble of making deposits in the bank for her. There was an evident desire to consummate the gift before his illness, and I have no doubt but that it would have been consummated earlier in the year if his counsel had not been on a southern trip and absent from the city for some time. The annual income tax paid by the deceased amounted to about $18,000 on an income of from $65,000 to $100,000 a year, while that of his wife varied to an amount not exceeding $200, and he frequently

stated that he wished to equalize these payments, and therefore would transfer the bonds. At the time of the transfer he had made a good recovery from his illness. He was feeling well and had substantial assurances of recovery from his attending physician. It is true he had reached the age of 71 years, and perhaps would not have lived many more, and he had just recovered from a severe illness, but his usual strength was coming back and he entertained no thought of death. Indeed, no reason existed for thinking that he would be attacked with a streptococcus throat. No symptoms were noticeable, though his sputum had been analyzed. His attack was unexpected. His physician, Dr. Brigham, had discontinued his visits and had assured him on March 18 that he was out of danger, his nurse was planning to accompany him on a trip to his country home at Cotuit before discontinuing her services, while he was planning future activities of one kind or another at Geneseo, as the testimony of Senator Wadsworth, who visited him at Boston during his illness, shows. The idea of defrauding the government out of a comparatively small amount of the inheritance tax, when presumably he knew that his estate would be required to pay a very large sum, to wit, $249,475.51, to my mind is inconceivable, and any presumption arising under the statute that the gift was made in contemplation of death is, I think, fairly overcome by the existing facts and circumstances.

[2] The government next contends that, if it is found as a fact that the bonds in question were transferred so that Mrs. Wadsworth received the income therefrom for household expenses and to relieve him of the burden of paying them and including them in his income tax returns, then the gift is nevertheless taxable as part of his estate, since it was to take effect after the donor's death. This contention is based upon the theory that Maj. Wadsworth maintained the household, and the securities were to be used to pay his own indebtedness. But I think that the gift was not in the nature of a reservation of income from the bonds to his own uses, since the gift was absolute, unaccompanied by any conditions or reservations. Mrs. Wadsworth testified that the income from the bonds was insufficient to pay the household expenses, and she used about $15,000 additional from her independent income, but that, whenever she required more money, her husband gave it to her, and there was no understanding that the income from the bonds should be used in a particular way. Hence I am of the opinion that article 34, regulation 37, does not apply.

[3] It is next contended that the amount of $9,294.12, which had admittedly been erroneously paid by the plaintiffs, cannot be recovered in this action, since it was not originally paid under protest, and hence it was a "voluntary payment" as that term is defined in Chesebrough v. U. S., 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432. The law clearly is that, unless a tax is paid under duress or compulsion and under protest made at the time of payment that it is being illegally exacted, there can be no recovery. In this case, however, the amount erroneously paid, as shown in the original return, was not in my opinion a voluntary payment of the tax on the bonds. The deputy commissioner's review and audit shows the amount to have been a reduction from

the estate tax payment, but I do not understand by what right he applied it to payment of taxes on bonds not specified in the original return. His disposition in this relation was, I think, unauthorized, arbitrary, and coercive. A demand by the commissioner for payment of the taxes on the bonds is included in the review and audit, and upon subsequent payment of the amount therein claimed to be due and owing (Exhibit D) the protest as to its legality was properly made. It may be that, if the government had not made a reduction on account of the bequest to the library at Geneseo, the payment by plaintiffs under their original return without demand would be held a voluntary payment and recovery barred, but the amount retained and irregularly applied without the consent of the plaintiffs and under their protest when they paid the tax exacted does not come under the principle of the adjudications cited in defendant's brief.

The plaintiffs, in my opinion, are entitled to judgment against the United States internal revenue collector for a return of the tax illegally assessed on the bonds in question and paid by the plaintiffs under protest.

A decree may be entered, with costs.

CHENEY BROS. v. GIMBEL BROS., NEW YORK.

(District Court, S. D. New York. May 17, 1922.)

1. **Trade-marks and trade-names and unfair competition ⟸68—Evidence held to show false representations in advertising sale of previous season's goods.**
   Where a merchant had purchased at reduced price a quantity of fabrics manufactured for the previous season's trade, some of which were seconds and did not bear the manufacturer's trade-mark, advertisements by the merchant and representations by its saleswomen that the fabrics were those of the manufacturer, which ordinarily sold at more than double the price, and that they were first quality and latest patterns and colors, were false representations, which were injurious to the manufacturer.

2. **Trade-marks and trade-names and unfair competition ⟸97—Manufacturer can enjoin advertisement using his name in connection with sale of last season's goods, after false representations.**
   Where a merchant had falsely advertised a sale of silks by a reputable manufacturer as being of the present season's style and colors, whereas in fact they were manufactured for the previous season, and some of them were seconds, the only protection to the manufacturer from the continued effect of the previous false representations is an injunction against the use of the manufacturer's name in advertisements of such goods, though they were in fact goods of the manufacturer, and such injunction will be issued, but the merchant will be permitted to give the manufacturer's name in answer to inquiry by customers.

In Equity. Suit by Cheney Bros. against Gimbel Bros., New York. On motion for injunction pendente lite to restrain alleged unfair competition. Injunction granted.

Harry D. Nims, of New York City, for complainant.

Rose & Paskus, of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. This is a motion for an injunction pendente lite to restrain alleged unfair competition. The defendant purchased a large amount of foulard silks of complainant's manufacture, and was selling them at $1.59 per yard. These foulards were manufactured by complainant for the season of 1921, and were not sold by them to the defendant, but purchased by the latter on April 18, 1922, from jobbers who had acquired them in the market at a low price.

Complainant had not sold them during the present season, and is accustomed to close out a season's goods before putting new styles on the market. Some of them are seconds, bearing complainant's private mark as such, and do not bear the Cheney trade-marks. Defendant advertised its sale extensively, and at first, on April 23, described the lot in a large advertisement in the New York Times, not only as "a sale of the famous foulard silks made by Cheney Bros., * * * fine quality foulards, the world's best, * * * which lends itself so gracefully to the fashions of the season," but stated in the advertisement that defendant had shopped for the identical fabrics in seven of the principal shops in Greater New York and found the current price for Cheney's foulards to run from $2.38 to $3.50. The advertisement also read: "60 designs in combinations of all the newest colors."

Moreover, the saleswomen of defendant repeatedly told customers that the foulards on sale at the latter's store were this year's patterns and of the best quality, and were ordinarily sold at $3.50. Large signs in the store also described the goods thus:

A Sensation!
22,000 Yards
Cheney's
Twill and Showerproof
Foulards
$1.59
Less than today's wholesale cost.

The Cheney foulards were also placed in the store on several tables with the Cheney signs, next a table on which were foulards of other manufacture, with no sign indicating that the other foulards were not Cheney's.

[1] I think it clear that oral and written representations have been made that would induce a purchaser to believe that: (1) All the foulards were Cheney's; (2) the foulards were Cheney's first quality; (3) the foulards were Cheney's latest patterns and colors. These representations were not true, and (3) were most injurious and prejudicial to the complainant. I cannot determine how far defendant has purchased and sold seconds in the lot as firsts, but in my opinion it has done this to some extent, and the merchandise has been so displayed that a customer might readily suppose that the foulards on all the tables were Cheney's.

[2] Complainant protested against the sale under a preliminary advertisement made on April 16, which described the sale as "sensational" and of "Cheney's foulard silks less than wholesale cost." This protest should have warned defendant not to follow up the advertising by

such language as appeared in the Times on April 23, and should also have secured protection for complainant from representations by saleswomen that the foulards were of the latest patterns and of the same kind sold by other merchants for about $3.50. Such advertising and such statements by the saleswomen in the store have been so widely diffused that no use of Cheney's name in connection with these foulards can fail to run the risk of being connected with the original misrepresentations. I think a preliminary injunction in broad terms should be granted as prayed for, together with an order enjoining defendant from using the words "Cheney," or "Cheney silks," or "Cheney foulards" in advertisements, placards, or signs. The defendant may, however, state to customers the name of the manufacturer, when inquiry is made.

Defendant's contention that the use of Cheney's name in advertising only states the truth is no answer to complainant's position. Defendant, by its past representations, has warranted the public in believing that the foulards were of this year's styles, when they were not. The only method of partially eliminating the effect of this action as a continuing misrepresentation is to abandon advertising Cheney's goods as such altogether. When a person so misrepresents the quality of the goods of another as to lead the public to suppose that the goods are of a different quality from what is being sold, the use of the manufacturer's name may be restrained altogether, in order to prevent what is in effect a continued representation that the goods are other than they really are in fact. As an alternative, the defendant might be required to state that the foulards are not of the present patterns, but this would seem to be an unnecessary hardship. Eli Lilly & Co. v. Wm. R. Warner & Co. (C. C. A.) 275 Fed. 752.

Settle order on notice.

HASHIMOTO v. AMERICAN UNION LINE, Inc.

(District Court, S. D. New York. February, 1921.)

Shipping ⊂⊃43—Owner held liable to charterer for failure to maintain efficient equipment.

Under a provision of the charter party requiring the owner to provide the necessary equipment for the proper and efficient working of the vessel, delay caused by the intentional or negligent failure of the master to repair or replace a broken winch *held* chargeable to the owner.

At Law. Action by Hashimoto, Esq., against the American Union Line, Inc. Jury waived. Judgment for plaintiff, less items of counterclaim allowed.

Judgment affirmed 280 Fed. 750.

Haight, Sandford & Smith, of New York City, for plaintiff.

Engel Bros., of New York City, for defendant.

MAYER, District Judge. The court has found as a fact that the Shigizan Maru was delayed in Genoa during March and April, 1917, for 1½ days, and that this delay was caused by a broken winch on the

port side of No. 3 hatch. The court has further found as a fact, in accordance with the stipulation of counsel, that the Shigizan Maru was delayed at Philadelphia in May, 1917, for one day and for the same reason. On the basis of these findings, it remains for the court to decide whether or not the defendant, as assignee of the charterer, is entitled to recover anything by reason of these delays.

The charter party contained, inter alia, the following provisions:

"That the former party (meaning the plaintiff) agrees to let, and the latter (meaning the Templeman Steamship Company, assignor of this plaintiff) agrees to hire, the said steamship or vessel (meaning the steamship Shigizan Maru), * * * she being then tight, staunch, and strong, and in every way fitted for the service."

"That the owners shall * * * provide and pay for the necessary equipment for the proper and efficient working of the steamer."

"That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the vessel for more than 24 hours, the payment of the hire shall cease until she be again in an efficient state to resume her duties."

The clause considered in Munson S. S. Line v. Miramar S. S. Co. (D. C.) 150 Fed. 437, affirmed 166 Fed. 722, 92 C. C. A. 412, read as follows:

"That the owner 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, engineroom, and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service."

The clause just quoted, supra, is, in substance and effect, similar to the clause in the charter party (quoted supra) that the owners shall provide the necessary equipment, etc. So far as applies to Philadelphia, I am unable to distinguish the case at bar in principle from the Munson Case, supra. See, also, Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012. Indeed, this case, if anything, is stronger, because clearly the failure to get a new winch at Philadelphia is not excusable.

I am inclined to think, however, that there is not involved any question of due diligence. It is always a matter of vital importance to a charterer that the "owner shall provide * * * for the necessary equipment for the proper and efficient working of the steamer." Hence the failure so to provide is a breach of duty, which cannot be excused, unless proximately due to an excepted peril. It is plain that at Philadelphia the captain made no effort whatever to get a new winch. Had he made such effort, he might have obtained a suitable new winch very promptly.

There is some discussion by plaintiff as to the efficacy as matter of pleading of the fourth counterclaim. I think it is sufficient for the purpose.

As to Genoa, the cause of the damage to the winch was a peril of the sea. The evidence shows that the winch was too badly damaged to be susceptible of repair. Here the question of due diligence is relevant, and the question is whether the captain exercised such diligence in endeavoring to obtain a new winch. When the ship arrived in port, it was the duty of the master (or, in other words, the owner) promptly

to provide the vessel with necessary equipment (i. e., a winch) to do the work for which she was chartered. Whether the master did discharge his duty in this respect is a question of fact.

On this branch of the case, the court has not had the advantage of seeing and hearing the witnesses. The impression, however, which the whole testimony has conveyed, is that the master was either indifferent or not fully appreciative of the necessity of providing a proper winch. Capt. McGrath, who impressed me as a very able stevedore, expressed surprise that the winch remained out of commission as long as it did:

"Q. You expressed surprise when you learned that this winch had remained out of commission from March 26th to the 28th day or 29th day of May, did you not? A. I naturally did as a shipmaster. I would wonder why it would be left that way."

Mr. Burke, a clerk in the employ of the firm of Marini & Brichetto, of Genoa, steamship agents and brokers, testified:

"We asked the Captain if he did not think it better to get his winch repaired, if possible. He, if I remember well, replied everything would be done in North America."

The testimony of Burke further showed that, when the Shigizan Maru arrived at Genoa, "things were normal in port." It seems extraordinary that nowhere in the important seaport of Genoa was there a winch to be found. The testimony of Capt. Doi to the contrary is not convincing, and on all the facts and surrounding circumstances I find that the master did not use due diligence to restore the vessel to its efficient equipment in respect of the damaged winch. On this item, therefore, I find with defendant.

Plaintiff may recover judgment for the amount found during the trial, less the items here disposed of and the other items passed upon in the course of the trial.

AMERICAN UNION LINE, Inc., v. HASHIMOTO.

(Circuit Court of Appeals, Second Circuit. February 20, 1922.)

No. 209.

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

Action at law by Hashimoto, Esq., against the American Union Line, Incorporated. Judgment for plaintiff (280 Fed. 748), and defendant brings error. Affirmed.

Engel Bros., of New York City (J. G. Engel and J. B. Engel, both of New York City, of counsel), for plaintiff in error.

Haight, Sandford, Smith & Griffin, of New York City (Harold S. Deming and Francis B. Goertner, both of New York City, of counsel), for defendant in error.

Before ROGERS and MANTON, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

PER CURIAM. Judgment affirmed.

BUFFALO UNION FURNACE CO. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, W. D. New York. March 20, 1922.)

1. **Shipping ⟸3½, New, vol. 8A Key-No. Series—Orders for iron by Fleet Corporation had implied condition war would continue.**

In contracts for the purchase of iron, made by the United States Shipping Board Emergency Fleet Corporation, which was an agency of the United States exercising powers delegated by the President, under Act June 15, 1917, § 1 (Comp. St. § 3115¹/₁₆d), which gave the President, in relation to placing orders for ships and materials, power to modify, suspend, cancel, or requisition any existing or future contracts, there was an implied condition which authorized the cancellation of the order on the termination of hostilities.

2. **Shipping ⟸3½, New, vol. 8A Key-No. Series—Authority of Fleet Corporation was terminated by Merchant Marine Act of 1920.**

The power conferred on the United States Shipping Board Emergency Fleet Corporation by Congress and by the orders of the President, were terminated by the Merchant Marine Act of 1920, so as to authorize cancellation of orders for iron under the implied condition of termination of the war emergency.

In Equity. Suit by the Buffalo Union Furnace Company against the United States Shipping Board Emergency Fleet Corporation. On plaintiff's motion for rehearing. Motion denied.

Slee, O'Brian & Hellings, of Buffalo, N. Y. (Frederick C. Slee and Dana B. Hellings, both of Buffalo, N. Y., of counsel), for plaintiff.

William J. Donovan, U. S. Atty., of Buffalo, N. Y. (Eldred E. Jacobsen, Asst. Counsel U. S. S. B. E. F. C., of Brooklyn, N. Y., of counsel), for defendant.

HAZEL, District Judge. [1] The cases cited by plaintiff in its brief for rehearing to show that the United States was not relieved from performance of the contract in question in the main treat of ordinary unqualified contracts, in which the impossibility of performance could not be anticipated. Such cases, however, have no application to the facts here. Although it is urged that, since the contract does not specifically provide for cancellation on cessation of war hostilities, and that defendant was bound to take the iron in question, either for use in its ships or after the war ended to dispose of it to others, I still remain of the opinion that the principle applies that the defendant, an agency of the United States, had a right to cancel because of the implied condition of war necessity, which may be read into the contract springing from the Act of June 15, 1917 (40 Stat. 182), wherein the President is given powers in relation to placing orders for ships and materials, and to—

"modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material."

The defendant, by proper designation of the President, had power to give the order for the iron in question, and later to cancel the order when the war ended. In Meyer Scale & Hardware Co. v. U. S., ——

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

Ct. Cl. ——, decided January 9, 1922, by the Court of Claims, it was held that acts of Congress dealing with the same subject were to be considered in the ascertainment of the legislative intent. In that case the contract providing for the delivery of suspension crane scales at various navy yards, after partial performance, was canceled by the United States. The action included a demand for recovery for prospective profits that would have been made upon scales that plaintiff was not permitted to deliver. The purpose and scope of the act was comprehensively considered by the court, and it was unanimously concluded that—

"Contracts, whether existing or future, were brought within the scope of the legislation, and the power was given to modify or cancel them, and there was no further need for a part or all of the things that furnish their consideration."

And the court further said:

"If the provision of this act with reference to the modification, cancellation, etc., of contracts applied to government contracts, as we believe and hold that it did, it was a provision of existing law which must be read into the contract, and the contract is to be treated, in determining the rights of the parties thereunder, as if modification and cancellation clauses were written therein."

These quoted conclusions are believed persuasive of the correctness of the decision made herein. Furthermore, the general principle appears in many adjudications that, where there is an implied understanding that the performance of a contract shall without fault of either party end in certain contingencies, and neither party agrees to be responsible for the continuance of the contract beyond such contingency, it is in the contemplation of the parties that the contract is coupled with an implied condition that it may be dissolved when the particular purpose for which it was made is at an end.

[2] It is contended that this principle does not apply in this case, as defendant did not cease business upon the termination of the armistice, but continued to conduct shipping transportations. In answer it suffices to say that it appears that the power conferred upon the defendant by Congress and by orders of the President was terminated by the Merchant Marine Act of 1920 (41 Stat. 988).

Motion for rehearing is denied.

VICTORY BOTTLE CAPPING MACH. CO., Inc., v. O. & J. MACH. CO. et al.

(Circuit Court of Appeals, First Circuit. May 17, 1922.)

No. 1529.

1. **Appeal and error ⟸1052(5)—Admission of evidence to aid construction of contract held harmless.**
The admission of evidence concerning prior negotiations to aid in construing a written contract, if erroneous, was not prejudicial, where the contract should, as a pure question of law, have received the interpretation put on it by the trial judge after receiving the evidence.

2. **Patents ⟸191—Patentee may convey right to exclude given by patent, with his right to make article existing in him independent of patent.**
Though a patent gives only the right to exclude others from making the article, not the affirmative right to make the article which the patentee possessed independent of the patent, the patentee may by one contract convey both the right to exclude manufacture by others and the right to manufacture himself.

3. **Patents ⟸211(1)—Contract held to convey right to make and sell.**
A contract whereby a patentee gave to another the exclusive right to make, use, and sell the invention, and undertook to protect the other in the exclusive right granted against all infringers, licensees, or others, and which required the licensee to proceed immediately to manufacture and sell on a royalty basis, and to expend a stipulated sum annually in advertising the machine, was not a bare license, granting the licensee only the right under the patent to exclude manufacture of the machines by others; but the grant of the right to manufacture and sell was a material part of the consideration, so that the licensee was entitled to a cancellation of the contract when it appeared the manufacture of the machines infringed patents owned by others.

4. **Patents ⟸211(1)—Grant impliedly includes that without which thing expressly granted would be useless.**
The maxim that one granting a thing impliedly grants that without which the thing expressly granted would be useless to the grantee is as applicable to grants of patent rights as to other species of property.

5. **Contracts ⟸143—Intention of parties is to be gathered from whole instrument.**
A contract must be construed as a whole, and the intention of the parties gathered from the entire instrument, and not from detached portions.

6. **Patents ⟸129—Licensee can assert invalidity in suit for royalties, after there has been equivalent of eviction from right to manufacture.**
Though a licensee, who has enjoyed all the privileges under his license, cannot withhold payment of the royalties because of alleged invalidity of the patent, he can show a failure of consideration for his agreement to pay royalties, by proving what corresponds to an eviction from his right to manufacture under the licensed patent.

7. **Patents ⟸212(1)—Evidence held to show eviction of licensee authorizing cancellation of royalty patent.**
Where the licensee of a patent was notified by the owners of other patents that the construction of the machines under the patent was an infringement of the other patents, and the patentee's attorney after investigation practically conceded infringement and advised discontinuance of manufacture, there was a substantial eviction of the licensee, which entitled him to a cancellation of his royalty contract for failure of consideration; it being unnecessary that he engage in apparently hopeless litigation with the other patentees to have the issue of infringement determined.

8. Patents ⟸218(1)—Patentee held entitled to royalty on machines sold which infringed another patent.

Where the licensee had manufactured and sold 40 machines before objection was made they infringed other patents, and there was no probability it would be held liable for damages because of such infringement, the patentee is entitled to the stipulated royalty on those machines, less the damages suffered by the licensee by breach of the patentee's contract to convey exclusive right to manufacture and sell.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit in equity by the Victory Bottle Capping Machine Company, Inc., against the O. & J. Machine Company and others. Decree for defendants, and plaintiff appeals. Decree modified and affirmed, and cause remanded for accounting.

A. Parker-Smith, of New York City (Roberts, Roberts & Cushman, of Boston, Mass., on the brief), for appellant.

Louis W. Southgate, of Worcester, Mass., for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and MORRIS, District Judge.

MORRIS, District Judge. This is an appeal by the Victory Bottle Capping Machine Company, Inc., plaintiff, appellant, from an interlocutory decree of the District Court of Massachusetts dismissing plaintiff's bill in equity, and granting defendant the O. & J. Machine Company cancellation under its counterclaim of an agreement between the parties, an injunction for the enforcement of cancellation, and damages for failure of consideration.

The subject-matter of this litigation is the Oliver patent, No. 1,310,960, applicable to bottle-capping machines.

About January 1, 1919, Ernest A. Oliver, of Flushing, N. Y., completed the construction of a bottle-capping machine. A few days later this machine was exhibited to Charles H. Oslund and J. Emanuel Johnson, of Worcester, Mass., the treasurer and president of the defendant O. & J. Machine Company. At the time of this conference no patent had been applied for by Oliver, but it was stated by Mr. Miller and Mr. Wickery, both of whom were interested in the enterprise with Oliver, that they were advised by their patent attorney that they had a "clear field." Shortly thereafter the plaintiff corporation was formed under the laws of the state of New York for the purpose of holding the Oliver patent; an assignment by Oliver was made to the corporation and a patent applied for January 24, 1919, which was granted July 22, 1919.

Following the inspection of the machine by Messrs. Oslund and Johnson, and before the patent was granted, negotiations were entered into between the new corporation, the Victory Bottle Capping Machine Company, Inc., and the O. & J. Machine Company, which resulted in a contract—Plaintiff's Exhibit A—the material parts of which provided that the plaintiff, called in the contract the "party of the first part," gave the defendant, called in the contract the "party of the second part"

the "sole and exclusive right to make, use, and vend the said invention" throughout the United States and territories, during the "full term of said patent and any extension thereof," subject to certain terms and conditions, the first of which was that the defendant should proceed without delay to make the necessary preparations for manufacturing machines at once.

The contract also provided that the defendant should spend annually the sum of $1,000 in advertising, in such a manner as would best promote the sale of such machines, and that it would manufacture at least 50 of the machines each year, subject, however, to delays on account of unavoidable casualties.

The third paragraph provided for the payment of a royalty of $300 on each machine manufactured and sold. It also provided terms of payment.

Paragraphs 10 and 12, quoted in full, were as follows:

"Tenth. The party of the first part will, at its own cost and expense, defend and protect the party of the second part in the exclusive making, using, and vending of the machines included in this agreement against all infringers, licensees, or others in the countries where applications for patents are now pending, and where patents have been or may be issued for such machines, and will, at its own expense, take such proceedings in law and in equity as may be necessary and proper to prevent and enjoin such infringement, and to save the party of the second part harmless from the results of such acts; and, in case of the failure of the party of the first part to fulfill any of the obligations in this clause contained the party of the second part shall have the right and privilege of prosecuting and defending any such proceedings at its own expense, and to charge the same against the party of the first part and collect from it, provided, however, that the party of the second part shall first give to the party of the first part 30 days' notice in writing demanding compliance with the terms of the agreement on its part, before proceeding to exercise the rights hereby conferred on the party of the second part."

"Twelfth. That any improvements or modifications to the said machine, made by the party of the second part, or its successors or assigns, shall belong to the said party of the first part."

By the terms of paragraph 13 the plaintiff agreed to execute all licenses or other documents necessary to vest in the defendant the right to make, use, and vend said machine.

Paragraph 14 provided that, if letters patent for which application had been made were not granted, then the defendant might terminate the agreement forthwith; and if the plaintiff should fail to comply with the terms of the agreement, or any of them, the defendant might, at its option, terminate the agreement upon giving 90 days' notice thereof in writing. Such termination, however, was not to release the defendant from any liability then due to the plaintiff.

After the agreement was executed the machine built by Oliver was sent to defendant's factory at Worcester, Mass., as a model. The defendant company at once set to work making the necessary equipment for the manufacture of the machines and the fulfillment of its contract. In the course of such preparations, Messrs. Oslund and Johnson invented and developed some important changes in the Oliver machine, and filed an application for a patent therefor October 31, 1919, serial No. 334,683. It is claimed that, while these changes were primarily designed for use on the Oliver machine, they are capable of

general use. The defendant manufactured or had in the process of manufacture 40 machines, when on November 11, 1919, it received a letter from attorneys of the Crown Cork & Seal Company, of Baltimore, Md., that the machines it was manufacturing were an infringement on two patents owned by said Crown Cork & Seal Company, viz. the Brewington patent, No. 860,787, dated July 23, 1907, and the La Porte patent, No. 1,080,114, dated December 2, 1913, and threatening immediate suit if the Oliver machines were put on the market.

This letter was immediately called to the attention of the plaintiff and a demand made for the protection which it claimed was contemplated in the terms of the agreement. A conference of the agents of the respective corporations was held in New York, at which the defendant requested the plaintiff to furnish an indemnity bond, but the request was refused. Thereafter the plaintiff's counsel called on counsel for the Crown Cork & Seal Company, the result of the interview being embodied in a letter dated December 18, 1919, which was forwarded to the defendant company by the O. & J. Machine Sales Company, to whom it was addressed. The following excerpt is taken from the letter:

"I told him [counsel for Crown Cork & Seal Company] that we had sold some machines and had some more in the works amounting to about 40 in all, and that while we would fight the suits if we had to, I had advised you to stop making the present machine and either try to sell your patents to the Crown Cork & Seal Company or to confine your activities in this line to some noninfringing form of machine."

After this letter was received, and after getting the advice of its own counsel, the defendant completed the machines it had in process of manufacture and stopped the further manufacture of them. It claims to have expended a large amount of money in making preparations for the enterprise, and has refused to pay any royalties to the plaintiff for the 40 machines built and sold. The plaintiff brought its bill praying for an accounting for the royalties provided for in the third paragraph of the contract, for a decree under paragraph 12 ordering an assignment by the defendants of all rights claimed under the Johnson and Oslund application for a patent, filed October 31, 1919, and all other improvements claimed by said defendants, and concluding with a prayer for an injunction perpetually enjoining the defendants or any of them from assigning to third parties or otherwise disposing of any inventions embodying improvements or modifications to bottle-capping machines they had made.

Defendants' answer in its final form filed by leave of court admitted the execution of the contract, and set up as a defense thereto a breach of paragraph 10 of the contract and the facts substantially as above set forth, with a counterclaim for damages for expenses incurred in experimental work, drawings, jigs, patterns, and equipment for the manufacture of the machines, which expense they allege is a total loss.

The court below found and ruled that the consideration for the contract was the "agreement by the plaintiff to give the defendant the exclusive right to make, use, and vend the machines contemplated by the parties to be made and a model of which was in existence and viewed by the parties before the making of the contract."

It was further found as a fact that the machine could not be manu-

factured without infringement upon the Brewington and La Porte patents owned by the Crown Cork & Seal Company; that the plaintiff had failed to protect the defendant as provided in paragraph 10; that the plaintiff corporation had no property, except its interest in the Oliver patent and the royalties and improvements in the hands of the defendants; and that the defendants were justified in ceasing to manufacture the Oliver machines.

A decree was entered ordering the cancellation of the contract of January 31, 1919, dismissing plaintiff's bill, and awarding defendant damages under its counterclaim to be determined by a master.

Against this decree the plaintiff, appellant, has assigned 12 errors, of which the first 7 relate to the substance of the decree, 8 and 9 relate to the admission of evidence, and 10, 11, and 12 refer to the action of the District Court in allowing the defendant to file its counterclaim.

The important issues between these parties relate to the construction of the contract and the allowance of damages under defendants' counterclaim.

[1] The District Court received testimony of negotiations leading up to the execution of the contract, both oral and documentary. Defendants' Exhibits 5 and 6. The documentary evidence consisted of a letter dated January 17, 1919, accompanying a "memorandum form" of a contract which, with changes, some of which were important, was finally executed January 31, 1919, as the final contract of the parties. Plaintiff's Exhibit A, ante. The memorandum was also received. Defendant's Exhibit 6. Exceptions were taken to the introduction of this testimony, and error alleged (assignment No. 9).

Independent of the testimony of what transpired leading up to the execution of the contract of January 31, 1919, we think the contract should, as a pure question of law, receive the interpretation put upon it by the learned trial judge; therefore the question of the admissibility of the evidence above referred to becomes immaterial.

[2] The plaintiff claims that the contract of January 31, 1919, is a license contract, and that in the absence of an express warranty such a license does not imply any undertaking by the licensor that the patent under which the license is granted is valid, or that the machine embodying the invention can be manufactured without infringing other patents. Its contention is that a patent does not grant any affirmative right to manufacture the article patented, as that is a right possessed by the patentee in any event, but that it merely grants the right to exclude others, citing Bloomer v. McQuewan, 14 How. 539, 14 L. Ed. 532, and other cases in point. Taking this undoubtedly sound principle of law as a foundation to build on, plaintiff's next contention is that a patentee, by his general ownership of the patent, having only the right to exclude others, conveys by his license to his licensee only that right of exclusion and immunity from actions on the part of the licensor, without guaranty that the licensee himself can make use of the invention. Webster Electric Co. v. Podlesak (D. C.) 255 Fed. 907; Chicago & A. Ry. Co. v. Pressed Steel Car Co., 243 Fed. 883, 156 C. C. A. 395.

We cannot accept any such narrow construction of the contract in suit. If we were to concede that a patentee obtains nothing but the

right of exclusion under his patent, it does not follow that he may not by contract grant both that right of exclusion and his natural original right to manufacture, use, and vend, which the plaintiff concedes an inventor or owner of a patent has independent of the patent.

These rights may be individual and distinct, but they are all property rights, and may be conveyed singly or collectively by a contract governed in its construction by the rules of the common law.

Mr. Justice Miller says in the case of Adams v. Burke, 17 Wall. 453, 21 L. Ed. 700 (Mass. Dist.):

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee."

To these three might be added a fourth, viz. the right of exclusion.

What form of contract is essential to convey these property rights, whether in fact a contract has been made, the validity of the particular contract, and the obligations of the contracting parties are questions to be determined by the principles of the common law.

[3] The granting clause of the first paragraph of the contract in question (Plaintiff's Exhibit A) reads:

"The party of the first part [plaintiff] hereby gives to the party of the second part [defendant] the sole and exclusive right to make, use, and vend the said invention," etc.

Paragraph ten provides that—

"The party of the first part will * * * defend and protect the party of the second part in the exclusive making, using and vending of the machines * * * against all infringers, licensees, *or others*, * * * and save the party of the second part harmless from all results of such acts," etc.

In view of this language, it would be a narrow construction, indeed, to hold that this contract was a bare license, granting to the licensee only the right of "exclusion" and immunity from an injunction brought against it by the patentee or owner.

[4] It is not to be presumed that a right so nugatory was the only subject of the contract, under the provisions of which the defendant corporation obligated itself to "immediately proceed to make preparations for beginning * * * the manufacture and sale of the * * * machines, * * *" and to "expend annually the sum of $1,000 for advertising," etc. Walker on Patents, § 297; Herzog v. Heyman, 151 N. Y. 587, 591, 45 N. E. 1127, 56 Am. St. Rep. 646.

It is a maxim of the common law that one, granting a thing, impliedly grants that without which the thing expressly granted would be useless to the grantee. This maxim is as applicable to grants of patent rights as to other species of property. Steam Stone Cutter Co. v. Shortsleeves, 16 Blatch. 381, Fed. Cas. No. 13,334; Brush Electric Co. v. California Electric Light Co., 52 Fed. 945, 960, 3 C. C. A. 368.

Taking the words of the first paragraph of the contract alone, it might be thought that the contract related solely to the Oliver invention, which appears to be only a modification of the Brewington machine; but, as said by the learned judge below:

"Subsequent parts of the contract, down through nine paragraphs, deal with the various steps of beginning and carrying on the business and the royalties to accrue * * * for the manufacture of these machines"

—meaning machines like the one exhibited to defendants' agents in New York, and which was subsequently sent to defendants' factory in Worcester, Mass., together with patterns and drawings essential for their manufacture.

[5] A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument, and not from detached portions; it being necessary to consider all of its parts in order to determine the meaning of every particular part as well as of the whole. Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; Pressed Steel Car Co. v. Eastern Ry. Co. of Minn., 121 Fed. 609, 57 C. C. A. 635. So construed, we hold that the "sole and exclusive" right to manufacture and vend the machine exhibited by Oliver in New York to agents of the defendant corporation for the term of the Oliver patent was the material consideration moving the defendants to enter into the contract and engage in the enterprise.

Subject to plaintiff's objection and exception, the court below admitted the Brewington and La Porte patents, and evidence of an expert that the Oliver machines could not be manufactured without infringing on those patents. The letter of December 18, 1919, was also admitted, subject to objection and exception.

[6] The plaintiff claims that, as this is an action brought to recover royalties under the license contract for machines manufactured and sold, evidence of infringement is not admissible. Such appears to be supported by authority. Kinsman v. Parkhurst, 59 U. S. 289, 293, 15 L. Ed. 385; Wilder v. Adams, 3 Woodb. & M. 329, Fed. Cas. No. 17,647; Consumers' Gas Co. v. American Elec. Construction Co., 50 Fed. 778, 1 C. C. A. 663; Geist v. Stier, 134 Pa. 216, 19 Atl. 505; Potterton v. Condit, 218 Mass. 216, 105 N. E. 443; Bartlett v. Holbrook, 1 Gray, 114.

In the Kinsman Case Mr. Justice Curtis says:

"Having actually received profits from sales of the patented machine, which profits the defendants do not show have been or are in any way liable to be affected by the invalidity of the patent, its validity is immaterial. Moreover, we think the defendants are estopped from alleging that invalidity. They have made and sold these machines under the complainant's title and for his account, and they can no more be allowed to deny that title and retain the profits to their own use, than an agent, who has collected a debt for his principal, can insist on keeping the money, upon an allegation that the debt was not justly due."

The present case is plainly distinguishable from cases wherein the licensee has enjoyed all the privileges under his license contract for its entire term, and then withholds payment of the royalties, alleging invalidity of the patent.

A distinction is also made as to evidence admissible to show a failure of consideration in a suit to recover the purchase price for a patent right and evidence admissible as a defense in a suit to recover royalties.

In the former, evidence of the invalidity of the patent is generally admitted in the state of Massachusetts. Bliss v. Negus, 8 Mass. 46;

Dickinson v. Hall, 14 Pick. 217, 25 Am. Dec. 390; Bierce v. Stocking, 11 Gray, 174; Lester v. Palmer, 4 Allen, 145; Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435. See, also, Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, and cases cited, and Croninger v. Paige, 48 Wis. 229.

But, in actions for the recovery of royalties, such evidence is usually inadmissible upon the principle above quoted from the Kinsman Case. McKay v. Smith (C. C.) 39 Fed. 556 (Dist. Mass.); Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43; Hyatt v. Ingalls, 124 N. Y. 93, 104, 26 N. E. 285; Saltus v. Belford Co., 133 N. Y. 499, 31 N. E. 518.

We are, however, content to rest the result in the present case upon the opinion of Judge Lowell in the case of White v. Lee (C. C.) 14 Fed. 789, 791 (Dist. Mass.), wherein he says, referring to cases cited:

"These cases point to the true distinction, however difficult its application may sometimes be, that something corresponding to eviction must be proved if a licensee would defend against an action for royalties"

—by attacking the validity of the patent. Marston v. Swett, 82 N. Y. 526, 534; Herzog v. Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646; Potterton v. Condit, 218 Mass. 216, 105 N. E. 443.

[7] The Brewington and La Porte patents; the testimony of the expert taken in connection with plaintiff's financial condition; the letter of Phillip, Sawyer, Rice & Kennedy, attorneys for Crown Cork & Seal Company (Defendant's Exhibit 1), and the letter of December 18, 1919, ante, were admissible to show a breach of the contract and a substantial eviction, and the evidence sustains the finding of the learned trial judge that the defendant was fully justified in refusing to further proceed with the enterprise. He has described the situation in apt language in his memorandum decision, wherein he says:

"The plaintiff is in the position of having contracted the defendant into a fairly expensive undertaking in reliance upon plaintiff's agreement to protect the defendant in the exclusive right to make these machines, when it could not give such exclusive right, and it is now seeking in a court of equity some $10,000 in money and additional patent rights, although itself in default. I have heard no case cited, binding upon me, which as matter of law leads to the conclusion that a concern circumstanced as this defendant was, with such a contract as this and not a mere naked license to use a described invention or patent, is bound to involve itself in a maze of expensive and apparently hopeless litigation with a concern not a party in this case—the Crown Cork & Seal Company—before it can claim, in a court of equity, protection under such a contract as I have been discussing. * * * Certainly it would be a feeble and futile conclusion for a court of equity to say that, when it is apparent from the admission of the plaintiff's learned counsel, as well as from the evidence of a competent and honest witness produced by the defendants, that the patent situation is such that sound-thinking business men would not think of adopting any other course than that which was indicated by the plaintiff's counsel's own letter—that the courts should be loaded with litigation with the Crown Cork & Seal Company before the rights of the parties under this contract can be worked out. If that is the law, some other court may lay it down; I will not rule it to be law until some court controlling over my action determines it to be law."

The plaintiff contracted to "defend and protect the defendant in the exclusive making, using, and vending of the machines * * * against all infringers, licensees *and others*." As to "others" it has

failed, and there is a consequent breach of a material provision in the contract. We therefore hold that the defendant is entitled to relief under its counterclaim. The only remaining question relates to the form of the decree.

[8] It appears that the defendant manufactured and sold 40 machines under its license contract. It does not appear that any claim for damages has ever been pressed against it by the Crown Cork & Seal Company, or that such a claim is likely to be pressed. Upon the principle that the defendant cannot escape payment of royalties while it continues in the enjoyment of its license, we hold that the decree of the District Court should be modified to the extent of permitting the plaintiff to retain its bill for an accounting of the amount due for royalties, that the defendant may have an accounting for damages under its counterclaim, and that the amounts so found due the several parties be set off against each other, and judgment rendered for the balance.

The improvement patents may be ordered into the custody of the clerk of court to await the trial of the question of damages. If the royalties are sufficient to satisfy the damages sustained by the defendant, the improvement patents should be assigned to the plaintiffs. If not, they should be disposed of, and the proceeds applied to satisfy the balance due the defendant.

With these modifications, the decree of the District Court is affirmed, without costs to either party, and the case is remanded to the District Court, for further action not inconsistent with this opinion.

PARILLA et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1922.)

No. 3617.

1. **Conspiracy ⟸47—Proof of overt act, usually done pursuant to previous scheme, tends to show conspiracy.**

   On a trial for conspiracy, proof of overt acts of a class usually, if not necessarily, done pursuant to a previous scheme and plan, has a substantial tendency to show a pre-existing conspiracy.

2. **Internal revenue ⟸47—Evidence held to show intent to evade tax on whisky withdrawn from bond ostensibly for export.**

   Where defendants, after withdrawing whisky from a bonded warehouse on an export bond, removed the whisky from the barrels in which it was contained and substituted water, by means of a hole that could be covered beyond observation, and left all export permits and marks on the barrels, a finding was warranted of an intent to evade payment of the tax, and not merely to escape provisions of the War Prohibition Act, preventing the withdrawal of the whisky, except for export, even on payment of the tax, though the regulations required re-examination at the point of export.

3. **Internal revenue ⟸47—Inference of intent to refill whisky barrels with water to avoid payment of tax held warranted.**

   Where whisky barrels withdrawn from a bonded warehouse ostensibly for export were traced to defendant's farm and found empty near by, having evidently been emptied through small holes intended to be covered

and concealed, to avoid payment of tax, the inference of an intent to refill them with water was warranted.

4. **Internal revenue ⊜47—Whether defendant was party to evasion of tax and conspiracy to evade tax held for the jury.**
Where defendant was found holding a pump hose used in emptying barrels of whisky and refilling them with water, but claimed that he had just observed what was going on and was trying to take his brother away, whether this explanation was true, or whether he was a party to the offense of evading the tax on the whisky and conspiring to evade the tax, was for the jury.

5. **Criminal law ⊜425—Statement made after conspiracy frustrated inadmissible against alleged conspirator.**
On a trial for removing and concealing whisky to evade payment of the tax and for conspiracy to do so, the statement of defendant's brother, after the conspiracy had been frustrated and not in defendant's presence, that he was transferring liquor under defendant's direction, was inadmissible.

6. **Witnesses ⊜248(2)—Answer to question calling for statement of third person responsive, when it gave different statement.**
Where a witness was asked whether defendant's brother did not say that he had been transferring liquor himself, an answer that he did not, but said he was doing it under defendant's direction, was responsive.

7. **Criminal law ⊜696(8)—Invited answer cannot be stricken out as hearsay, because not as expected.**
Where defendant's counsel asked a witness if defendant's brother did not say he was transferring liquor himself, the answer that he said he was doing it under defendant's direction could not be stricken out as hearsay on defendant's motion, as the question invited incompetent testimony.

8. **Criminal law ⊜781(7)—Instruction as to failure of defendant to deny statement made in his presence not misleading, though inaccurate.**
A charge that, if a statement was made in defendant's presence and he kept silent, this would be evidence tending to show guilt, though inaccurate, in that the statement was immaterial, unless made in defendant's hearing, could not have misled the jury, as it must have been obvious to the jury that defendant could not be called on to deny a statement which he did not hear.

9. **Criminal law ⊜409—Failure to deny statement, made when officers were making investigation, held to have evidentiary force.**
Where, at the time a statement incriminating defendant was made, no warrants had been issued, and prohibition officers were merely inquiring and investigating, defendant's failure to deny the statement had evidentiary force; he not being under duress.

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

Ralph Parilla and others were convicted of offenses, and they bring error. Affirmed.

E. H. Moore and W. R. Stewart, both of Youngstown, Ohio (Moore, Barnum & Hammond, of Youngstown, Ohio, on the brief), for plaintiffs in error.

Joseph C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The three respondents were indicted under section 37 of the Criminal Code (Comp. St. § 10201) for a conspiracy to move and conceal whisky in order to defraud the United

States of the tax thereon, and thereby to violate section 3450, R. S. (Comp. St. § 6352). This conspiracy charge was covered by the first count. The second count alleged a direct violation of section 3450. These three respondents were found guilty on both counts. They were sentenced to imprisonment in the penitentiary on the first, and to pay fines on the second.

Section 3450, as far as now material, reads as follows:

"* * * And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. * * *"

At the time of the transaction involved, the Volstead Act (41 Stat. 305) had not taken effect. The War Prohibition Act (40 Stat. 1046 [Comp. St. Ann. Supp. 1919, §§ 3115$^{11}/_{12}$f–3115$^{11}/_{12}$gg]) was in force, and the result was that there was no lawful way in which the owners of beverage whisky in bond could get it out, excepting for export. The law (R. S. § 3330 [Comp. St. § 6125]) provided that, upon getting an export permit, the owners could withdraw the whisky from the warehouse without paying any tax, by giving a bond that they would pay it if the whisky were not, within a prescribed time, passed out of the country through the named port of export.

[1] Parilla and Dammeyer owned severally a considerable quantity of whisky in a bonded warehouse near Youngstown. The conspiracy alleged is that they planned with Friedman, a truckman, that they would get this out of the warehouse under permits for export through the port of Niagara Falls to Canada; that, while it was being transported by them from the warehouse to Niagara Falls, they would substitute water for the whisky in the barrels and export these barrels of water; and that they would thus be able to have the whisky in their possession and yet avoid the payment of the tax of $6.60 per gallon. The overt acts alleged were the carrying out of the plan, up and into the step of the water substitution. The proof was directed to these same acts; and as they are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has at least a substantial tendency to show a pre-existing conspiracy.

[2] Each of the defendants insists that a verdict of acquittal should have been instructed, because there was not sufficient evidence to support a verdict of guilty. This claim is largely based on the facts that a good export bond was given, that the regulations provided that the whisky must be re-examined at the point of export, that it would have been impossible to escape liability on the bond, and hence that the proper inference from the facts proved is that the respondents did not intend to evade paying the tax, but intended only to escape those provisions of the War Prohibition Act which prevented them from getting their whisky out of bond even on payment of the tax. This exonerating inference would be permissible from the proofs; but it is by no means the necessary inference. The jury was at liberty to find that the respondents did not understand that their scheme could not be carried through at Niagara Falls. They might have been ignorant of

the regulation requiring examination there, or they might have thought they could find a way to defeat that regulation. If the plan had been only what is now claimed, there was no apparent motive for the substitution of the water. It would have been far simpler merely to secrete the original packages and never take them to Niagara Falls. Taking out the whisky and putting back water though a hole that could be covered beyond observation, and leaving upon the barrels all the export permits and marks, point strongly, if not inevitably, to the conclusion that the plan was to ship these barrels into Canada, and to seem to comply with the conditions of the bond, and thus avoid liability thereon.

[3] As to Dammeyer's barrels, the proof of the water substitution is direct. As to Parilla's, it rests on inference; but that is sufficient. They were traced into Parilla's possession at his farm, and later were found empty near by, and were evidently emptied through small holes intended to be covered and concealed. The intent to refill them with water is the natural inference from this method of emptying them. We therefore conclude there was, on the facts, a case for the jury as to the general conspiracy, and as to these two defendants.

[4] Respondent David Friedman is not shown to have been originally connected with the plan. He had been engaged to carry the liquor on his trucks from Youngstown to Niagara Falls, but that plan had been abandoned, and he carried Dammeyer's barrels from the distillery to Dammeyer's former saloon, and then later, when a car was secured at the railway station, was to take them there and load them on the car. In the meantime he was found in Dammeyer's place, with the party which was engaged in substituting water for whisky in the barrels, by using a pump and hose, and his brother Bert was actively participating in this transfer. Clearly, if David Friedman was taking an active part in this transfer, or if he was standing by and acquiescing, waiting until it should be finished, in order that he might take the next step in the plan of shipping the water barrels to Canada, there would be sufficient reason for the jury to infer his participation in the conspiracy. A witness claims to have seen and recognized him helping in the pumping. He admits having had the pump hose in his hands, but claims that he had just observed what was going on and was trying to take his brother away. Whether the prosecution was right in its theory or whether his explanation of the suspicious circumstances should be believed, was clearly for the jury.

[5-7] Upon cross-examination of Counts, one of the officers, he testified that after the discovery of the plan, and the seizure of the liquor by the officers, and the arrest of respondents, Bert Friedman made a statement to Counts that he (Bert) had been transferring the liquor under the direction of his brother David, the defendant. This statement was after the conspiracy had been frustrated, and was not in the presence of David. It was clearly inadmissible as against him, and its reception would be error, save for the circumstances under which it occurred. On direct examination Counts had not referred to this subject. Counsel for David first inquired about it, and therefore made Counts his own witness. The question in effect was, "On this

occasion did not Bert say to you that he had been transferring the liquor himself?" and the answer in effect was, "No; he said he was doing it under David's direction."

Counsel immediately objected to the last statement as volunteered, and asked that it be stricken out, because not responsive. The court rightly overruled this motion. An answer which purports to give the whole of the statement concerning which a question is asked cannot be said to be irresponsive. Counsel then moved to strike it out, because it was hearsay as against David and could not bind him. This motion was overruled, for the reason that counsel could not strike out an answer which he had invited. In this, also, we think the court was right. There may be cases where an answer is formally responsive, but yet where a part of it is so plainly incompetent and so far beyond anticipation that examining counsel would not be estopped to move to strike out that part; but this question clearly expected and invited, and tried to bring into the case, the wholly incompetent fact that Bert Friedman had himself assumed the whole burden and insisted that his brother was not guilty. Counsel cannot ask such a question, and take the benefit of it if he likes the answer, but strike the answer out if it is harmful.

[8] A witness testifies that at the time the enforcement officers entered Dammeyer's place, and found Dammeyer and Friedman there, and the substitution going on, Dammeyer said to the officers that he had been induced to adopt the plan by the suggestions of Parilla and Friedman. Friedman said nothing in contradiction. Whether he was so near that he would have heard the statement was a disputed inference. The court charged that if this statement was made in the presence of Friedman, and he kept silent, that would be evidence tending to show his guilt. There are two criticisms upon this charge. The first is that whether the statement was made in Friedman's presence was not important; it was immaterial, unless made within his hearing. The court's charge was verbally inaccurate in this respect; but we do not think the inaccuracy substantial. It must have been obvious to the jury, as to every one, that Friedman could not be called upon to deny a statement which he did not hear, and that the charge could not have been intended to convey any such idea. We cannot think a jury would be misled.

[9] The second criticism is that, under existing circumstances there was no obligation for Friedman to deny the statement, if he did hear it; and this claim is based upon the decisions that one who is under arrest or in custody is so far under duress that he may keep silence without prejudice (as in Com. v. Kenney, 53 Mass. 235, 237, 46 Am. Dec. 672). This was not the situation here. There was no color of duress. No warrants had been issued. The prohibition officers were merely inquiring and investigating. A protestation by Friedman that Dammeyer's charge was untruthful would have been natural, and its absence had evidential force.

We have considered the other errors argued in the briefs, but we find nothing requiring further comment. The convictions and sentences are affirmed.

FALCONI et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1922.)

No. 3632.

1. **Indictment and information ⊜3—All felonies must be prosecuted by indictment; "infamous crimes."**
   All felonies, as defined by Criminal Code, § 335 (Comp. St. § 10509), are "infamous crimes," within the Fifth Amendment, for which no civilian may be held to answer, unless on the presentment or indictment of a grand jury.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Infamous Crime.]

2. **Indictment and information ⊜3—Offenses subject to prosecution on information; "infamous crimes."**
   Misdemeanors, punishable by fine, or by fine and imprisonment not exceeding one year, unless there is coupled with the punishment of imprisonment some specific provision making the particular misdemeanor infamous, are not "infamous crimes," and may be prosecuted by information.

3. **Indictment and information ⊜3—Misdemeanor, if punishment may include term at hard labor, must be prosecuted by indictment.**
   Imprisonment at hard labor for any definite term, regardless of the length of the term or the place of imprisonment, is infamous punishment, and an offense for which such a sentence may be imposed, though a misdemeanor, must be prosecuted by indictment.

4. **Criminal law ⊜1217—Ohio statutes held not to authorize employment at hard labor of federal prisoner sentenced to imprisonment in county workhouse.**
   Ohio statutes relating to county prisons *held* not to authorize employment at hard labor of a federal prisoner sentenced to imprisonment in a county workhouse, where neither the statute under which he was convicted nor the sentence imposed authorized imprisonment at hard labor.

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

Criminal prosecution by the United States against James Falconi and Frank Furwa. Judgment of conviction, and defendants bring error. Affirmed.

E. H. Moore, of Youngstown, Ohio (Moore, Barnum & Hammond, of Youngstown, Ohio, on the brief), for plaintiffs in error.

D. J. Needham, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The plaintiffs in error, Falconi and Furwa, were convicted upon both counts of an information charging the unlawful possession and the unlawful sale of intoxicating liquor, in violation of the National Prohibition Act (41 Stat. 305). Falconi was sentenced to pay a fine of $500 on the first count, and on the second count to be confined in the Stark County Workhouse, at Canton, Ohio, for a period of 4 months. Furwa was sentenced to pay a fine of $10 on the first count and on the second count to be confined in the Stark County Workhouse at Canton, Ohio, for a period of 3 months.

It is the claim of plaintiffs in error that the offense charged in the

second count of this information is subject, in that jurisdiction, to infamous punishment, and therefore is an infamous crime, which under the provisions of the Fifth Amendment to the federal Constitution cannot be prosecuted otherwise than upon presentment or indictment by a grand jury.

[1] It is now thoroughly well settled that all felonies as defined by section 335 of the Criminal Code (Comp. St. § 10509) are infamous crimes, for which no person shall be held to answer unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Mackin et al. v. U. S., 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; Parkinson v. U. S., 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; In re Mills, 135 U. S. 263, 267, 10 Sup. Ct. 762, 34 L. Ed. 107; In re Claasen, 140 U. S. 200, 204, 11 Sup. Ct. 735, 35 L. Ed. 409.

[2] It would seem to be equally well settled that misdemeanors punishable by fine, or by fine and imprisonment not exceeding one year, unless there should be coupled with the punishment of imprisonment some specific provision making the particular misdemeanor infamous, are not infamous crimes, within the purview of the Fifth Amendment, and may be prosecuted by information. In re Bonner, Petitioner, 151 U. S. 242, 257, 14 Sup. Ct. 323, 38 L. Ed. 149; 4 Blackstone, Com. 310; Hunter v. U. S. (C. C. A.) 272 Fed. 235; Robertson v. U. S. (C. C. A.) 262 Fed. 948, 950; Brown v. U. S., 260 Fed. 752, 171 C. C. A. 490; Blanc v. U. S., 258 Fed. 921, 923, 169 C. C. A. 641; U. S. v. Wells Co. (D. C.) 186 Fed. 248; U. S. v. Camden Iron Works (D. C.) 150 Fed. 214; De Four v. U. S., 260 Fed. 596, 598, 171 C. C. A. 360; Weeks v. U. S., 216 Fed. 292, 298, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524.

[3] In the case of Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140, the Supreme Court held that a statute authorizing imprisonment at hard labor for a definite period inflicts an infamous punishment, and therefore the offense, though a misdemeanor, is an infamous crime, within the meaning of the Fifth Amendment. This holding in the Wong Wing Case has been considered, approved, and followed by the Supreme Court in the recent case of United States v. Moreland (decided April 17, 1922) 257 U. S. ——, 42 Sup. Ct. 368, 66 L. Ed. ——. If the decision in Wong Wing v. U. S. was at all doubtful, that doubt has been dispelled by the clear, positive, and definite declaration of the Supreme Court in U. S. v. Moreland that imprisonment at hard labor for any definite term, regardless of the length of the term or the place of imprisonment is infamous punishment, and that, where the accused is in danger of an infamous punishment, if convicted, he has a right to insist that he be not put upon trial, except on the presentment or indictment of a grand jury.

This question was not presented in any of the other cases above cited, nor was it presented or involved in the case of Yaffee v. U. S., 276 Fed. 497, recently decided by this court. In the Yaffee Case the motion to strike the information from the files was based upon the

claim that the filing of an information with leave is contrary to the constitutional rights of the defendants, where the punishment of the offense may include imprisonment. The general rule, announced in that case, as to the right to prosecute by information for a misdemeanor punishable by fine, or fine and imprisonment for not more than one year, must be restricted to the facts of that case, and therefore has no application whatever to the prosecution of a misdemeanor punishable by imprisonment at hard labor.

[4] Nor does the case at bar involve any such question. Under the provisions of section 29 of title 2 of the National Prohibition Act, the offense charged in the second count of this information may be punished by a fine of not more than $1,000 or imprisonment not exceeding 6 months. This statute does not authorize, nor does the sentence specifically impose, imprisonment at hard labor. Robertson v. U. S., supra. It is claimed, however, that the sentence of these plaintiffs in error to imprisonment in the workhouse at Canton, Ohio, is equivalent to a sentence of imprisonment at hard labor. This claim is based upon the provisions of section 5539, R. S. (Comp. St. § 10523), which provides that a federal prisoner shall be subject to the same discipline and treatment as convicts sentenced by the state or territory in which such jail or penitentiary is situated.

In view of the Ohio statute designating what prisoners in a jail or workhouse may be put to hard labor, it is unnecessary to decide, and we do not decide, whether a sentence to a county jail or workhouse where hard labor may be required as a part of the discipline of such institution is equivalent to a direct provision in a statute, under which the prosecution is had, authorizing imprisonment at hard labor, regardless of the fact that the nature of the crime must be determined from the statute defining it, and providing the punishment. Mackin v. U. S., supra, 117 U. S. at page 352, 6 Sup. Ct. 777, 29 L. Ed. 909; Kurtz v. Moffitt, 115 U. S. 487, 501, 6 Sup. Ct. 148, 29 L. Ed. 458.

Section 2238 of the General Code of Ohio reads in part as follows:

"In such counties, the board of commissioners, whenever practicable, shall cause to be worked as provided in this chapter, all convicts so sentenced to imprisonment at hard labor, and also all male convicts, physically capable of performing hard labor, confined in the county jail or workhouse for failure to pay a fine or costs in criminal prosecution, or who pleaded insolvency or inability to pay such fine or costs."

"Such counties," as used in this section, refers to counties in which, under the provisions of section 2236, G. C., the board of county commissioners has secured property and completed arrangements for the working of its prisoners, and in which counties, under the provisions of section 2237, G. C., the court or magistrate may lawfully sentence persons convicted of an offense, the punishment of which is, in whole or in part, imprisonment in the county jail or workhouse, to be imprisoned at hard labor within such county for the same terms or periods as may be prescribed by law for their confinement in such jail or workhouse. It is insisted, however, that under the provisions of section 2227—2, G. C., all prisoners in a county jail or workhouse may be employed in the manufacture of articles used by any department

or public institution belonging to or controlled by the political subdivision or subdivisions supporting or contributing to the support of any such workhouse or jail, or to any political subdivision of the state, regardless of whether such prisoners are sentenced to imprisonment at hard labor, and that section 2238, G. C., has no relation or application whatever to section 2227—2, G. C., but only to sections 2236 and 2237, G. C.

Section 2238, G. C., originally a part of section 7388—51, R. S., is a part of chapter 3, division 4, title 5, of the General Code of Ohio. It provides in terms that the convicts sentenced to imprisonment at hard labor shall, whenever practical, be placed at work "as provided in this chapter." Section 2227—2, G. C., is the second section of the Act of April 16, 1913, entitled "An act to prohibit the employment under contract to any person, firm or corporation of any person confined in any workhouse or jail in this state." 103 Ohio Laws, p. 725. The several sections of that act are now respectively sections 2227—1 to 2227—6 of the General Code, and are also a part of chapter 3, division 4, title 5, of the General Code of Ohio, so that the language found in section 2238, "as provided in this chapter," must now be construed in connection with each and all of the several sections of the Act of April 16, 1913.

The first section of this act (section 2227—1, G. C.) reads as follows:

"The labor or time of any person confined in any workhouse or jail in this state shall not hereafter be let, farmed out, given, sold or contracted to any person, firm, corporation or association."

It is clear, not only from the title of the Act of April 16, 1913, but also from the provisions of its several sections, that it was the legislative intent to prevent the practice of farming out prison labor in direct competition with the free labor of the state, and applies to all convict labor in county jails and workhouses. The first section of this act substantially accomplished the purpose named in this title. The second section (section 2227—2, G. C.) supplements the provisions of the first section. It is an express limitation upon the power conferred in section 2238, G. C., to place prisoners at hard labor, by specifically providing the character and class of labor at which they shall be employed. It does not purport to extend the power to place such prisoners at hard labor, but, on the contrary, it is clearly a limitation of that power, and must be construed in connection with the other sections of the chapter in which it is found.

Any other construction of these sections would lead to the absurd conclusion that prisoners not sentenced to hard labor may nevertheless be placed at hard labor in all counties of the state where no property has been secured or no arrangements have been completed for the working of its convicts, but in counties in the state where such arrangements have been made and such property secured they cannot be placed at hard labor unless the sentence so provides. A mere statement of this proposition is its own refutation. It is clear that this was not the meaning, intent, or purpose of the General Assembly of Ohio in enacting this legislation, but, on the contrary, that it was the legislative in-

tent that the Act of April 16, 1913, should be construed in harmony with existing legislation upon the same subject-matter.

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

WICHITA WATER CO. v. CITY OF WICHITA.

CITY OF WICHITA v. WICHITA WATER CO.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1922.)

Nos. 5903, 5911.

1. **Specific performance ⟸28(1), 31—Contract must be complete and certain.**
   A contract, to be specifically enforced, must be complete, certain in its terms, free from doubt or ambiguity, and declare the precise act to be done.

2. **Municipal corporations ⟸169—Statements of city clerk, contrary to resolution of city commissioners, not binding.**
   Statements of a city clerk in a letter contrary to a resolution of the commissioners of the city, a copy of which was inclosed, were of no effect, and did not bind the city.

3. **Specific performance ⟸14—No enforcement, if consent of third party required.**
   There can be no specific performance of a contract, if the assent of another not a party to the contract is required.

4. **Specific performance ⟸80—Agreement to arbitrate not enforced.**
   As a general rule an agreement to submit a matter to arbitration, or valuation, or an agreement an essential part of which is that a matter shall be submitted to arbitration, or valuation, will not be specifically enforced, nor will the court itself fix the price, or substitute other valuers; but, where the agreement to submit to arbitrators is a subordinate part of the contract, and the defendant refuses to submit the matter, the court itself may make the value by reference to a master or otherwise.

5. **Specific performance ⟸80—Arbitration clause in water franchise unessential as regards enforcement of contract to purchase.**
   Arbitration clause in a franchise granted by a city to a water company, concerning the fixing of value of properties on election by the city to purchase, *held* an unessential part of the franchise contract, so far as the enforcement of a contract to purchase is concerned.

6. **Specific performance ⟸31—City held not to have elected to purchase water system under rights in franchise of water company, so as to constitute an enforceable contract.**
   Where water company franchise gave the city the right to purchase at the end of 20 years, a resolution at such time providing for appointment of appraisers, etc., to value the system, to the end "that the proposition may be submitted to the vote of the citizens of said city for their acceptance or their rejection," and correspondence *held* not a contract which the water company could have specifically enforced, even though the city had no right to have a valuation fixed prior to purchase.

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

Suit in equity by the Wichita Water Company against the City of Wichita, to have the amount which the city should pay for a water

system ascertained. From a decree (271 Fed. 973), both parties appeal. Reversed on city's appeal, and appeal of water company dismissed.

W. R. Voorhis, of New York City, and R. R. Vermilion, of Wichita, Kan. (Earle W. Evans, Joseph G. Carey, W. F. Lilleston, David Smyth, and J. W. Smyth, all of Wichita, Kan., Henry H. Pierce and Sullivan & Cromwell, all of New York City, on the brief), for Wichita Water Co.

Robert C. Foulston, of Wichita, Kan. (George Siefkin, of Wichita, Kan., on the brief), for city of Wichita.

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

CARLAND, Circuit Judge. [1] The Wichita Water Company, hereafter called water company, alleging that the city of Wichita, hereafter called city, a municipal corporation of the state of Kansas, had purchased, but refused to pay for, a system of waterworks located in said city and formerly belonging to the water company, commenced this action in the court below against the city to have the amount which the city should pay for said system of waterworks ascertained by a master and its payment compelled. A motion to dismiss the complaint was made by the city and overruled. As the same questions were subsequently raised by a motion for judgment on the pleadings made by the water company, we do not stop to consider the motion to dismiss. The city answered, and on motion of the water company, judgment was rendered in its favor on the pleadings. The final decree provided that the city should pay the water company for its system of waterworks the sum of $1,999,660.77, in the manner provided for in the decree. Both parties appealed; the water company claiming that it was not allowed sufficient compensation, and the city claiming that it had never purchased the waterworks system, and, if it had, error intervened to its prejudice in fixing the amount of the compensation it should pay therefor.

The first question for consideration is: Did the city agree to purchase the waterworks system, or, in other words, was there a contract between the parties which the trial court in the exercise of a sound judicial discretion might enforce? This contract must have been complete, certain in its terms, free from doubt or ambiguity, and have declared the precise act to be done. In Colson v. Thompson, 2 Wheat. 341, 4 L. Ed. 256, Justice Washington, speaking for the Supreme Court, said:

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it."

In Hunt v. Rousmaniere, 1 Pet. 14, 7 L. Ed. 33, the same Justice said:

"Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a

legitimate branch of its jurisdiction, and in its exercise is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences."

In Carr v. Duval, 14 Pet. 83, 10 L. Ed. 364, Justice Catron, speaking for the Supreme Court said:

"If it be doubtful whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance; the principle is a sound one, and especially applicable in a case like this, where the party attempting to enforce the contract has done nothing upon it.' Huddlestone v. Briscoe, 11 Ves. 522."

In Dalzell v. Dueber Manufacturing Co., 149 U. S. 325, 13 Sup. Ct. 890, 37 L. Ed. 754, Justice Gray, speaking for the Supreme Court, said:

"From the time of Lord Hardwicke it has been the established rule that a court of chancery will not decree specific performance, unless the agreement is 'certain, fair, and just in all its parts.' Buxton v. Lister, 3 Atk. 383, 385; Underwood v. Hitchcox, 1 Ves. Sen. 279; Franks v. Martin, 1 Eden, 309, 323. * * * So this court has said that chancery will not decree specific performance, 'if it be doubtful whether an agreement has been concluded, or is a mere negotiation,' nor 'unless the proof is clear and satisfactory, both as to the existence of the agreement and as to its terms.' Carr v. Duval, 14 Pet. 79, 83; Nickerson v. Nickerson, 127 U. S. 668, 676; Hennessy v. Woolworth, 128 U. S. 438, 442."

With the foregoing principles of law in mind, let us consider the pleadings with a view of determining whether there was a contract on the part of the city to purchase the waterworks system. It appears from the complaint that in September, 1882, the city enacted an ordinance, numbered 266, whereby it granted to I. A. Jones, his associates, successors, and assigns, for the term of 40 years, a right to construct, operate, and maintain a system of waterworks in said city. Jones assigned his contract rights under said ordinance to the Wichita Water Company, a Kansas corporation, which changed its name to the City of Wichita Water Company, and the latter transferred its rights to the Water Company, a Delaware corporation. Sections 9 and 10 of the ordinance above mentioned provided as follows:

"Sec. 9. That the city shall have the right to purchase the works ten years after completion, and failing to purchase at the expiration of ten years, then every five years thereafter at appraised valuation of three disinterested parties, said appraisers to be selected in the following manner, namely: The city to select one; the said Jones or assigns to select one; and the two thus chosen to select a third. When these three shall be chosen, they shall be duly sworn, and they shall proceed to declare the valuation of the franchise works and choses of action, by examining not exceeding three experts on behalf of each party, and when they, or a majority of them, have declared the valuation in writing, the city shall pay the same within three months thereafter; and in case there should be no hydrant rental existing at the time of purchase, then the number of hydrants erected shall be taken into consideration at the rates provided for in sections 5 and 6, and the city in this purchase shall assume all the obligations of the water company, the lawful quittance for which shall be secured by said Jones, or assigns, as a part payment of the declared valuation, and the said Jones, or assigns, shall accept obligations of the city of Wichita, legally issued, at legal rates of interest, not exceeding twenty annual payments, for the balance due upon the declared valuation after deducting the obligations of the water company.

"Sec. 10. That the city shall give six months' notice in writing of their intentions to purchase."

On November 9, 1917, the mayor and commissioners of the city passed the following resolution:

"Whereas, by the terms of section 9 of Ordinance No. 266, being an ordinance entitled 'An ordinance providing for a system of waterworks for the city of Wichita, for domestic, sanitary and other purposes,' it is provided that the city of Wichita, at certain periods and times shall have the right to purchase the system of waterworks constructed under said ordinance;

"And whereas, by the provisions of said section 9 a manner for the valuation of said waterworks is provided;

"And whereas, the city of Wichita desires to open negotiations for the purpose of appraising and fixing the value of the said waterworks, to the end that the proposition may be submitted to the vote of the citizens of said city for their acceptance or their rejection;

"And whereas, it is deemed necessary to first determine the valuation of said plant now operated in the city of Wichita by the Wichita Water Company as the assignee of I. A. Jones, his associates, successors, and assigns: Therefore—

"Be it resolved by the board of commissioners of the city of Wichita, Kansas, that the city manager be and hereby is authorized, directed, and instructed to open negotiations with the Wichita Water Company, to the end that the valuation of the said plant and properties may be fixed as provided by the terms of section 9 of the Ordinance No. 266, and that after said valuation shall have been fixed that, if the same is deemed expedient, a proposition to issue bonds for the purchase of said waterworks may be then submitted to the citizens of said city.

"Adopted at Wichita, Kansas, Nov. 7, 1917. "L. W. Clapp, Mayor.
"Attest: H. D. Lester, City Clerk."

Prior to the passage of said resolution, the city had adopted in the manner provided by law a plan of government provided by chapter 86, Session Laws of Kansas for the year 1917, commonly known as the city manager plan, and at the time of the passage of said resolution the city was governed by five commissioners, and one L. R. Ash was city manager, and possessed the powers conferred on city managers by said chapter 86. On November 14, 1917, H. D. Lester, city clerk, under the direction of said L. R. Ash, wrote, signed, and delivered to E. C. Elliott, superintendent of the water company, the following letter:

"November 14, 1917.

"Mr. E. C. Elliott, Supt. Wichita Water Company, Wichita, Kansas—Dear Sir: Mr. L. R. Ash, city manager, has directed that I send to you a certified copy of resolution adopted by the board of commissioners, at their meeting held November 7, 1917, providing for appraising and determining the value of the waterworks, with a view of purchasing the same. Inclosed herewith is certified copy of said resolution. Please consider this your notice of action of commissioners, and be governed thereby, and proceed with any steps that may be necessary to be taken by your company.

"Yours truly, H. D. Lester, City Clerk."

A copy of the resolution of November 9, 1917, was inclosed with said letter. On November 27, 1917, the water company answered the Lester letter of November 14, 1917, as follows:

"35—2966.

"November 27, 1917.

"To the Honorable Mayor and Commissioners of the City of Wichita, Kansas—Gentlemen:

"We beg to acknowledge receipt of a letter from the city clerk, under date of the 14th inst., inclosing a certified copy of a resolution of your honorable body under date of November 7, 1917, from which it would appear that it

is the desire of the city of Wichita to acquire title of the waterworks system under section 9 of Ordinance No. 266.

"That section provides that the city shall have the right to purchase the works 'at the appraised valuation of three disinterested parties, said appraisers to be selected in the following manner, namely: The city is to select one; the said Jones, or assigns, to select one; and the two thus chosen to select a third.'

"While section 10 of the ordinance provides for a six months' notice of the intention to purchase, we are not disposed to cause any delay, and if the city now desires to purchase the works as provided in section 9 of the ordinance, you may proceed to appoint your appraiser for the city, and upon being advised of your appointment the company will appoint its appraiser, and the appraisers so selected can be placed in communication and co-operation in the appointment of the third man.

"Yours truly, The Wichita Water Company,
"By E. C. Elliott, Vice Pres."

December 13, 1917, Lester wrote Elliott as follows:

"December 13, 1917.

"Mr. E. C. Elliott, Vice President Wichita Water Company, Wichita, Kansas—Dear Sir: Your letter of November 27, 1917, was read to the board of commissioners on December 11, 1917.

"Communication read in full. 'Powell moved that the above communication be received, filed, and copied in full in minutes of commissioners' proceedings, and the board of commissioners to proceed, under franchise ordinance, to appoint the appraiser to represent the city. Motion carried.'

"This is notice to the water company of action taken by the board of city commissioners, Wichita, Kansas, relative to appointing appraiser to assist in making valuation of the waterworks system in Wichita.

"Yours very truly, H. D. Lester, City Clerk."

December 27, 1917, the board of directors of the water company adopted the following resolution:

"Whereas, notice has been received from the city clerk of the city of Wichita, Kansas, dated December 13, 1917, of the resolution adopted by the board of commissioners December 11, 1917, empowering the board of commissioners to proceed under franchise ordinance to appoint the appraiser to represent the city and notify the water company of such action in accordance with section 9 of Ordinance No. 266 of the city of Wichita, approved September 19, 1882:

"Therefore be it resolved by the board of directors of the Wichita Water Company that said notice be accepted, and that Mr. William Wheeler, of 14 Beacon street, Boston, Mass., be and is hereby appointed a member of the board of appraisers to value the property of the Wichita Water Company in accordance with section 9, of Ordinance No. 266 of the city of Wichita, approved September 19, 1882, herein referred to; and

"Be it further resolved that the respective notices be given the board of commissioners of the city of Wichita and Mr. William Wheeler, of Boston, Massachusetts, of such appointment."

On December 31, 1917, the water company wrote the following letter to the city:

"Wichita, Kansas, Dec. 31, 1917.

"The Honorable the Board of Commissioners of the City of Wichita, Kansas—Gentlemen:

"The board of directors of the Wichita Water Company, at a meeting held December 27, 1917, adopted the following resolution:

"'Whereas, notice has been received from the city clerk of the city of Wichita, Kansas, dated December 13, 1917, of the resolution adopted by the board of commissioners December 11, 1917, empowering the board of commissioners to proceed under franchise ordinance to appoint the appraiser to represent the city and notify the water company of such action, in accordance

with section 9 of Ordinance No. 266 of the city of Wichita, approved September 19, 1882:

"'Therefore be it resolved by the board of directors of the Wichita Water Company that said notice be accepted, and that Mr. William Wheeler, of 14 Beacon street, Boston, Mass., be and is hereby appointed a member of the board of appraisers to value the property of the Wichita Water Company, in accordance with section 9 of Ordinance No. 266 of the city of Wichita, approved September 19, 1882, referred to; and

"'Be it further resolved that respective notices be given the board of commissioners of the city of Wichita and Mr. William Wheeler, of Boston Massachusetts, of such appointment.'

"We respectfully request that we be advised by the city of the name of its appraiser, appointed under its resolution of December 11, 1917, so that notice may be given Mr. Wheeler, in order that the two appraisers so selected may arrange a conference, by telegraph or in person, to select the third member.

"Regarding the expense of the appraisement, it is possible that the framers of section 9, Ordinance No. 266, contemplated that the entire cost of same should be borne by the city; but, in view of it being silent as to such condition, we have to suggest that, if the city agrees, and so indicates, the plan outlined below for apportioning the expenses can be followed:

"The city and the water company to bear jointly, share and share alike, the cost, including fees and all expenses of the third appraiser, but that the cost for fees and expenses of the two other members of the board of appraisers to be paid by their respective nominators; also that the cost and expense of the introduction of evidence shall be paid by the city or the water company, whichever on whose behalf and by whom such evidence is introduced.

"Yours respectfully,. The Wichita Water Co., by Vice Pres."

On January 2, 1918, the commissioners of the city took action on the letter of the water company of December 31, 1917, as follows:

"Wichita, Kansas, Jan. 2, 1918.

"Commission met in regular adjourned session, with President Power in the chair. Crawford, Hadley, Jackman, present; Mayor Clapp absent.

"The following among other proceedings were had:

"Communication from Wichita Water Company, wherein they state that they have appointed Mr. William Wheeler, of Boston, Mass., as appraiser to represent them in appraising property of Wichita Water Company, and stating method of handling expenses of appraising, read. Crawford moved that the communication be received and filed, and the city manager authorized to acknowledge receipt of same, and to state that the city will name its representative at an early date. Motion carried."

On January 4, 1918, L. R. Ash, city manager, wrote to Elliott as follows:

"City of Wichita, Kansas, January 4, 1918.

35—2966.

"Mr. E. C. Elliott, Vice Pres. Wichita Water Co., Wichita, Kansas—Dear Sir: This will acknowledge receipt of yours of December 31st to the board of commissioners relative to the appointment of appraisers for the valuation of the property of the Wichita Water Company, and in reply will say that the commission has instructed me to say to you that the appointment of the city's appraiser will be accomplished within a short time, when it is hoped that the valuation of the property may proceed. In due time the commission will desire to go into the matter further with you as regards the details for making the appraisal.

"Very truly yours, L. R. Ash, City Manager.

"LRA/S"

On February 7, 1918, Ash again wrote Elliott as follows:

"February 7, 1918.

"Wichita Water Company, Mr. E. C. Elliott, Supt., Wichita, Kansas—Gentlemen: The city has been somewhat delayed in its effort to appoint a

satisfactory man for the work of appraising the property of your company, looking to the purchase of the plant by the city in accordance with the franchise provision; but I hope that you will proceed with the preparation of the inventory of the property, in order that we may not be unduly delayed in getting results. As quickly as we can do so, our engineer will be appointed, and no doubt there is a great deal of work that can be done in the preparation of the inventory that will not need, at this time, the co-operation of the city's representative. I hope, therefore, that you will take steps to go forward with the work, having my assurance that we will not delay the appointment of the city's appraiser any longer than circumstances will necessitate.

"Very truly yours, L. R. Ash, City Manager.

"LRA/S"

[2] The complaint also alleged that the water company had been at all times ready and willing to proceed with the appraisal of its waterworks system as provided in section 9 of Ordinance No. 266, and to convey the same to the city by all proper instruments and conveyances, but that the city had refused to further proceed with the appraisal of said waterworks system, and had attempted to repudiate the action already taken by it in the premises. The answer of the city was composed largely of conclusions of law or allegations of fact that would not have been admissible to vary the terms of the written instruments hereinbefore set forth. Coming now to a consideration of the different written instruments which constituted the contract to purchase the waterworks system on the part of the city, if any such contract existed, we turn to the resolution of November 9, 1917, not only because it was the first action on the part of the city, but also because it is to that action that all subsequent proceedings referred. The whereas clauses of the resolution may be properly referred to as giving the reasons which induced the city to pass the resolution. The first whereas clause referred to section 9 of Ordinance No. 266 as giving the city the right to purchase the system of waterworks. The second refers to the provisions of section 9 which provides the manner of the valuation of the waterworks system. The third recites that the city desires to open negotiations for the purpose of appraising and fixing the value of the waterworks, to the end *that the proposition may be submitted to the vote of the citizens of said city for their acceptance or their rejection.* The fourth recites that it is deemed necessary to *first determine the valuation of said plant now operating in the city of Wichita;* then the resolution itself directs and instructs the city manager *to open negotiations* with the water company, to the end that the valuation of the waterworks may be fixed as provided by the terms of section 9 of Ordinance No. 266, and that after said valuation shall have been fixed *that if the same is deemed expedient a proposition to issue bonds for the purchase of said waterworks may be then submitted to the citizens of said city.* It thus appears from the whereas clauses and from the resolution itself that the mayor and commissioners had in view the ascertainment of the value of the waterworks system, so that the proposition as to whether the city should purchase the waterworks system and issue bonds in payment thereof might be submitted to the vote of the citizens of the city for their acceptance or rejection. It nowhere appears in the resolution that the mayor and commissioners intended

to purchase the waterworks system without the proposition to purchase and to issue bonds was first submitted to the citizens of the city. It is no doubt true that the city was not entitled to have the value of the waterworks system determined in advance of the purchase, but this fact cannot prevent the court from determining what the intent of the mayor and commissioners was in passing the resolution of November 9, 1917. They cannot be held to have intended to purchase the waterworks system merely because they proceeded under a mistaken idea of their rights in the premises. In other words, if the resolution as a whole shows no intention of purchasing the waterworks system until the proposition had been submitted to a vote of the citizens of the city, the resolution cannot be held to be a declaration of intention to purchase because the mayor and commissioners were proceeding on a wrong theory. What they did is the same, whether right or wrong.

Proceeding now on the theory that all the mayor and commissioners sought to do by the resolution of November 9, was to obtain a valuation which might be submitted to the citizens of the city of Wichita for the purpose mentioned, we come to the other written documents bearing upon the question of purchase. The first is the letter of the city clerk of November 14, 1917. This letter inclosed a copy of the resolution of November 9, and anything the clerk may have said which was contrary to the resolution could have no effect and could not mislead the water company. The same is true as to the city manager. The next instrument in order of time is the letter of the water company to the mayor and commissioners, dated November 27. This letter acknowledges the receipt of the letter from the clerk of November 14, inclosing a certified copy of the resolution of November 9. The water company said in the letter that it would appear from the resolution that it was the desire of the citizens of Wichita to acquire title to the waterworks system under section 9 of Ordinance No. 266, but it appears also from the letter of the water company that it was not quite sure about the desire of the city, for in the closing part of its letter it says, "and if the city now desires to purchase the works as provided under section 9 of the ordinance," then appraisers may be appointed. This letter simply shows that the water company was in doubt as to whether the city desired to purchase the waterworks or not. The next action of the city was on December 11, 1917, when on motion the communication of the water company was placed upon the minutes of the commissioners' proceedings, and it was resolved that the commissioners proceed under franchise ordinance to appoint an appraiser to represent the city. This action of the mayor and commissioners was entirely consistent with the resolution of November 9, and did not alter the situation in any respect. This action of the mayor and commissioners was communicated by the city clerk to the water company on December 13, 1917. The clerk says in his letter that it was notice to the water company that action had been taken by the board of city commissioners relative to appointing appraisers to assist in making the valuation of the waterworks system. There never was any notice in terms given by the mayor and commissioners that they intended to purchase the waterworks system. On December 27, 1917, the water company appointed

an appraiser to value the property of the water company and notice of this appointment was given to the city. On receipt of the notice of the appointment of an appraiser by the water company the commissioners of the city in regular session directed the city manager to acknowledge receipt of said notice and to state that the city would name its representative at an early date. The city manager complied with the instructions of the commissioners. Again on February 7, 1918, the city manager wrote the water company that the city had been somewhat delayed in finding a satisfactory man for the work of appraising the property of the water company, but hoped that the water company would proceed, so there would be no undue delay in getting results, and that the city would appoint an appraiser as soon as possible.

[3] It thus will be seen that all the acts of the city and the correspondence between it and the water company subsequent to the resolution of November 9 simply related to the matter of the valuation of the waterworks system pursuant to said resolution, and it clearly appears from the resolution itself that the mayor and commissioners had no intention of purchasing the waterworks system unless the valuation was known and the proposition submitted to the citizens of Wichita. There can be no specific performance, if the assent of another not a party to the contract is required. Ellis v. Treat, 236 Fed. 120, 149 C. C. A. 330. Right or wrong in their legal attitude, that is all they intended to do, and all they did do. In addition to the compelling force of the authorities hereinbefore referred to, there is another feature of this case which required the court to be sure there was a contract on the part of the city, because in the way the alleged contract has been enforced the city is compelled to pay the valuation fixed by the court, instead of by the three appraisers. As a general rule, an agreement to submit a matter to arbitration or valuation, or an agreement, an essential part of which is that a matter shall be submitted to arbitration, or valuation as for a sale or lease at a price or rent to be fixed by valuers, will not, be specifically enforced, nor will the court itself fix the price or substitute other valuers, since that would be to make a new contract for the parties. Where, however, the agreement to submit to valuers or arbitrators is a subordinate or unessential part of the contract, and the defendant refuses to submit the matter to arbitrators or valuers, the court itself in such a case may make the value by reference to a master or otherwise.

[4-6] We recognize and follow the decision of this court in Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660, wherein it is held that the arbitration clause in a franchise granted by a city to a water company, such as the one in question in this case, is an unessential part of the franchise contract, and that, so far as the enforcement of a contract to purchase is concerned, it may be enforced in the manner followed by the court below. In the case mentioned, however, the franchise of the water company was to expire in 20 years. Notice of intention on the part of the city to purchase the waterworks system was to be given one year in advance. The opinion in the case says:

"One year before the expiration of the term of the contract, the city gave notice to the complainant that it would 'purchase said waterworks and appurtenances at the time and in accordance with the provisions of said proposition and ordinances.'"

Of course by such a notice there could not be any question but that the city of Aspen had elected to purchase the waterworks system, but no such language is found in the record in the present case.

The case of Slocum v. City of North Platte, 192 Fed. 252, 112 C. C. A. 510, is another case decided by this court and relied upon by counsel for the water company. So far as the question of contract is concerned, however, it has very little relevancy. In the Slocum Case the city of North Platte appointed its appraiser. The water company also appointed an appraiser. The two appraisers so appointed selected a third, and the three so selected duly appraised the water plant at $85,021. This court directed the entry of a decree against the city for the amount of the award. Prior to the appointment of the appraisers, and in January, 1905, the electors of North Platte, at an election duly had for that purpose, voted by the requisite majority an issue of $60,000 of bonds of the city to raise money to "build, purchase or otherwise acquire a system of waterworks to be owned and operated by the city." The bonds so voted were subsequently signed by the proper officials, duly registered as required by law, and were ready for negotiation whenever the city was able to negotiate them. At the time of the election there was no other waterworks system in the city that it could purchase, except the one belonging to the plaintiff. After such election the city rejected the price at which the water company offered to sell its plant, and proceeded in the way provided by the franchise ordinance to have appraisers appointed, who appraised the value of the waterworks system as above stated. There was no declaration by the city that the object of the valuation by the appraisers was for any other purpose than purchasing the waterworks system. The case on its facts is not similar to the one before us.

We have examined the cases cited by counsel for the water company wherein contracts similar to the one alleged to have existed in this case have been enforced; but this case turns entirely upon the question as to whether there was a contract, and we are of the opinion that all the acts of the city officials in the premises were for the sole purpose of having a value placed upon the waterworks system, so that the proposition of whether the city should purchase said system at the value determined upon might be submitted to the citizens of the city, and that the mayor and commissioners never intended on their own authority to purchase the same. Being of such opinion, it necessarily results that there was no contract to purchase which could be enforced.

The decree on the appeal of the city, No. 5911, is reversed, with instructions to the trial court to dismiss the action, with costs. This necessarily results in a dismissal of the appeal of the water company, No. 5903.

JAMES v. DAVIS, Director General of Railroads.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5930.

1. **Carriers ⇐30—Exception to tariff classificaton held not to abrogate provision that carrier was not obliged to furnish special poultry cars.**

A note in the printed tariff and classification filed by a railroad company, stating that it was not obligated to furnish special poultry cars, and requiring shippers to pay the rental for such cars, which the company did not own, *held* not abrogated by a circular containing exceptions to the "classification" which did not contain the note, but provided a different classification and a lower rate for live poultry in carload lots.

2. **Carriers ⇐32(2)—Cannot waive provisions of filed and published tariffs.**

A carrier is without power to waive a provision of its filed and published tariff respecting the instrumentalities and facilities which it would furnish to shippers.

3. **Carriers ⇐40—Railroad company held under no duty to furnish special poultry cars to shipper.**

A carrier *held* under no duty to furnish to a shipper special poultry cars, which it did not own, and when it denied its obligation to furnish such cars in its filed and published tariffs.

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

Action at law by Emmett E. James against James C. Davis, Director General of Railroads and Agent. Judgment for defendant, and plaintiff brings error. Affirmed.

The parties will be designated as they were in the trial court. The plaintiff commenced this action in a state court of Nebraska against the railroad company and Walker D. Hines, Director General of Railroads and Agent, to recover damages alleged to have been sustained by the plaintiff on account of the failure of defendant to furnish cars for the transportation of live poultry in interstate commerce. The case was removed to the United States District Court for the District of Nebraska and dismissed as to the railroad company. Subsequently James C. Davis, Director General of Railroads and Agent, was substituted for the defendant, Walker D. Hines. The trial of the action resulted in a directed verdict for the defendant, and this ruling is assigned as error. The facts as they appeared at the trial were substantially as follows:

The plaintiff is a dealer in live poultry with his principal place of business at Falls City, Richardson county, Neb., buying said poultry at various places in Nebraska and Kansas and shipping the same to the principal plant at Falls City, and from there in carload lots to New York and other Eastern markets. For this purpose, special cars are required. The defendant does not own any of these special cars. They are provided by the Live Poultry Transit Company. The shipper pays the rental charge as specified in the tariff. In the months of September and October, 1919, plaintiff required for the shipping of live poultry then on hand to the principal plant in Falls City, and also that which had been purchased from customers and was then in transit to Falls City, a large number of special cars. Between September 8th and 13th plaintiff gave orders to and made requisitions on the agents, servants, and officers of the defendant for nine cars to be used in shipping live poultry from the plant in Falls City, such cars to be furnished one each on September 15th, 17th, 19th, 22d, 24th, 26th, and 29th, and October 1st and 3d, which orders and requisitions were duly received and acknowledged by the officers of the defendant and were given and received at such times that in the usual course of business, they might and could have been filled, and such cars could have been at the poultry house of the plaintiff at Falls City on the days for which they

were ordered. Defendant neglected and failed to furnish the cars and plaintiff claims that he suffered damages by reason thereof in the sum of $7,100.35. The defendant's predecessor in office, more than 30 days prior to the dates heretofore mentioned, when the special cars were to be delivered to plaintiff, adopted rates, rules, and regulations governing the transportation of live poultry in carload lots and incorporated the same into printed tariffs and classifications, and filed the same with the Interstate Commerce Commission at Washington, and posted and published the same as required by law. On the dates above referred to said tariffs and classifications were in full force and effect, and provided in respect to the transportation of live poultry in carload lots that the same would be transported by the defendant at rates specified in said tariffs. The transportation of live poultry from Falls City is governed by the provisions of the Western Classification and exceptions thereto which provide as follows:

"Defendant's Exhibit 2.

"Item.	L. C. L.	C. L.
"9. Poultry or Pigeons Live.		
"See notes:		
"In coops or crates, L. C. L.		D 1
"In coops or crates or in poultry cars, straight or mixed C. L., min. wt. 18,000 lbs., subject to rule 6–B		2

"Note 1. Carload shipments must be accompanied by caretakers. Rules governing the transportation of caretakers will be found in carriers' tariffs.

"Note 2. Feed and water may be loaded in the same car, but no weight allowance shall be made therefor.

"Note 3. Ratings provided do not obligate the carriers to furnish special poultry cars, and do not include the rental charge for special poultry cars; the rental charge for such cars will be found in carriers' tariffs.

"Note 4. Shipments will not be received for transportation when consigned 'To Order' or 'Notify.'"

"Plaintiff's Exhibit 2.

"Circular 17.

"Exceptions to Classifications—Continued.

"Rule No.	Articles.	Rating.
	"Poultry (Live), Carloads.	
	"Poultry (Alive), C. L., in poultry cars or in stock cars (see note), actual weight, subject to minimum weight of 20,000 lbs.	
1580	"Note. Live poultry may be shipped in stock cars, when in coops of sufficient strength to be safely tiered, and when securely braced to prevent shifting in the car, the loading to be so arranged as to permit feeding and watering in transit. When so tendered rates and minimum weights applicable on live poultry in poultry cars, will apply.	Third Class Rates
	"Feed and water furnished by and at the expense of the shipper or owner, necessary to properly care for the live poultry while in transit, will be transported in the car containing the live poultry without charge. If more feed is furnished than is required for the journey, and surplus is removed from the car at destination by the owner, consignee or agent thereof, such surplus will be charged for at the less than carload rate properly applicable thereto from point of origin to destination.	
	"Shipments of live poultry, carloads, consigned 'To Order' will not be accepted.	
	"Will not apply on Nebraska intrastate traffic except as provided in rule No. 110. See rule 1590."	

In order that the ruling of the trial court may be understood, it is necessary to say that, following a suggestion on the part of the court, the evidence as to the tariffs and classifications and the exceptions thereto was first introduced.

When this evidence had been introduced, counsel for the plaintiff, by permission of the court, filed an amended reply to the answer of the defendant, paragraph 2 of which alleged as follows:

"2. And for a further reply in this behalf the plaintiff alleges the fact to be that at all times mentioned in the plaintiff's petition and for a long time before the dates therein mentioned and at all times since the said defendant held itself out to the shipping public as ready, willing, and able to furnish special cars for the shipping of live poultry in carload lots; that between the 14th day of September and the 4th day of October, 1919, the defendant furnished to the plaintiff six of such special poultry cars as alleged in the petition herein, and during the time mentioned in plaintiff's petition the defendant furnished to other shippers at Lincoln, Table Rock, Fairbury, and Fremont, Nebraska, St. Joseph and Kansas City, Missouri, as also to shippers at other points not known to the plaintiff, special poultry cars for the shipping of live poultry in carload lots, thereby waiving any supposed rights which they may have had under the terms of the rules and regulations governing the shipment of live poultry in carload lots as adopted and filed with the Interstate Commerce Commission as mentioned in the answer of the defendant. And the plaintiff further alleges the fact to be that at no time did the defendant give to the plaintiff, as a reason for not furnishing special poultry cars, that it elected not to do so by virtue of such alleged regulation, but, on the contrary, repeatedly promised the plaintiff to furnish such special cars; that by virtue and in pursuance of such representations made by the defendant of its ability, readiness, and willingness to furnish such special cars the plaintiff made requisitions and orders on the defendant for such special cars as alleged in plaintiff's petition, which said orders and requisitions were accepted by the defendant, who then and there promised and agreed to and with the plaintiff to furnish such special cars; that relying on such promises so made by the defendant the plaintiff continued to purchase live poultry, until by reason of the defendant's failure and neglect to furnish such cars he was obliged to cease buying poultry as alleged in his petition. And the plaintiff alleges that by reason of the acts, promises, and agreements of the defendant as above set forth the defendant is now estopped from relying on such alleged and regulation so filed with the Interstate Commerce Commission, and from denying its liability to furnish such special poultry cars to the plaintiff for the shipment of his poultry in carload lots."

After the amended reply was filed, counsel for the defendant moved that the jury be instructed to return a verdict in favor of the defendant on the pleadings and record as made, for the reason that the evidence and the admissions made in the pleadings precluded the plaintiff from maintaining the cause of action stated in the petition. This motion as heretofore stated was granted.

F. A. Hebenstreit, of Omaha, Neb., and F. N. Prout, of Falls City, Neb., for plaintiff in error.

J. W. Weingarten, of Omaha, Neb. (Kenneth F. Burgess, of Chicago, Ill., of counsel, and Byron Clark and Jesse L. Root, both of Omaha, Neb., on the brief), for defendant in error.

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

CARLAND, Circuit Judge (after stating the facts as above). [1] The question arising upon the record is as follows: Was note 3 in the Western Classification of live poultry filed with the Interstate Commerce Commission, Defendant's Exhibit 2, in full force and effect during the time mentioned in the petition of the plaintiff, and, if so, did it justify the defendant in its refusal to furnish the plaintiff special cars for the transportation of live poultry. The uncontradicted evidence

showed that the plaintiff always shipped his live poultry under the third-class rate, minimum weight 20,000 pounds, as provided in Plaintiff's Exhibit 2. In view of this fact, he claims that said exhibit controlled the classification and rate of shipment, and, as there was no such language in said exhibit as is found in note 3 of Defendant's Exhibit 2, there was no declaration by the defendant on file in connection with the classification and rates provided in Plaintiff's Exhibit 2, to the effect that the ratings provided did not obligate the defendant to furnish special poultry cars, and therefore, as the defendant held himself out as a carrier of live poultry in poultry cars, he was bound to furnish such cars to the plaintiff when requested to do so. It appears from the record that Circular No. 17, in which Plaintiff's Exhibit 2 is found, provided on the title page thereof as follows:

"Rules, regulations and exceptions shown herein will take precedence over the classification governing tariffs made subject hereto. (See rule 20.)"

Rule 20 of the Western Freight Tariff Bureau found in Circular 17 reads as follows:

"The term Western Classification. * * * Where Western Classification or Current Western Classification is referred to herein, the same is intended to refer to Western Classification No. 55 (R. C. Fyfe's I. C. C. No. 13, F. S. C. Mo. No. 4), supplements thereto and reissues thereof."

This Western Classification No. 55 is a classification containing Defendant's Exhibit 2. It is therefore claimed that note 3 was superseded by Circular No. 17. We do not think that it necessarily follows that all of Defendant's Exhibit 2 was superseded. The language taken from the title page of Circular No. 17, issued by the Western Freight Tariff Bureau, refers to rules, regulations, and exceptions that will take precedence over the "classification" governing tariffs subject thereto. The ratings provided in Western Classification No. 55 are for—

"Poultry or pigeons, live." "In coops or crates L. C. L. D. 1 (meaning double first-class rate)." "In coops or crates or in poultry cars, straight or mixed car load min. W. T. 18,000 lbs., subject to rule 6-B 2 (meaning second-class rate)."

Plaintiff's Exhibit 2, being rule No. 1580 of Western Freight Tariff Bureau Circular No. 17, contains the following classification:

"Poultry, Live, Carloads. Poultry (alive), C. L., in poultry cars or in stock cars (see note), actual weight, subject to minimum weight of 20,000 lbs."

This classification carried a third-class rate, which was a cheaper rate than those provided for in Defendant's Exhibit 2 taken from Western Classification No. 55. The rate was not only cheaper but the minimum weight was larger. The defendant had said in its Exhibit 2 with a double first-class and a second-class rate and a less minimum weight, that it was not obligated to furnish special poultry cars, that the ratings did not include the rental charge for special poultry cars and that the rental charge for such cars would be found in carriers' tariffs. It is now insisted that, because note 3 does not appear in Plaintiff's Exhibit 2 that the defendant is obligated to pay the rental stated in the live poultry tariffs to the Live Poultry Transit Company, the owner

of the cars, for that is what plaintiff's contention amounts to, although it is carrying the poultry at a less rate than it did when it said that it would not furnish special poultry cars. As there is no express repeal of note 3 the express repeal, if it may be so called, being limited to "classification," we think whether note 3 has been superseded is a question of intention to be decided on all the evidence. It appears from the record that Western Classification No. 55 is the principal document filed by the defendant showing the classification and rates for live poultry. Circular No. 17 of the Western Freight Tariff Bureau is, as its name denotes, an exception to the regular classification. It does not seem reasonable to us that the defendant would intentionally abrogate note 3, and carry live poultry at a cheaper rate, while the cars still belonged to the Live Poultry Transit Company, and the rental charge for their use still was a part of defendant's tariff. The evidence shows that in all cases this rental charge was charged in the expense bill against the shipper, or billed as an advance payment and paid by the consignee. Our conclusion therefore is, upon the whole matter, that note 3 was in force during the time mentioned in plaintiff's petition when cars were requested. We think our conclusion is sustained by the following cases which relate to the construction of tariffs: Chicago Portland Cement Co. v. I. C. R. Co. et al., 45 Interst. Com. Com'n R. 477; Merrell-Soule Co. v. B. & O. R. Co., 49 Interst. Com. Com'n R. 733; Ludowici-Celadon Co. v. E. J. & E. Ry. Co. et al., 39 Interst. Com. Com'n R. 407; Newman Lumber Co. v. M. C. R. R. Co., 26 Interst. Com. Com'n R. 97; Marx et al. v. I. C. R. Co., 36 Interst. Com. Com'n R. 519.

[2] It remains to consider what effect note 3 had upon the duty of the defendant to furnish cars for the shipment of live poultry. So far as the allegations of plaintiff's complaint and reply touching the question of waiver of note 3 by the defendant's acts and declarations are concerned, the question is not argued in the brief of counsel for plaintiff. The decisions of the court are such that the omission is well justified. Plaintiff could not waive the declaration contained in note 3, as it referred to the instrumentalities and facilities for carriage that would be furnished by the defendant. These under the law it was necessary to mention in the tariffs, and each shipper was bound to take notice of the same, and each shipper was entitled to the same treatment as all other shippers by the defendant. The allegations in plaintiff's amended reply that the defendant furnished these special poultry cars to other shippers at Lincoln, Table Rock, Fairbury, and Fremont, Neb., and at St. Joseph and Kansas City, Mo., if true, simply show that the defendant was guilty of discrimination, if the circumstances and conditions were the same. The following authorities are decisive of the question as to whether the defendant could disregard note 3 as filed as a part of its tariff for the carriage of live poultry: Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; Davis v. Southern Pac. Co. (D. C.) 235 Fed. 731; Hamlen & Sons Co. v. Illinois Cent. R. Co. (D. C.) 212 Fed. 324; Zoller Hop. Co. v. Southern Pac. Co., 72 Or. 262, 143 Pac. 931.

[3] The only remaining question is as to the duty of the defendant

to furnish special poultry cars to the plaintiff with note 3 on file with the Interstate Commerce Commission and published in its tariffs for the carriage of live poultry. An examination of the Interstate Commerce Law and the several amendments thereof satisfies us that the law at the time the plaintiff's alleged cause of action arose did not declare that it was the duty of the carrier to furnish or provide special types of equipment and that the law as announced in U. S. v. Pennsylvania Ry. Co., 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251, rules this case. The following paragraphs from the syllabus in that case fairly state what the court decided:

"The powers conferred on the Interstate Commerce Commission by the Act to Regulate Commerce, as amended (Act Feb. 4, 1887, 24 Stat. 379; Act March 2, 1889, 25 Stat. 855; Act June 29, 1906, 34 Stat. 584; and Act June 18, 1910, 36 Stat. 539), do not include the power to require carriers to provide and furnish oil tank cars—no question of discrimination being involved."

"When a carrier in its published tariffs denies any obligation to furnish tank cars, the fact that it publishes rates for commodities so carried may not be construed as an offer, constituting a duty, to furnish such cars; and a finding by the Commission to the contrary is reviewable as a conclusion of law."

See, also, Matter of Private Cars, 50 Interst. Com. Com'n R. 652; Chicago R. I. Ry. Co. v. Lawton Refining Co., 253 Fed. 705, 165 C. C. A. 299, Eighth Circuit. We are of the opinion that the trial court did not err in directing a verdict for defendant.

Affirmed.

NEW YORK TRUST CO. et al. v. FARMERS' IRR. DIST.

FARMERS' IRR. DIST. v. NEW YORK TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

Nos. 5915, 5916.

1. **Waters and water courses ⟸228½, New, vol. 10A Key-No. Series—Irrigation district bodholders cannot complain of terms of surrender made by their appointees, unless they defeat consideration for bondholders' agreement.**

Where the bondholders of an irrigation district proposed to surrender a part of the bonds and to accept payment of the balance in smaller installments at lower interest, if the United States would take over the district, and provided that the details of the taking over should be worked out by a board composed of the persons named in the proposal, the bondholders cannot object to the details as worked out by the board so appointed by them, unless they invalidated the contract with the United States, so as to defeat the consideration for the bondholders' agreement.

2. **Statutes ⟸141 (2)—Nebraska statute conferring additional power on irrigation districts held not an amending act subject to requirement as to inclusion of section or sections amended.**

Laws Neb. 1917, c. 191, passed to enable irrigation districts organized under the laws of Nebraska to co-operate with the United States in the matter of irrigation projects, as contemplated by Act Feb. 21, 1911 (Comp. St. §§ 4738–4740), was an independent act complete in itself, and not affected by Const. Neb. art. 3, § 11, providing that no law shall be amended, unless the new act contains the section or sections so amended.

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3. **Waters and water courses ⟸228½, New, vol. 10A Key-No. Series—Nebraska irrigation district has authority to contract for operation by United States.**

Under Rev. St. Neb. 1913, § 3467, as amended by Laws 1917, c. 83, and under Laws Neb. 1917, c. 191, an irrigation district of Nebraska was given authority to make a contract for the operation of its project by the United States.

4. **Waters and water courses ⟸231—Operation of irrigation system does not give United States right to determine amount of taxes to be levied.**

A contract by a Nebraska irrigation district giving the United States authority to operate the district's system and obliging the district to collect taxes sufficient to meet the expenses of operation, and to exercise the control of the service given by Rev. St. Neb. 1913, § 3465, as amended by Laws Neb. 1917, c. 82, for the purpose of enforcing irrigation taxes, did not deprive the district of its power to determine the amount of taxes to be levied, and did not invade the sovereign powers of the state.

5. **Waters and water courses ⟸217—Operation of irrigation system for landowners is not exercise of state sovereignty.**

The management and operation of an irrigation system for the benefit of the landowners is not an exercise of any of the powers of state sovereignty, so that a contract giving such management to the United States was not a grant of state sovereignty.

6. **Waters and water courses ⟸222—Interest of United States in irrigation district held to authorize contract by it.**

Where a state irrigation district had purchased from the United States Reclamation Service a water right which was not yet paid for, and had contracted to carry through its canals water for the reclamation project, and there was grave danger the irrigation district would be unable to operate its system, the Reclamation Service had such an interest in the district that it might contract for the operation of the district under Act Feb. 21, 1911, § 2 (Comp. St. § 4739), authorizing the Secretary of the Interior to co-operate with irrigation districts for the construction or use of reservoirs, canals, or ditches.

7. **Waters and water courses ⟸222—Reclamation Service may operate irrigation system without acquiring title.**

The Reclamation Service has authority to take over the operation of a state irrigation district system for the purpose of protecting its claims against the district without acquiring absolute title to the project.

8. **Contracts ⟸300(3)—Party causing delay cannot object contract was not completed in time.**

A party to a contract cannot object that the terms of the contract were not settled within the time specified in his proposal, where the delay was caused by him.

9. **Waters and water courses ⟸228½, New, vol. 10A Key-No. Series—Contract that Reclamation Service should "take over" irrigation system does not require transfer of title.**

In a proposal by the bondholders of an irrigation district, agreeing to reduce the principal and interest of their bonds if the United States should take over the district, the words "take over" must be given their primary meaning, to assume control or management of, and do not require the transfer of absolute title to the United States, especially where the other provisions of the proposal were not consistent with an outright sale of the property to the United States, but were consistent with the assumption of management and control by the United States.

10. **Waters and water courses ⟸228½, New, vol. 10A Key-No. Series—Contract between irrigation district and Reclamation Service held not burdensome to bondholders.**

A contract between the bondholders of an irrigation district, which was unable to continue the operation of its system, the failure of which would have resulted in loss to the bondholders, whereby the bondholders

agreed to surrender less than 10 per cent. of their bonds and to give additional time at lower rate of interest for payment of the remaining bonds, in consideration of the taking over and operation of the district by the United States, was not burdensome.

11. Waters and water courses ⟸228½, New, vol. 10A Key-No. Series—District held liable for interest on bonds to be canceled during delay in procuring acceptance by Reclamation Service.

Where the bondholders of an irrigation district agreed to release a portion of the bonds and to accept a lower rate of interest on the last of the bonds, on condition that the United States should take over the operation of the system and should procure from the Secretary of the Interior the approval of the United States for the terms of payments of the remaining bonds of the district, the district was properly charged with interest on all its bonds prior to the time it procured the approval of the Secretary of the Interior, though before that date it had performed the condition of securing a contract for the operation and maintenance of its system by the United States.

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

Action begun at law by the New York Trust Company and another against the Farmers' Irrigation District, which was transferred to the equity docket on the filing of an equitable answer by defendant. From a decree awarding plaintiffs the money relief sought, but sustaining the validity of the contract attacked, both parties appeal. Affirmed.

See, also, 280 Fed. 797.

Some years prior to June 22, 1915, there existed a corporation organized and existing under the laws of the state of New Jersey, known as the Tri-State Land Company. This corporation had been engaged in the construction and completion of an irrigation project in the counties of Morrill and Scotts Bluff, Neb., which was to be supplied with water taken from the North Platte river through a gravity canal, the headgate of which was about one-half mile east of the Nebraska-Wyoming state boundary line on the north side of the North Platte river and of a total length of approximately 86 miles. Upon completion of the canal the operation thereof was placed in charge of the Farmers' Mutual Canal Company, a subsidiary corporation of the Tri-State Land Company. On or about January 23, 1913, said irrigation canal and its headgate, and all of the irrigation works and the appurtenances thereunto belonging, were transferred and conveyed by the Tri-State Land Company and the Farmers' Mutual Canal Company to the Farmers' Irrigation District, a Nebraska corporation, in consideration of bonds of said district of the aggregate par value of $2,703,000, bearing interest at 6 per centum per annum, payable semiannually, no part of the principal of which was to be paid during the first 10 years. Said bonds were deposited by the Tri-State Land Company with and turned over to the New York Trust Company as collateral security to secure the payment of certain bonds theretofore issued by said Tri-State Land Company in the principal sum of $1,691,000, of which bonds the said New York Trust Company was trustee.

For a long time prior to June, 1915, the Farmers' Irrigation District and the Tri-State Land Company had been insolvent and without pecuniary resources to meet their obligations, and the irrigation project, which had been constructed as heretofore stated and transferred to the Farmers' Irrigation District, was in danger of becoming an absolute failure, with the consequent loss of all money that had been invested therein. A bondholders' committee, the Tri-State Land Company, and the Farmers' Irrigation District had been engaged continuously in trying to solve the problem of how to continue the operation of the irrigation system and the distribution of water for the benefit of the agricultural lands lying within the boundaries of the district. There

had been efforts made and negotiations had with the reclamation officers of the United States, in charge of what is known as the North Platte irrigation project, which obtains its water for irrigation purposes from the Pathfinder reservoir, located on the North Platte river in the state of Wyoming. The Tri-State Land Company had entered into a contract with the United States by which the Land Company had obligated itself to pay $500,000 for the right to take water from the Pathfinder reservoir, there was a balance of $475,000 due on the contract, and the failure to make the stipulated payment had caused the United States to threaten a forfeiture of the right. The United States was desirous of having the Farmers' Irrigation District assume this contract and of acquiring the permanent carriage right of 250 second feet of water through the main canal of the Farmers' Irrigation District from the North Platte river to Red Willow creek for the irrigation of an additional unit to be included in the North Platte project of the United States. In this condition of affairs, the Tri-State Land Company bondholders' committee, by C. N. Wright, agent, and W. N. Ferguson, bondholder, made the following proposal to the Farmers' Irrigation District:

"To the Farmers' Irrigation District:

"Whereas, there is a prospect of the United States taking over and operating the Farmers' Irrigation District canal; and

"Whereas, there has been discussion between representatives of said district and the bondholders' committee of the Tri-State Land Company and W. N. Ferguson, who holds practically all of said bonds, as to the terms on which said bondholders and said W. H. Ferguson would be willing to modify the terms and conditions of payment of said bonds in the event of the United States taking over said district canal:

"Now, in order that the purpose and intention of said bondholders may be definitely understood, said bondholders' committee and W. H. Ferguson propose:

"First. To turn over to said district for cancellation $203,000 of said district bonds.

"Second. To reduce the interest rate on the remainder of said bonds from 6 per cent. semiannual to four per cent. per annum; and

"Third. To adopt the government plan of payment on the balance of said bonds, to wit, 2 per cent. of interest and principal of said bonds shall be paid for each of the first 4 years, 4 per cent. of said interest and principal shall be paid for the fifth and sixth years, and 6 per cent. of said interest and principal shall be paid each the next 14 years.

"This proposition is made upon the consideration and with the understanding that it is to further and facilitate the negotiations with the United States respecting latter taking over said district irrigation works, which negotiations are to be brought to a conclusion within 2½ years from date of this instrument; it being understood that the other details, terms, and conditions for the taking over of said district irrigation works by the United States shall be worked out by a board consisting of Andrew Weiss, as advisory member, and S. K. Warrick and C. N. Wright, of Scotts Bluff, Neb., representing the bondholders, and John Mueller, of Bayard, Neb., and L. L. Raymond, of Scotts Bluff, Neb., representing the district. The vote of three of the four active members of said board shall be binding. If said board shall fail in its negotiations with the United States, it shall then formulate a revised schedule of time of payments of bond principal and interest, which revised schedule shall be placed in force and effect by the bondholders.

"It is also understood that the proposition herein contained is not a part consideration for the passage by the district of contract now pending between the Tri-State Land Company, Farmers' Irrigation District, and the United States, but is an entirely separate, distinct, and independent proposition.

"In the event that above board finds its duties and plans interfered with by lack of legal authority, then said board shall join in securing the requisite authority; it being understood, however, that lack of authority for district action shall not preclude the board from endeavoring to carry out its plans through individual contractual relations between the landowners and the bondholders; it being understood that there shall be no action of this board

that will invalidate the existing lawful obligation of the district in the instance of the bonds remaining after the cancellation of the $203,000 as hereinabove provided.

"Dated this 22d day of June, 1915.

"Tri-State Land Company Bondholders' Committee,
"By C. N. Wright, Agent.
"W. N. Ferguson, Bondholder."

In consideration of said proposal, the electors of the Farmers' Irrigation District, at an election duly held, voted in favor of the adoption and ratification of the carriage contract heretofore mentioned and the assumption by the Farmers' Irrigation District of the obligation of said $475,000 owing to the United States by the Tri-States Land Company. The committee appointed in the proposal met from time to time for the purpose of framing and perfecting a course of procedure by which the United States could enter into a contract to take over and operate the works and system of the Farmers' Irrigation District during the period in which said bonds were being paid and satisfied. These negotiations were carried on for a period of more than two years, and required repeated visits to Washington, D. C., for the purpose of making a complete presentation of the entire scheme to the Department of the Interior and the United States Reclamation Service. As a result of these negotiations the following contract was executed by and between the United States and the Farmers' Irrigation District:

"This agreement, made December 12, 1917, between the United States of America, acting in this behalf by the Secretary of the Interior, Reclamation Service, pursuant to the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, and the Farmers' Irrigation District, a corporation organized and existing under the laws of the state of Nebraska, hereinafter styled the District, its successors and assigns, witnesseth:

"Whereas, by contract dated August 10, 1915, with the United States, the District purchased the right to the delivery of water stored in Pathfinder reservoir of the North Platte project, agreeing to pay therefor the sum of $475,000 in annual installments as therein specified; and

"Whereas, by the terms of the aforesaid contract the United States acquired the permanent carriage right of 250 second feet of water through the District's main canal from North Platte river to Red Willow creek for the irrigation of an additional unit proposed to be included in the North Platte project of the United States; and

"Whereas, the United States in its necessary drainage of its North Platte project lands must carry the drainage through the District's lands, and can consequently effect a considerable saving and derive much benefit from the acquisition of the right for co-operative use of the District's drainage works, heretofore or hereafter constructed; and

"Whereas, it is necessary for the District to secure some readjustment of the annual payments to the bondholders, including a lower schedule of payment in the beginning years in order (1) that any possible default upon said bonded indebtedness may be obviated; (2) that prompt payment may be made to the United States of the sums due annually for storage water contract; (3) that the District may at all times maintain its irrigation works in such condition of repair and efficiency as to insure proper carriage and delivery of water to the United States, as provided in said contract of August 10, 1915; (4) that a proper drainage system may be constructed within said District and so designed as to permit joint use by the United States for drainage of the North Platte project lands; and

"Whereas, in connection with said readjustment, it is necessary that the United States should have such control and supervision over the irrigation works and system of the district, and their operation and maintenance, as will fully and completely protect the interests of the United States in said agreement of August 10, 1915, for storage water for the District and carriage rights for the United States, as well as conserve the water supply and aid the United States in the drainage of its North Platte project lands:

"Now, therefore, in consideration of the bondholders and the District making a satisfactory arrangement as between themselves, that is acceptable to

the Secretary of the Interior, and properly providing among other things for—

"(a) Cancellation of the bondholders of $203,000 of the $2,203,000 of bonds outstanding.

"(b) Four per cent. interest per annum payable annually, instead of the present six per cent. per annum payable semiannually.

"(c) Adoption of the United States' 20-year plan of payment; and

"In further consideration of the mutual covenants herein contained, and the mutual advantages to be derived, it is agreed:

"The District shall convey to the United States in trust, as provided by the laws of the state of Nebraska, the irrigation works and systems of the district, which shall be operated and maintained by the United States until full payment has been made to the United States for the purchase of stored water and full payment shall have been made on the bonds herein referred to. The trust conferred upon the United States shall terminate upon full payment of all amounts due the United States and of all obligations on account of the bonds herein referred to, unless said trust is continued by mutual agreement of the parties hereto, but shall in any event terminate 30 years from the date of conveyance by the District to the United States.

"2. All expenditures made by the United States for the District shall be paid by the District as part of the operation and maintenance of the irrigation works and system, and shall become due on March 1, in advance or under such other plan as may be required by the Secretary of the Interior. Any amount not paid when due shall bear interest from such date until the date of payment at the rate of 10 per cent. per annum, and the United States shall be authorized to avail itself of any remedies which may be necessary in order to procure payment from the District. The District shall annually levy and collect taxes sufficient in amount for the general fund to meet the necessary expenses of operation and maintenance of the irrigation works and system and the annual payments to the United States for storage water, and for the bond fund to meet the payments due the bondholders.

"3. The District shall exercise its authority under the law to shut off the water supply from any land for which the District taxes have not been paid in full within two years from the date when due, and the United States, through its representative operating and maintaining the works of the District, may exercise said authority to shut off water. The District will cooperate with the United States by the exercise of all its powers in securing all practicable economy in the use of water.

"4. The District shall at its own expense perform all drainage work necessary to care for the seepage on its lands, otherwise irrigable, and will permit the United States to use such portions of the District's drainage works as may be necessary for the drainage of the lands in the North Platte project under such conditions and arrangements as may be agreed upon. The District shall take all necessary action to provide for the reclamation by drainage of as large an area each year as may be practicable, and shall, so far as practicable, reclaim all the water-logged area in the District within 4 years from the date of this contract.

"5. That all expenses in the readjustment or payment of said bonds shall be provided for in the contract between the District and the bondholders, and the United States shall in no way be liable for any portion of such expense, for the payment of said bonds, or the interest thereon.

"6. This contract shall become binding on the parties hereto and effective only when there has been submitted to the Secretary of the Interior satisfactory evidence that $203,000 of the $2,203,000 bonds of the District outstanding have been canceled, and that there have been deposited with him certified copies of the agreement entered into between the bondholders and the District and declared by him in writing as satisfactory, which papers shall provide, among other things:

"(a) That the bondholders of the District shall accept 4 per cent. interest per annum payable annually on the $2,000,000 of bonds left outstanding, in lieu of the 6 per cent. semiannually provided for in said bonds; and

"(b) That the payment of said $2,000,000 of bonds outstanding, together with the interest thereon, shall be in the percentage provided for payment of

construction charges on reclamation projects in accordance with section 2 of the Reclamation Extension Act of August 13, 1914 [Comp. St. § 4713b].

"7. No member of or delegate to Congress, or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained, shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the Act of Congress approved March 4, 1909 (33 Stat. 1109 [Comp. St. § 10286]).

"This agreement is executed in pursuance of a resolution of the board of directors of the District, of which a certified copy is hereto attached.

"In witness whereof this contract has been executed on behalf of the parties and the seal of the District has been attached.

"The United States of America,
"By Franklin K. Lane, Secretary of the Interior.
"Farmers' Irrigation District,
"By F. H. Riege, President,
"B. J. Seger, Secretary."

This contract was duly executed on behalf of the United States by its Secretary of the Interior, Franklin K. Lane, and on behalf of the irrigation district by its president and secretary. On December 17, 1917, notice was given by resolution of the acceptance of the proposal by defendant. It is conceded that the proposal of June 22, 1915, was executed as stated, and that the signers of the same obligated their principals. It is conceded that the contract between the United States of America and the Farmers' Irrigation District was properly executed, except it is denied that the District or the United States had the power to agree to do the things which they agreed to do. A formal deed of conveyance was made and delivered to the United States by the Farmers' Irrigation District, the granting clause of which is as follows:

"Now, therefore, in consideration of the premises and of the benefits and advantages to accrue to said Farmers' Irrigation District under said contract and the deed executed in pursuance of its terms, the said Farmers' Irrigation District, a corporation duly organized under and pursuant to the laws of the state of Nebraska, does hereby sell and convey unto the United States of America, in trust, the irrigation works and system of the Farmers' Irrigation District, a corporation, for the uses and purposes specifically set forth and stated in the said contract approved by the Secretary of the Interior July 17, 1917, and executed by and between the District and the United States, acting through the Reclamation Commission on September 10, 1917, which contract and all its terms and provisions are hereby referred to and made a part of this conveyance, and it is hereby declared that this conveyance shall be interpreted and construed as between the parties hereto under and according to all of the terms, provisions, conditions, and limitations of said contract.

"To have and to hold the property above conveyed unto the United States of America, in trust, for the uses and purposes set forth in the contract herein referred to."

On November 14, 1918, the New York Trust Company et al., hereafter called plaintiffs, commenced an action at law against the Farmers' Irrigation District, hereafter called defendant, for the purpose of recovering the sum of $15,000 claimed to be due upon 1,000 interest coupons attached to the bonds of the defendant issued as hereinbefore stated, which coupons had matured July 1, 1918. The defendant by answer admitted the issuance and delivery of the bonds and coupons as claimed by the plaintiffs, but pleaded as an equitable defense the contract claimed to have been made by the plaintiffs by the proposal of June 22, 1915, and the acceptance thereof and compliance with its terms by the defendant. The action was transferred to the equity docket. The cause came on for trial, and the court rendered judgment in favor of plaintiffs for the sum of $15,000, with interest thereon from July 1, 1918. The court also found that the proposal of June 22, 1915, and the performance by the defendant of the stipulated requirements upon which the proposal was

based, constituted a valid contract between the plaintiffs and the defendant, and should be enforced according to its terms.

It had developed, however, during the trial, that, of the total number of bonds issued by the defendant, $97,300 of the same were not controlled by the plaintiff bondholders' committee, and six months was given defendant in which the holders of such bonds might comply with the requirements of the Secretary of the Interior, and that the defendant should also have the same time to submit satisfactory proof that the readjustment of the bonded debt and rate of interest provided for in the contract executed by plaintiffs and defendant, as enforced by the decree of the court, had been declared by the Secretary of the Interior in writing as satisfactory to him, within the purview of paragraph 6 of the contract executed by the Secretary of the Interior. The relief therefore granted to the defendant was made interlocutory, for the purpose of arranging the matters above specified. The defendant appealed from that part of the decree in favor of the plaintiff, and such appeal is known in this court as No. 5768. On April 14, 1921, the cause again came on for hearing upon the petition of the defendant to have the interlocutory decree entered September 18, 1920, made final and absolute. At the request of the plaintiffs the case was reopened and some additional testimony taken. The defendant produced the bonds that were not subject to the control of the bondholders' committee, and it was conceded by the plaintiffs that the bonds were produced by the defendant with past-due coupons attached. The defendant also produced the following certificate by the Secretary of the Interior:

"The Secretary of the Interior.

"Washington, February 14, 1921.

"I, John Barton Payne, Secretary of the Interior, do hereby certify that the readjustment of the bonded debt of the Farmers' Irrigation District, the rate of interest thereon, and terms of payment thereof, as decreed and provided for in the interlocutory decree of the United States District Court for the District of Nebraska, entered on September 8, 1920 (case of New York Trust Company et al. v. Farmers' Irrigation District), is satisfactory and acceptable to me, within the purview of paragraph 6 of the contract between the United States and said Farmers' Irrigation District, signed by the Secretary of the Interior on December 12, 1917, conditioned, however, upon the production and delivery to the clerk of said court, for the purpose of being subjected to the modifications prescribed in said decree, of all of the $97,300 of the bonds of said district mentioned therein which are not held by the Tri-State Land Company bondholders' committee, in excess of the principal sum of $50,000, the cancellation of $203,000 of said bonds in the control of said bondholders' committee as provided in said decree prescribed of all of the residue of said bonds, excepting the said $50,000 of those not in said committee's control, this being accepted by me as a substantial compliance in that behalf with the said contract of December 12, 1917.

"John Barton Payne, Secretary."

The trial court, after again considering the case and the evidence, entered a final decree enforcing the contract between plaintiffs and defendant according to its terms, and also providing for the adjustment of the bonded debt of the defendant according to the terms of the contract. From this decree the plaintiffs appealed, and the appeal is known in this court as No. 5915. The defendant also appealed, and that appeal is known as No. 5916. We believe that enough has been stated to present the several contentions of the parties. Additional facts may be stated, however, if it becomes necessary in considering any particular contention.

Jessee L. Root and Fred A. Wright, both of Omaha, Neb. (John J. Sullivan and Byron Clark, both of Omaha, Neb., on the brief), for New York Trust Co. and others.

Halleck F. Rose, of Omaha, Neb. (L. L. Raymond, of Scotts Bluff, Neb., Charles P. Craft, of Aurora, Neb., and John F. Stout, Arthur R. Wells, and Paul L. Martin, all of Omaha, Neb., on the brief), for Farmers' Irr. Dist.

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

CARLAND, Circuit Judge (after stating the facts as above). [1] The consideration on the part of plaintiffs for the proposal of June 22, 1915, was the taking over of defendant's irrigation works by the United States, the negotiations to accomplish which they desired to further and facilitate. The details, terms, and conditions of such taking over, other than those specified in the proposal, were to be worked out by a board composed of the persons named therein. The plaintiffs are not parties to the contract of December 12, 1917. The parties to that contract find no fault with it, and so far as the record shows are willing to perform it. As the details, terms, and conditions thereof, other than those specified in the proposal, were left to a board appointed by the plaintiffs themselves, they cannot complain of such details, terms, and conditions, unless it can be said that they necessarily render the contract void; in other words, the plaintiffs, to show a failure of consideration for the proposal, must show that the contract of December 12, 1917, and the deed executed by defendant in pursuance thereof, do not for some reason constitute a taking over by the United States of defendant's irrigation works, within the meaning of those words as used in the proposal, or that the contract is so repugnant to the specified terms of the proposal as to render it void.

Taking up the objections made by counsel for plaintiffs to the validity of the contract of December 12, 1917, we proceed to consider the contention that the defendant had no authority under the laws of Nebraska to make it, and that, if said laws confer such authority, such laws and the acts of defendant thereunder are void, as attempts to surrender and grant to the United States the inalienable sovereign powers of the state of Nebraska, known as the police power and powers of taxation and eminent domain. By the last clause of the proposal of June 22, 1915, it is made apparent that the bondholders anticipated that there might be a want of legal authority on the part of defendant to enter into an agreement whereby the United States could take over and operate the defendant's irrigation canal. Therefore the board appointed by the proposal was authorized to join with the defendant in securing the requisite authority.

[2] The defendant is a public corporation of Nebraska. Section 3465, Rev. Stats. Neb. 1913, prescribes the powers and duties of the board of directors of such corporation. Section 3467 of the same statutes provides how the title to property of such corporations shall be held. Undoubtedly for the purpose of enabling irrigation districts organized under the laws of Nebraska to co-operate with the United States in the matter of irrigation projects, as contemplated by the Act of February 21, 1911, 36 Stat. 925, 926 (Comp. St. §§ 4738–4740), the Legislature of Nebraska on March 28, 1917, passed chapter 191, Laws of Nebraska 1917, p. 464. Under the decisions of the Supreme Court of Nebraska, this law would not be affected by section 11 of article 3 of the state Constitution, which provides in substance that no law shall be amended unless the new act contains the section or sections so

amended. Chapter 191 above referred to is an independent act, complete in itself. State v. Cornell, 50 Neb. 529, 70 N. W. 56; Zimmerman v. Trude, 80 Neb. 503, 114 N. W. 641; State v. Ure, 91 Neb. 31, 135 N. W. 224; Stewart v. Barton, 91 Neb. 96, 135 N. W. 381; State v. Hevelone, 92 Neb. 748, 139 N. W. 636; Hoopes v. Creighton, 100 Neb. 517, 518, 160 N. W. 742, L. R. A. 1917C, 1146, Ann. Cas. 1917E, 847; Allan v. Kennard, 81 Neb. 289, 116 N. W. 63.

[3] By chapter 83, Laws 1917, p. 196, section 3467, R. S. Neb. 1913, was amended so that by chapter 191, supra, and chapter 83, full power and authority, in our opinion, was given to the defendant to make the contract of December 12, 1917. Chapter 82, Laws Neb. 1917, p. 194, in amending section 3465, Rev. Stat. Neb. 1913, expressly authorized control of the service by the defendant for the purpose of enforcing irrigation taxes. We are unable to find from this legislation or the contract that the sovereign powers of the state of Nebraska referred to were invaded or attempted to be granted away.

[4, 5] It is claimed, however, that as the United States is to operate the irrigation system that the amount of expenses for operation and maintenance are within its control, and therefore the right to determine the amount to be levied is taken from the defendant. We are of the opinion that this is not a reasonable construction of the language used. The defendant is only obliged to levy and collect taxes sufficient to meet the necessary expenses of operation and maintenance of the irrigation works and system, and what the necessary expenses are the defendant has a right to determine for itself, because its obligation to levy the taxes extends only to the amount necessary for the operation and maintenance of the irrigation works and system. By the contract of August 10, 1915, made between the Tri-State Land Company, the defendant, and the United States, it was agreed that the charges for operation and maintenance of the irrigation system should be estimated in advance by defendant's board of directors. So that prior to December 12, 1917, it had been settled as to where the power to determine the amount of the annual expenses for operation and maintenance should be lodged. The mere management and operation of an irrigation system for the benefit of the landowners cannot be said to be an exercise of any of the powers of state sovereignty. If the defendant had employed a manager to operate its system, the manager would not be exercising any of the powers of state sovereignty, and the fact that defendant conveyed its irrigation system to the United States, who was its creditor, in trust, for the purpose of management, does not change the situation.

[6] It had also been provided by the contract of August 10, 1915, above mentioned, which obligated the defendant and the Tri-State Land Company to pay to the United States $475,000 for water stored in the Pathfinder reservoir, and which granted to the United States a permanent carriage right of 250 second feet of water through defendant's main canal from the North Platte river to Red Willow creek for the irrigation of an additional unit to be included in the North Platte project of the United States, that the United States should pay to defendant as an operation and maintenance charge for the carriage of

water through defendant's main canal one-fifth part of such amounts as should be expended by defendant each year for the operation and management of its works used in diverting and carrying the water of the United States. The facts recited show that the United States had a direct and important interest as to how defendant's irrigation system should be managed. It was to use this system for carrying its own water, and also was a creditor of defendant in the sum of $475,000, both of which important interests the evidence shows were in danger of being lost through the inability of the defendant to longer operate its irrigation system. It is also recited in the contract of December 12, 1917, that the co-operative use of the defendant's drainage works would be for the benefit of the North Platte project of the United States.

We are of the opinion that the foregoing facts bring the situation within the provisions of section 2 of the Act of February 21, 1911, 36 Stat. 926, which authorizes the Secretary of the Interior, upon terms to be agreed upon, to co-operate with irrigation districts for the construction or use of reservoirs, canals, or ditches as might be advantageously used by the government and irrigation districts. So far as the expenditure of money by the United States in connection with the irrigation works is concerned, the contract provided that all these expenditures should finally be paid by the defendant as part of the operation and maintenance of the irrigation works. We have no doubt but that the Secretary of the Interior had full power and authority to make the contract. The fact that he did make it shows a construction by the Department of the Interior of the statutes relating to the Reclamation Service favorable to the contention of counsel for defendant.

[7] It is further claimed by counsel for the plaintiffs that the Secretary of the Interior had no authority to bind the United States to operate any irrigation project which the United States did not hold by absolute title. We are of the opinion that the laws in existence relating to the Reclamation Service gave the United States the power to take over the operation of the irrigation system for the purpose of securing the payment of a debt contracted by the system to the United States. Not much specific authority is needed for a creditor to take over the management of a debtor's property with the latter's consent, in order to protect the creditor's rights.

[8, 9] The objection that the taking over of defendant's irrigation system was not made within the time limited by the proposal, or the contract with the United States completed within such time, even if the statement upon which the objection is based is true, which we do not decide, cannot be relied on by plaintiffs to defeat their contract, as the delay was caused by them. The contention that the words "take over," found in the proposal, meant that the United States should purchase the irrigation works of defendant and become the owner thereof, must fail, as being contrary to the intention of the parties making and accepting the proposal. The primary meaning of the words is "to assume control or management of," and in any event the transaction between the defendant and the United States was clearly a taking over of the irrigation system, whatever the words might mean in some other con-

nection. It will hardly be contended that the words ever are or could be used for the purpose of conveying title.

The "details, terms, and conditions for the taking over" were left to a board appointed by the plaintiffs. Their action as to the manner of taking over is very strong evidence of how the plaintiffs and defendant understood the meaning of the words. If the plaintiffs had intended that there should be a purchase by the United States of the irrigation system, it would have been very easy to have said so in the proposal. There was no consideration for a purchase mentioned, and at the time the proposal was made no one knew just what arrangement could be made with the United States. To have tied the matter up, so that there must be a purchase, would have defeated the object of the proposal in the beginning. There would be $2,000,000 in bonds left to be paid after the cancellation of the $203,000 in bonds, and nothing was said about the United States assuming the payment of the bonds. The first whereas clause of the proposal speaks of the United States taking over and operating the Farmers' Irrigation District canal. If the words "take over" meant an outright purchase of the irrigation system, plaintiffs would have had no interest in the operation of the system. We are of the opinion that, from the proposal itself, no other meaning can be given to the words "take over," except that they meant the assumption and control or management of the irrigation system.

[10] We find no violation of the express stipulations of the proposal, and if the details, terms, and conditions of the taking over are not satisfactory, they are as the board appointed by the plaintiffs themselves made them. So far as the contract being burdensome is concerned, the situation of the parties must be taken into consideration. The record fairly shows that the bonds held by plaintiffs would have been worthless if the defendant had been obliged to continue alone to manage and operate the affairs of the irrigation system. $203,000 worth of bonds surrendered, where there was a possibility of saving $2,000,000 would seem to be a small matter. It would extend this opinion beyond all reasonable limits to notice everything that has been discussed in the briefs of counsel. As to the main contentions, we are satisfied that at the time the court entered its final decree, its action was just and right between the parties.

[11] So far as the appeal of the defendant is concerned, the questions raised thereby are not entirely free from difficulty. Defendant claims that, if its acceptance and the performance of the conditions of the proposal made a valid contract between the plaintiffs and defendant, that contract ought to be enforced as of the date when defendant claims it had fully performed the conditions required of it; to be more specific, not later than January 1, 1918. The judgment for the plaintiffs is for interest coupons which became due July 1, 1918. If the contract should be enforced as of January 1, 1918, then there would be $203,000 in bonds which would have drawn no interest after that date, and the balance of the bonds would have drawn interest in accordance with the terms of the proposal or contract between the parties. The amount involved is, of course, considerable. Generally speaking,

if it could be said that the delay in the performance of the contract was wholly attributable to the plaintiffs, then the contract ought to be enforced as of the date claimed. Section 6 of the contract, however, provides that it shall not become binding and effective until there has been submitted to the Secretary of the Interior satisfactory evidence that $203,000 of the $2,203,000 bonds of the defendant outstanding had been canceled, and that there had been deposited with the Secretary certified copies of the agreement entered into between the plaintiffs and the defendant, and such agreement declared by him in writing as satisfactory.

The refusal of the plaintiffs to perform the terms of the proposal prevented a strict compliance with this section. It was, however, a matter between the defendant and the United States, and the Secretary of the Interior was satisfied with the decree of the court compelling the plaintiffs to perform the terms of the proposal. If the United States or the Secretary of the Interior was satisfied, the plaintiffs cannot be heard to complain, so far as compliance with section 6 is concerned. The objections of the plaintiffs to the performance of the proposal cannot be said to be frivolous. Some of the objections present questions concerning which lawyers might differ, and therefore the court cannot say that the plaintiffs intentionally and without cause delayed the settlement between the parties. We are inclined to the view that the trial court's action in the premises should be sustained, and we therefore affirm the decree below; plaintiffs and defendant paying all the costs of their own appeal.

Affirmed.

FARMERS' IRR. DIST. v. NEW YORK TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5768.

Appeal and error ⊂=80(6)—Decree allowing district bondholders interest, but requiring district to perform further acts, held not final.

In a suit by the bondholders of an irrigation district to recover interest, a decree allowing plaintiffs the interest sued for and reserving decision as to the validity of the contract whereby the plaintiffs agreed to accept a lesser rate of interest and to cancel a portion of their bonds, on condition the United States took over the irrigation system until the defendant could procure the assent of the Secretary of the Interior to the terms of payment of the bonds, as required by the proposal of the bondholders, was not a final decree, so that an appeal therefrom must be dismissed.

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

Action begun at law by the New York Trust Company and another against the Farmers' Irrigation District, but transferred to the equity docket when defendant filed an equitable answer. From a decree requiring the defendant to pay the interest on its bonds sued for, but reserving determination of the validity of the contract between plain-

tiffs and defendant for reduction of the principal and interest of the bonds until defendant should have an opportunity to obtain the approval of the Secretary of the Interior to the new terms of payment for the bonds, defendant appeals. Appeal dismissed.

Halleck F. Rose, of Omaha, Neb. (Charles P. Craft, of Aurora, Neb., L. L. Raymond, of Scotts Bluff, Neb., and John F. Stout, Arthur R. Wells, and Paul L. Martin, all of Omaha, Neb., on the brief), for appellant.

Jesse L. Root and Fred A. Wright, both of Omaha, Neb. (John J. Sullivan and Byron Clark, both of Omaha, Neb., on the brief), for appellees.

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

CARLAND, Circuit Judge. The judgment from which this appeal was taken was not a final judgment. It did not become final until the trial court finally passed upon the equitable defense of appellant. The same questions which are raised on this appeal have been considered in No. 5916, being the cross-appeal of appellant in No. 5915, 280 Fed. 785.

This appeal is therefore dismissed, with costs.

MORRISEY et al. v. SHENANGO FURNACE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1922.)

No. 5938.

Injunction ⇐88—Decree limiting future expenditures of village held void for want of jurisdiction.

A court of equity is without jurisdiction to enjoin a village and its officers from expending for municipal purposes more than a sum prescribed during each six months of a four-year period in the future, and a decree granting such an injunction, there being no finding of any illegal action by defendants, *held* void.

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

Suit in Equity by the Shenango Furnace Company and others against The Village of Buhl and others. From a judgment adjudging E. J. Morrisey and others in contempt for violation of an injunction, they bring error. Reversed.

The Shenango Furnace Company, a corporation of Pennsylvania, and a taxpayer of the village of Buhl, a municipal corporation of Minnesota, and hereafter called plaintiff, on or about September 11, 1918, commenced an action in equity in the court below against said village and the president, recorder, treasurer, and trustees thereof, hereafter called defendants, for the purpose of enjoining and restraining said defendants and their successors in office from expending money or contracting obligations in the future in an amount greater than the court might find was a reasonable maximum amount for such a village to expend annually for village purposes. The water, light, power,

and building commission and the public library board of said village and the members of said commission and board were subsequently made parties defendants.

The defendants answered the complaint of the plaintiff and on November 4, 1918, the cause came on for hearing, whereupon the following stipulation signed by counsel for the respective parties was filed in the trial court:

"It is hereby stipulated between the plaintiff herein and the defendants herein that the facts in said case are as set forth in the decree hereto attached, and that the court may order and enter the said decree and the injunction therein provided for, and that the same may be entered, without taxation of costs, forthwith."

A decree was entered pursuant to the stipulation on the same day as follows:

"This cause having come on for hearing before the undersigned, one of the judges of the court above entitled, Washburn, Bailey & Mitchell having appeared as solicitors and as attorneys for the plaintiff, and Victor L. Power, Fryberger, Fulton & Spear, and Thad S. Bean having appeared as solicitors and attorneys for the defendants, and stipulations having been entered into between said parties for a decree and the issuance of an injunction pursuant thereto, and the court being fully advised in the premises, the court now finds as follows:

"A. That the plaintiff is a foreign corporation organized and existing under and by virtue of the laws of the state of Pennsylvania and is a citizen of said state; that said plaintiff is a property owner and taxpayer in the defendant village of Buhl, and that the amount involved in this controversy is upwards of $3,000, exclusive of costs and interests; that the defendants and each of them are citizens and residents of the state of Minnesota, and the court has jurisdiction of said cause.

"B. Further, that the amounts hereinafter specified are the maximum amounts defendants are entitled to expend for and on behalf of all municipal purposes during the four-year period hereinafter specified; that it is necessary for the proper conduct of the municipal affairs of said defendant village that there be a prompt collection of all charges for water, light, and heating service furnished by said municipality; that in the pending litigation said defendant village has incurred certain attorney's fees and expenses; and, further, that it may be reasonably necessary and desirable for the defendant village or the defendant water, light, power, and building commission, as the case may be, to purchase a certain boiler, and, under certain conditions, for the defendant village to purchase a certain property for use as a public market or potato warehouse; and the court further finds that prior to October 1, 1918, certain claims were duly presented to the defendant village for expenditures theretofore made or liabilities incurred in its behalf; that there is now pending a certain order in this suit restraining and enjoining certain of said defendants and each of them from certain acts; and it is hereby ordered, adjudged and decreed:

"(1) That for a term of four years from and after October 1, 1918, the defendant village of Buhl, the defendant water, light, power, and building commission of said village, and the defendant public library board of said village, and all officers, agents, and employés of said defendants, and each of them, and all representatives and subsidiary boards of said village of Buhl, shall be and they hereby are limited to a total municipal expenditure of $48,000 for each six months period of said term, plus all local municipal revenues actually collected by or on behalf of said village, or any of said defendants, within each of said periods, for charges made and municipal service rendered during each such period, to private consumers, neither said village, nor any department, board, or commission thereof, or therein to be considered a private consumer within the terms of this judgment, all local municipal revenues collected by or on behalf of said village or any of said defendants, for charges prior to October 1, 1918, not to come within the said expenditures hereby limited, but to be applied on indebtedness accruing prior to October 1, 1918, the intention hereof being that said sum of $48,000 for each six months period is to be the maximum limit of expenditure of any funds collected or to be collected by general taxation, both through general levies of taxes and any levies for

the construction, maintenance, and support of the water, light, heat, and power plant, library, parks and all other municipal activities; that said total municipal expenditures for or on behalf of said village and all departments thereof including said commission and said board, pursuant to the foregoing, shall be and the same hereby are limited as follows, period by period:

"October 1, 1918, to April 1, 1919, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered including municipal light, heat, or water service, within said period.

"April 1, 1919, to October 1, 1919, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"October 1, 1919, to April 1, 1920, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"April 1, 1920, to October 1, 1920, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"October 1, 1920, to April 1, 1921, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"April 1, 1921, to October 1, 1921, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"October 1, 1921, to April 1, 1922, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"April 1, 1922, to October 1, 1922, the sum not to exceed $48,000 plus all local municipal revenues actually collected within said period for charges made and services rendered, including municipal light, heat, or water service, within said period.

"The local municipal revenues referred to in the foregoing being only those collected from private consumers, as above specified; that said defendants and each of them, and all officers and employés thereof, be enjoined and prohibited from making any expenditure or incurring any debt or liability for or on behalf of said village or any commission or board thereof, or for any municipal purpose during any one of said six months periods in excess of said amount limited as aforesaid, nothing herein contained to affect the right of the defendants, or any of them, to levy or receive the amount of taxes which they are or may be authorized to levy by the statutes of the state of Minnesota in such cases made and provided, all tax collections within said four-year period to be used in the discharge of municipal indebtedness incurred prior to October 1, 1918, and thereafter, within the limits herein specified.

"(2) That said defendants and each of them, as the case may be, shall require prompt payment of all amounts which may become due on behalf of said municipality from every source other than taxes raised by general levy, and in particular, shall require prompt payment of all amounts which may become due for water, light, or heating service furnished by said village or said water, light, power and building commission.

"(3) That notwithstanding the foregoing, the defendant village or the defendant commission, as the case may be, may purchase a boiler for the municipal water, light, and heating plant, if the same be deemed necessary, at a price of approximately $22,000 for the purchase and installation of said boiler, the cost thereof not to be reckoned or included in said municipal expenditures limited as aforesaid; that the defendant village is hereby allowed and authorized to pay all its attorney's fees and expenses incurred by it in the

pending suit, said amounts not to be reckoned or included in said municipal expenditures limited as aforesaid.

"(4) That said defendant village shall be enjoined and restrained from purchasing the building commonly known as the Range Mercantile Company Building, or lot on which the same is situated, except and unless said village shall purchase the same from and out of the amount which said village is allowed to expend from and after October 1, 1918, up to April 1, 1919.

"(5) That any funds now on hand or which may be hereafter received during said four-year period by said defendants, or any of them, either from general taxation or any other source, shall be applied and expended in paying the principal and interest of the existing bonded indebtedness of said village as the same may accrue, and in paying warrants and orders heretofore issued or which (within the said maximum limits herein fixed), may be hereafter issued for expenditures made or liabilities incurred for municipal purposes, and all said warrants or orders, whether heretofore issued or hereafter issued, to be paid in the order and manner provided by the statutes of said state of Minnesota.

"(6) That in the event any controversy arises between said defendant village and said defendant water, light, power, and building commission, or between said village and said library board, with reference to any expenditure of any part of the above maximum amount, or with reference to incurring any liability within said prescribed limits, either by said commission or by said board, at any time during said four-year period, or with reference to any apportionment of any part of the said amount so allowed to be expended between all said defendants, then said controversy shall be referred to this court for appropriate disposition, and for the purpose thereof, this court retains jurisdiction of the pending suit, but in the meantime the total expenditures made or incurred by all of the defendants together shall not exceed the total of $8,000 a month from October 1, 1918, up to any given 1st day of April or 1st day of October during said period, plus all local municipal revenues actually collected as aforesaid.

"(7) That if defendants shall faithfully carry out the terms of this judgment and the injunction herein provided for, and shall abide thereby, but only in such event, then said plaintiff shall not question, nor be allowed to question, either in this suit or otherwise, any of the warrants or orders of said defendant village heretofore issued or the warrants or orders of any of said defendants to be hereafter, within the limit herein specified, issued during said four-year period, on the ground that they are in excess of the limitations authorized by law, nor shall plaintiff question, on the ground that they are in excess of the limits prescribed by law, warrants or orders for all lawful bills incurred during the latter half of August, 1918, and during the month of September, 1918, except for the purchase of that certain property, heretofore referred to as the Range Mercantile Company Building and lot, as to which said defendants shall be governed by the foregoing provisions.

"(8) That upon issuance of the writ of injunction hereinafter provided the restraining order now pending in this suit shall be vacated and set aside as to all the defendants, except as to matters covered thereby and which are enjoined and prohibited herein and in the injunction to be issued.

"(9) That a writ of injunction enjoining and restraining defendants as herein specified in paragraphs numbered 1, 2, 3, 4, 5, 6, 7, and 8, and in the form hereto attached, shall forthwith issue out of said court and under its seal, but that no costs shall be allowed to either party in the pending suit.

"Let a writ of injunction issue as above provided."

An injunction was also issued on the same day as provided in paragraph 9 of the decree and was duly served. On July 5, 1921, the plaintiffs in error were ordered to show cause why they should not be punished for contempt in violating the injunction. On July 18, 1921, there was a hearing on the order to show cause. It was shown and admitted that during the periods mentioned in paragraph 1 of the decree the village of Buhl had expended over and above the amount limited by the decree the sum of $232,615.78; that E. J. Morrisey, F. J. Demel, Jr., T. P. Corey, N. L. Johnson, Matt Kayfes, W. Jacobs, George R. Barrett, and A. Chere, as officers of said village of Buhl or members of the two boards hereinbefore mentioned, had intentionally and knowingly taken

part in violating the injunction as to the expenditure of money or the contracting of obligations in excess of the amount limited by the decree. They were found guilty of contempt by the court, and sentenced to imprisonment for a period of 60 days each in the county jail for St. Louis county, Minn., whereupon the plaintiffs in error brought said judgment here for review.

Warner E. Whipple, of Duluth, Minn. (A. R. Folsom, of Buhl, Minn., on the brief), for plaintiffs in error.

W. D. Bailey and Alfred Jaques, U. S. Atty., both of Duluth, Minn. (Washburn, Bailey & Mitchell, of Duluth, Minn., on the brief), for defendants in error.

Before CARLAND, Circuit Judge, and TRIEBER and POLLOCK, District Judges.

CARLAND, Circuit Judge (after stating the facts as above). We do not stop to consider whether the proceeding to punish plaintiffs in error for contempt was civil or criminal, or brought here by the right method. Section 1649a, U. S. Comp. Stat. (39 Stat. 727), nor whether the decree entered pursuant to the stipulation was anything more than a contract between the parties which had received the approval of the court. 21 C. J. p. 815. We shall assume for the purpose of this case that the decree was strictly judicial, but even so the stipulation manifestly could not confer power upon the court to do that which the court could not do under any known rule of equity jurisprudence. The only defense made in the court below or here by plaintiffs in error was, and is, that the trial court had no jurisdiction of the subject-matter dealt with in the decree. Ex parte Reed, 100 U. S. 13, 23, 25 L. Ed. 538; Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; In re Nielsen, 131 U. S. 176, 184, 9 Sup. Ct. 672, 33 L. Ed. 118.

Laying aside this contention for a moment, we notice what seems to us a vital defect in the decree, which in our opinion rendered the injunction issued upon it absolutely void; that defect being that the decree did not adjudge the plaintiffs in error guilty of anything. It did not find that they had violated any law, statutory or common, or that they had been guilty of fraud or abuse of discretion. One might gather from the decree that in the opinion of the court the village officers were spending too much money, from the fact that the decree limited the amount which they should spend during certain periods for four years in the future, but this inference alone would not sustain the injunction. The contention of counsel for plaintiffs in error that the court had no jurisdiction of the subject-matter is based upon the proposition stated by counsel substantially as follows: That the determination by the trial court in advance of the extent of the financial necessities of the village of Buhl for a period of four years in the future wherewith to enable it to function governmentally and discharge the public, political, and governmental duties imposed upon it by reason of its character as an agency of the state government was a matter wholly nonjudicial in its character, and one which was confided exclusively by law to the legislative or administrative judgment and discretion of the plaintiffs in error, constituting in their collective official capacity the village council. We are clearly of the opinion that the contention of counsel is

sound. East St. Louis v. Zebley, 110 U. S. 321, 324, 4 Sup. Ct. 21, 28 L. Ed. 162; Clay County v. McAleer, 115 U. S. 616, 618, 6 Sup. Ct. 199, 29 L. Ed. 482; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; Alpers v. San Francisco (C. C.) 32 Fed. 503, opinion by Justice Field; McChord v. L. & N. Ry. Co., 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289; 21 C. J. 156; 10 R. C. L. 93.

We are unable to find that the decree entered falls within any acknowledged head of equity jurisprudence. The trial court was wholly without jurisdiction to punish the plaintiffs in error for contempt, and therefore its judgment was and is void. We may properly say that the allegations of the complaint, if proven, show a state of affairs in regard to the expenditure of public moneys by the officers of the village of Buhl that call strongly for legislative action by the state of Minnesota, and we must presume that such action will be, if not already, taken. So far as our own jurisdiction is concerned, the jurisdiction of the trial court is questioned only as a court of equity, and not as a federal court. Therefore this court has jurisdiction to review the judgment in contempt.

Judgment reversed.

SALEM TRUST CO. v. MANUFACTURERS' FINANCE CO. et al.

(Circuit Court of Appeals, First Circuit. April 11, 1922.)

No. 1515.

1. **Removal of causes ⟹30—Citizenship of nominal party held not to defeat right of removal.**

   Joinder of a defendant, which is a citizen of the same state as complainant, but is merely the depository of the fund in controversy between the other parties, without any interest therein, *held* not to defeat the right of removal by the principal defendant, which is a nonresident.

2. **Courts ⟹372(1)—Federal courts not bound by state decisions as to priority between assignees.**

   The question whether, as between two successive assignees of the same chose in action, the fact that the second first gave notice to the debtor gives him priority is one of general jurisprudence, on which the federal courts are not bound by the decisions of the courts of the state where the parties reside and the assignments were made.

3. **Assignments ⟹85—First notice to debtor gives priority as between successive assignees of chose in action.**

   Under the rule of the federal courts, as between two successive assignees of the same chose in action, the second prevails if he was the first to give notice to the debtor.

Brown, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; George W. Anderson, Judge.

Suit in equity by the Salem Trust Company against the Manufacturers' Finance Company and another. Decree for defendants, and complainant appeals. Affirmed.

Alexander Whiteside, of Boston, Mass. (Raymond P. Baldwin and Warren, Garfield, Whiteside & Lamson, all of Boston, Mass., on the brief), for appellant.

Robert G. Dodge, of Boston, Mass., for appellee Manufacturers' Finance Co.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. This is a bill in equity brought by the Salem Trust Company, a Massachusetts corporation, against the Manufacturers' Finance Company, a Delaware corporation, and the International Trust Company, a Massachusetts corporation, to establish the alleged right of the Salem Company as against the Finance Company to a sum deposited by the Finance Company with the International Trust Company.

The suit was originally brought in the superior court of Massachusetts, but was removed by the Finance Company to the District Court on the ground of diverse citizenship. After removal the plaintiff, the Salem Company, filed a motion to remand the cause, which was denied.

The case was then heard on agreed facts from which it appears that, on May 16, 1919, the Nelson Blower & Furnace Company assigned to the Salem Company the indebtedness, to the amount of $45,000, of the Murray & Tregurtha Corporation to it under a contract for the construction of certain marine engines; that, on July 15, and again on September 20, 1919, the Blower & Furnace Company assigned the same indebtedness to the defendant, the Finance Company, on the former date to the amount of $40,000 and on the latter $10,000; that all of the assignments were for a valid consideration; that on or about September 20, 1919, the defendant the Finance Company, having no knowledge of the assignment to the plaintiff, notified the Murray & Tregurtha Corporation of the assignment to it; that at that time the Murray & Tregurtha Corporation had no knowledge of the assignment to the plaintiff, and did not learn of it until later; that on September 26, 1919, the Blower & Furnace Company was placed in the hands of a receiver, who completed the contract with Murray & Tregurtha only on the understanding that his expenses should be paid in priority to the assignments; that on October 6, 1919, the plaintiff and defendant, having learned of the assignments, entered into an agreement reciting the facts as to the assignments; that the parties were in dispute as to their respective rights, and providing that the defendant should collect the account and deposit the proceeds in the International Trust Company in a special account in the defendant's name as trustee, and that if the parties could not agree upon the ownership of the proceeds, the question should be determined in some court of competent jurisdiction upon a proceeding brought by either party; that in pursuance of this agreement the defendant collected $8,634.10, which it deposited as agreed in the International Trust Company; that after deducting the cash expenses incurred in making such collection the amount on deposit was $7,963.36, the sum in dispute.

In the court below it was held that, inasmuch as the defendant was the first to give notice of its assignment to Murray & Tregurtha, it was entitled to the fund, even though its assignment was later in time to that of the plaintiff, and a decree was entered dismissing the bill.

It is from this decree that the present appeal is taken, and the assignments of error present two questions: (1) Did the District Court err in refusing to remand the cause? and (2) in ruling that, as between two successive bona fide assignees of the same chose in action, the second prevails, if he was the first to give notice to the debtor.

[1] The International Trust Company was not a necessary party defendant. It had no interest in the subject-matter litigated, but held the sum in dispute as the agent or depositary of the defendant, the Finance Company. By the sixth article of the contract the parties did not agree upon any particular court to determine the controversy between them, but left that question for determination by any court of competent jurisdiction, and, as the International Trust Company was at most a nominal party only, the motion to remand was rightly denied. Walden v. Skinner, 101 U. S. 577, 25 L. Ed. 963; Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514; Bacon v. Rives, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; Ex parte Nebraska, 209 U. S. 436, 28 Sup. Ct. 581, 52 L. Ed. 876.

[2, 3] We are also of the opinion that the ruling of the court below, that the assignee who first gave notice had the prior right, though the assignment to him was later in date, was correct, and that the question decided is one of general jurisprudence as to which the decisions of the highest courts of a state are not controlling. Methven v. Staten Island Light & Power Co., 66 Fed. 113, 13 C. C. A. 362; and In re Leterman, Becher & Co., 260 Fed. 543, 171 C. C. A. 327, in which certiorari was denied October 20, 1919, by the Supreme Court, 250 U. S. 668, 40 Sup. Ct. 14, 63 L. Ed. 1198, under the name of Coleman & Co. v. Tawas Co. The ruling was in conformity with the well-established rule in the federal courts that the party who first gives notice of his assignment is to be regarded as having the greater equity. Judson v. Corcoran, 17 How. 612, 15 L. Ed. 231; Spain v. Hamilton's Administrator, 1 Wall. 604, 17 L. Ed. 619; Laclede Bank v. Schuler, 120 U. S. 511, 516, 7 Sup. Ct. 644, 30 L. Ed. 704; Methven v. Staten Island Light, Heat & Power Co., 66 Fed. 113, 13 C. C. A. 362; In re Leterman, Becher & Co., 260 Fed. 543, 171 C. C. A. 327; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 637–639, 7 C. C. A. 391; 5 C. J. pp. 953, 954, 955, § 135.

The law of Massachusetts relating to the assignment of choses in action is the same as that of New York and the facts in the cases cited from the Second circuit (66 Fed. 113, 13 C. C. A. 362, and 260 Fed. 543, 171 C. C. A. 327) differ in no material respect from those now before us, namely, the applicability of the state or the federal rule and the limitations of the latter. The questions presented are therefore the same as those that were before the court in the Second circuit, the decision of which the Supreme Court declined to review on certiorari. As these questions were definitely presented in the certiorari proceeding and were of general importance in that their decision by the Court

of Appeals in the Second Circuit involved a conclusion at variance with the law of New York as well as with that of many other states, the action of the Supreme Court in declining to review the decision is hardly conceivable unless it was satisfied the decision was right.

The decree of the District Court is affirmed, with costs to the Manufacturers' Finance Company, appellee, in this court.

BROWN, District Judge (dissenting). This case presents a question of priority of the rights of successive assignees of sums due or to become due upon a contract for the construction of marine engines. The debtor has discharged its obligation by payment, and by agreement of the assignees the fund is held until decision upon the conflicting claims of the two assignees.

It is conceded that under the law of Massachusetts the fund belongs to the Salem Trust Company, the first assignee. The Manufacturers' Finance Company, the second assignee, claims that the law of Massachusetts is inapplicable, and that the rights of the parties are to be decided upon what is called "the law of the federal courts" on a question of general jurisprudence.

Our first inquiry is whether the case is controlled by the law of Massachusetts.

The contract which created the debt was a Massachusetts contract, between two Massachusetts corporations. Under this contract the Murray & Tregurtha Corporation was to pay $2,500 each for 30 marine engines. The Nelson Blower Company was to construct the engines.

On May 16, 1919, the Nelson Company assigned the indebtedness due and to become due on said contract, to the amount of $45,000, to the Salem Trust Company, a Massachusetts corporation. If valid, this assignment covers the entire fund in controversy.

As these transactions were all between citizens of Massachusetts, the settled law of that state determined, as between them, the obligations and rights of the three parties—the debtor, the assignor, and the assignee. The Massachusetts decisions establish the rule that in the absence of estoppel the rights of a first assignee of a chose in action will prevail against the rights of a subsequent assignee, regardless of notice to the debtor or obligor. Thayer v. Daniels, 113 Mass. 129, 131; Putnam v. Story, 132 Mass. 205; Herman v. Conn. Mut. Life Ins. Co., 218 Mass. 181, 186, 105 N. E. 450, Ann. Cas. 1916A, 822; Rabinowitz v. People's National Bank, 235 Mass. 102, 104, 126 N. E. 289.

After the rights of these citizens of Massachusetts had become fixed under the law of that state, the assignor, the Nelson Company, on July 15, 1919, assigned the same indebtedness to the defendant Manufacturers' Finance Company, a corporation organized under the laws of Delaware, but having a usual place of business in Boston, Mass.

The different citizenship of the second assignee is not enough to avoid the conclusion that the second assignment, like the first, was a contract made and to be enforced in Massachusetts, and subject to the laws of that state.

The jurisdiction which a state possesses over property within its borders extends alike to tangible and intangible property. Pennington v. Fourth National Bank, 243 U. S. 269, 37 Sup. Ct. 282, 61 L. Ed.

713, L. R. A. 1917F, 1159. A vested right of action is property in the same sense in which tangible things are property. Pritchard v. Norton, 106 U. S. 124, 132, 1 Sup. Ct. 102, 27 L. Ed. 104.

"The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." Von Hoffman v. City of Quincy, 4 Wall. 535, 550 (18 L. Ed. 403); Brine v. Insurance Co., 96 U. S. 627, 634, 635, 637, 639, 24 L. Ed. 858; Halsbury's Laws of England, vol. 4, § 781, p. 366.

No reason is apparent why the second assignment is not subject to that rule, or why the law of Massachusetts relating to assignments of legal choses in action does not establish a rule of property. See 19 Yale Law Journal, 258, 260, 261.

Moreover, by a statute of Massachusetts (R. L. c. 173, § 4), the assignee of a legal chose in action assigned in writing has a legal right of action in his own name. He need not ask relief in equity against the debtor. This statute, unlike English statutes relating to the assignments of legal choses in action, does not require notice to the debtor. See Halsbury's Laws of Eng. vol. 4, p. 367, note (h).

The rule that authoritative state decisions rendered by a state court before the rights of the parties accrued and became fixed are presumed to be known to the parties, and form part of the contract, seems as applicable to written assignments of book accounts, or accounts receivable, as to conveyances or written instruments between private parties evidencing a transfer of real property or tangible personal property. As the state has like control over tangible and intangible property within its jurisdiction (Pennington v. Fourth Nat. Bank, 243 U. S. 269, 37 Sup. Ct. 282, 61 L. Ed. 713, L. R. A. 1917F, 1159), the rule seems equally applicable to tangible and intangible property (Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, 372, 30 Sup. Ct. 140, 54 L. Ed. 228).

Whether we adopt the theory that an assignment of a legal chose in action is a complete transfer of the assignor's legal right, or the theory that the assignee gets only an equitable title recognized by and enforceable in a court of law through an action in the name of the assignor or in his own name, it seems equally necessary to give effect to local decisions which have become rules of property.

It would seem sufficient for the purposes of this case to hold that the settled law of Massachusetts forms part of and controls these contracts of assignment. A foreign corporation, which is permitted to maintain a usual place of business in the state of Massachusetts for the transaction of local business, certainly has no right to preferential treatment as compared with resident citizens of Massachusetts, or to complain that it is subject to the same law. Horn Silver Mining Co. v. New York, 143 U. S. 305, 315, 12 Sup. Ct. 403, 36 L. Ed. 164; Shaffer v. Carter, 252 U. S. 37, 53, 40 Sup. Ct. 221, 64 L. Ed. 445. The consent of the state to its conduct of business therein of an intrastate character implies the condition that it shall assent to and be governed by the laws affecting the mode of transfer of property which govern its own citi-

zens. That the state has assented to the making of contracts by foreign corporations which shall become superior to those of its own citizens and prejudicial to their rights of property is not to be assumed. The different citizenship of the parties does not give to the contract an interstate character or create a right to question the local policy of a state in respect to the transfer of property, tangible or intangible. Pickens v. Merriam (C. C. A.) 274 Fed. 1, 7, 8.

If we adopt the view that under the Massachusetts decisions the Salem Trust Company, through an assignment in writing of a legal chose in action, acquired a statutory right of action in its own name, and that the assignor's legal right of action was transferred to the plaintiff, it follows, the assignor having parted with his interest by the first assignment, that the second assignee could take nothing. The second document of assignment was therefore as ineffective under the law of Massachusetts as any deed of property which the grantor did not own. In that view of the case we should conclude that there was, in substance, but one assignment—the first. There would then remain no question of "equitable priority" or of "equitable preference," as these terms are generally used. This question of priority arises between merely equitable interests, and not between an equitable interest and a legal title. Pomeroy's Eq. Jur. (3d Ed.) §§ 677, 679, 1277, 1273; Judson v. Corcoran, 17 How. 612, 614, 15 L. Ed. 231.

Upon the question whether a statutory provision authorizing an assignee to sue at law in his own name betters his position, and changes his right into a legal title, interest, or ownership, there seem to be contrary opinions. See Pomeroy's Eq. § 137; In re Westerton, 1919, 2 Chan. Div. L. R. 104; Williston on Contracts, vol. 1, §§ 435, 446a, 447; Marsh v. Garney, 69 N. H. 236, 45 Atl. 745.

Assuming, therefore, that, regardless of the Massachusetts statute and decisions that we have cited, we have a question of equitable preference, we may inquire whether the second assignee can establish his right to such preference.

The Manufacturers' Finance Company, the second assignee, rests its claim to equitable priority upon the fact that it was first to give notice of its assignment to the debtor, the Murray & Tregurtha Company. We are asked to accept and apply the following rule:

"Between two successive bona fide assignees of the same chose in action, the second will prevail, if he was first to give notice to the debtor."

It will be observed that this rule, as stated by Lord Macnaghten in Ward v. Duncombe, 1893, A. C. 369, 390, "gives the go-by to all considerations founded upon the conduct of the parties." This rule, which is commonly, and it seems erroneously, styled the rule of Dearle v. Hall, 3 Russ. 1, might more properly be called the rule of Foster v. Cockerell, 3 Cl. & F. 456. It was applied in that case between incumbrancers of an equitable interest in trust funds.

Both Dearle v. Hall and Foster v. Cockerell are critically examined by Lord Macnaghten in Ward v. Duncombe, who said of the rule declared in Foster v. Cockerell:

"Priority in such a case depends simply and solely upon priority of notice,"

This shifting from a consideration of the conduct of both parties, and of the effect that the conduct of one might have had upon the other, to a consideration of the single question of priority of notice, was so radical a departure from the ordinary operations of the conscience of a chancellor as to evoke the remark from Lord Macnaghten that the court in Foster v. Cockerell "has gone perilously near legislating."

It is a general principle in courts of equity that, where both parties claim by equitable titles, the one who is prior in point of time is deemed the better in right. In protecting an innocent purchaser holding the legal title against one who has the prior equity, a court of equity can act only on the conscience of a party. If he has nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Boone v. Chiles, 10 Pet. 177, 210, 9 L. Ed. 388. But the question of conscience is as important between equitable titles as between a legal and an equitable title. The doctrine of equitable estoppel and the principles of negligence involve a consideration of the effect of conduct, whether action or inaction, upon the conduct of others.

When we disregard the question whether the failure of the first assignee to give notice has in fact misled or prejudiced the second assignee, and the further question whether the conduct of the obligor has been affected by the fact that notice of the second assignment preceded notice of the first assignment, there seems to be left no question of conscience and no established principle of equity which requires the reversal of the ordinary rule that he who is prior in time is prior in right.

In this case the statement of agreed facts fails to show that the second assignee made inquiry of the debtor before making its loan and taking its assignment. There is nothing which shows that it relied upon any knowledge except that furnished by the assignor, or that the failure of the first assignee to give notice influenced its conduct or that of the debtor.

I am unable to agree that the case of Dearle v. Hall, when stripped of its consideration of the important fact that the second assignee had made inquiry of the trustee and found no incumbrance before he made his loan, relying upon an apparent title, has been approved by the Supreme Court of the United States, in the cases cited by the defendant.

Judson v. Corcoran, 17 How. 612, 615, 15 L. Ed. 231, in dicta upon which defendant relies, makes express reference to the element of inquiry by the second assignee:

"There may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, * * * would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy.

"The cases of Dearle v. Hall and Loveridge v. Cooper * * * establish the doctrine to the foregoing effect in England."

In Spain v. Hamilton, 1 Wall. 604, 624, 17 L. Ed. 619, the junior transferees made inquiries. The defendant quotes from 1 Wall. 624:

"In order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

This relates to perfecting title, not against a subsequent assignee, but against the debtor. The expression "for otherwise a priority of right may be obtained by a subsequent assignee" is wholly insufficient as an approval of a rule that he may obtain it merely by giving first notice after taking the assignment.

In Baker v. Wood, 157 U. S. 212, 215, 15 Sup. Ct. 577, 39 L. Ed. 677; Judson v. Corcoran is cited in support of the rule of estoppel.

"We know of no case holding that a man is estopped by silence as against the public, or any particular person with whom he has no fiduciary relation."

See Wiser v. Lawler, 189 U. S. 260, 272, 23 Sup. Ct. 624, 629 (47 L. Ed. 802). See, also, Greey v. Dockendorff, 231 U. S. 513, 516, 34 Sup. Ct. 166, 58 L. Ed. 339.

The discussion of Dearle v. Hall and of Foster v. Cockerell, 3 Cl. & Fin. 456, by the House of Lords, in Ward v. Duncombe, [1893] App. C. 369, should be read before extending the doctrine of those cases which relate to the assignments of equitable interests to a case relating to the assignment of legal choses of action in accordance with the statutory law of a state. Lord Macnaghten said (page 391):

"The learned counsel for the appellants invited your Lordships to define exactly the principle on which the doctrine of notice as established by the rule in Dearle v. Hall depends. Speaking for myself, I think that would be a very hard task. I am not sure that the doctrine rests upon any very satisfactory principle. I am not sure that it has not been established at the expense of principles at least as important as any of those to which it has been referred.

"The general principle applicable to all equitable titles is, I think, well expressed by Lord Cairns in Shropshire Union Railways & Canal Company v. The Queen, L. R. 7 E. & I. 506: 'A pre-existing equitable title,' said Lord Cairns, 'may be defeated by a supervening legal title obtained by transfer'—he was there speaking of an equitable title to shares. Then he goes on: 'And I agree with what has been contended, that it may also be defeated by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title. But I conceive it to be clear and undoubted law, and law the enforcement of which is required for the safety of mankind, that in order to take away any pre-existing admitted equitable title, that which is relied upon for such a purpose must be shewn and proved by those upon whom the burden to shew and prove it lies, and that it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.'

"In defense of the rule in Dearle v. Hall, it has been said that notice is necessary in order to 'perfect' the title of the assignee—in order to 'complete' his title. Those expressions have frequently been used; but they are, I venture to think, little more than mere phrases. Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in Foster v. Cockerell. * * *

"Much of the reasoning in Dearle v. Hall is founded upon Ryall v. Rowels, 1 Ves. 348. Indeed, as observed by Wigram, V. C., in Wilmot v. Pike, 5 Hare, at page 19, it is impossible to read Sir Thomas Plumer's very elaborate judgment without seeing that his opinion as to the mode of transferring equitable interests in property not capable of actual delivery, 'was borrowed entirely from the decisions in bankruptcy as to the acts which were necessary

under the statute to take a chose in action out of the order and deposition of a bankrupt.' The doctrine of reputed ownership is entirely the creature of statute, and applicable by statute in cases of bankruptcy only. I cannot help thinking that, in extending the doctrine to cases of equitable assignment of personal property where there is no bankruptcy (which is practically what was done in Foster v. Cockerell), the court has gone perilously near legislating. The inconvenience of such a course is obvious, and the result has been singular. The law relating to reputed ownership in bankruptcy has been altered from time to time. When Dearle v. Hall was decided, it extended to all choses in action. Now it does not apply to choses in action at all, except to 'debts due, or growing due, to the bankrupt in the course of his trade or business.' But the rule in Dearle v. Hall founded in great measure on the bankruptcy law as it existed sixty years ago, remains unaltered, and it is beyond the power of any court to alter it.

"I am inclined to think that the rule in Dearle v. Hall has on the whole produced at least as much injustice as it has prevented. It was argued in Dearle v. Hall that notice to the trustees necessarily prevents fraud on the part of the assignor. 'The trustees,' said Mr. Sugden, 'are converted into a register, and by applying to them every one who proposes to negotiate for the purchase of the fund, except in the very improbable event of the trustees incurring personal responsibility by lending themselves to the vendor's dishonest purposes, is enabled to ascertain whether any prior incumbrances exist which will prevail over the title that is to be conveyed to him.' That argument was in substance adopted by the court."

In Lloyd's Bank v. Pearson, [1901] 1 C. D. 865, at page 872, Cozens-Hardy, J., said:

"I have carefully read Lord Macnaghten's judgment in Ward v. Duncombe, which I accept as a guide, but I do not profess to be able to discover any definite principle upon which the rule in Dearle v. Hall is founded. Nevertheless it must now be recognized as a positive rule, though it is not one to be extended."

In 1 Ames' Cases on Trusts, p. 326, is a note on Dearle v. Hall, and on page 327 a quotation from Meux v. Bell, 1 Hare, 73, in which an attempt was made to answer the objection that, if no inquiry is made, the puisne incumbrancer has not in point of fact been deceived or injured by the neglect of the prior incumbrancer. The answer seems to be that the second incumbrancer's notice has the effect of inquiry, and, if he is not told when he gives his notice that there is a prior incumbrance, he thenceforward relies, and may be injured by reliance after his notice.

In the present case, however, though the second assignee took its assignment on July 15, 1919, it gave no notice until on or about September 20, 1919, six days before the assignor, the Nelson Company, was placed in the hands of a receiver. Reliance during this period cannot take the place of reliance at the time of parting with its money, as a ground for estopping the first assignee by reason of its negligence.

That inquiry by the second assignee before making his loan would have disclosed nothing affords no reason for excusing inquiry. It is true that we cannot apply the rule that he who fails to make inquiry is bound by what inquiry would have disclosed. But we may apply the rule that there can be no estoppel of the first assignee without reliance by the second assignee, and that negligence of the first, which did not affect the conduct of the second, or of the debtor, has no more weight in equity than at law. In considering whether there was negli-

gence, we must consider the rule of diligence established by the state statute. Apparent ownership or reputed ownership does not mean a grantor's assertion of ownership. Ownership of the assignor is not otherwise apparent in a transaction like this until inquiry is made and no prior assignment found. Before that reliance is solely upon the word of the assignor.

The defendant relies especially upon decisions in the Second circuit, which it must be admitted approve its contention.

In the earlier case of In re Gillespie (D. C.) 15 Fed. 734, not cited by defendant, Judge Addison Brown qualifies the rule by the phrase:

> "And where the latter has used all due diligence by inquiry and notice, the equity of the latter is to be preferred over that of the former."

In the case of Methven v. Staten Island Co., 66 Fed. 113, 13 C. C. A. 362, the second assignee seems to have perfected his title by acceptance of the debtor. The recent case of In re Leterman, Becher & Co., 260 Fed. 543, 171 C. C. A. 327, however, drops all qualification from the rule and rests the decision squarely upon priority of notice. I find myself unable to agree with the decision of that court, though I have given it most careful consideration.

It is also held, but without discussion of the question, that the rights of successive assignees of the same fund presents a question of "general jurisprudence." This was first held by the Circuit Court of Appeals of the Second Circuit in Methven v. Staten Island Light, Heat & Power Co., 66 Fed. 113, 13 C. C. A. 362, and was followed in In re Leterman, Becher Co., Inc., 260 Fed. 543, 547, 171 C. C. A. 327. In the latter case it was said that an assignee of a chose of action who omits to give notice is guilty of the same neglect as he who leaves a personal chattel, to which he has assumed title, in the actual possession and under the absolute control of another person.

But it should be observed that this question as concerns chattels has repeatedly been held to be a matter of local law in cases relating to conditional sales and chattel mortgages. Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Bryant v. Swofford Bros., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997.

It is impossible to rely upon analogy to a fixed legal rule concerning reputed or apparent ownership of chattels, since the laws of the states differ widely on this subject. The courts of the United States have applied the rule that an assignee of a legal right of action, who may have a remedy in a suit at law in the assignee's name, has no right to equitable relief. Glenn v. Marbury, 145 U. S. 499, 508, 509, 12 Sup. Ct. 914, 36 L. Ed. 790.

Assignments of legal choses in action are in a different class from assignments of strictly equitable interests. The security acquired by the assignee is to be made effective through action at law. To establish by statute or by decisions of its courts legal rules which shall regulate a transfer of such a right seems beyond question within the power of a

state. Whether assignments shall be recorded in a registry, or what other steps shall be taken to perfect the transfer of A.'s legal right to B., is as truly a matter of local policy as are like questions concerning conditional sales of chattels.

If an assignment in writing delivered to the assignee is deemed sufficient, a court of the United States should not attempt to prescribe for the states a general rule of public policy which imposes conditions additional to or contrary to those prescribed by the laws of the state.

Can we say that the first assignment, wholly a Massachusetts contract, is not effective to pass to the assignee all the right which the assignor had at the time of assignment, because he did not notify the debtor, when by the law of the state it has been decided that he need not do so? Is he to be held negligent in failing to do what the law of the state holds he need not do? Is a citizen of Delaware doing business in Boston entitled to say that, though the first assignee has a perfect title against all citizens of Massachusetts, he has not such title against a citizen of Delaware? Is a debtor receiving notices from both before payment to be under an obligation in the state courts to pay the first assignee, and also under an obligation under federal law to pay the second assignee?

In order to do complete justice to all the parties, it seems necessary to provide for reimbursement of one of them by the assignor who has been paid twice. If the second assignee, who has been fraudulently induced to rely upon the assignor's statement, may, by giving notice, shift the consequences of this fraud to the shoulders of the first assignee in a federal court of equity, that court must be able to afford him a remedy against the assignor.

The consequences that may follow from adopting in the federal courts one general rule—the general rule that priority of notice gives priority of right—must not be ignored. As there are many states which, like Massachusetts, New York, and New Hampshire, reject the rule (see, also, 1 Ames' Cases on Trusts, 326, 327), it will override the laws of many states, unsettle rights under the laws of those states, and thus infringe the rule that the federal courts administer the laws of the state, and this, not upon a question of conscience, but upon a rule of policy which "gives the go-by to all considerations founded upon the conduct of the parties." Ward v. Duncombe, [1893] A. C. 369, 390. In Massachusetts or New York a second assignee might recover from the assignor on the ground of fraud or failure of consideration. The first assignee can, of course, have no right of recovery, since he has not been defrauded, he was not deceived, and the subsequent assignment was not in fraud of his right, since it did not deprive him of anything.

The assignor has been paid twice for the fund that he has assigned. The first assignee cannot in the state court recover his money from the assignor, because under the law of the state he received full consideration. The second assignee cannot in the federal court recover his money, because under the rule of "general jurisprudence" he received full consideration. The first assignee loses his right to the fund by the act of the second assignee, in giving notice which creates in him a

right by converting an assignment worthless under the law of the state into an assignment valid in a federal court of equity. The first assignee is thus penalized by a court of equity for a neglect which has not had the least effect upon the conduct of the second assignee.

It is not the function of a court of equity to punish negligence in the abstract; nor should a court of equity create a law of notice which circumvents the established rules of estoppel and negligence.

The confusion introduced in the English courts of a single jurisdiction by splitting the decision in Dearle v. Hall into two distinct parts—one the question of equitable estoppel by negligence; the other the question of superior diligence in giving notice to the debtor—is apparent from reading the case of Ward v. Duncombe. The confusion that will result from incorporating this rule of notice in the single system of equity administered by the federal courts, while dealing with transactions arising under the laws of many independent jurisdictions, is a sufficient practical reason for rejecting the rule. If in England the rule, as Lord Macnaghten has said, "has on the whole produced at least as much injustice as it has prevented," we should not adopt it as a fundamental rule of equity. It is not a rule of conscience, but at best a rule of doubtful and disputed policy as to the mode of transfer of substantial rights.

It is said notice must be given to protect third persons against fraud; but third persons who make no inquiry are not so protected, even if notice is given the debtor. It is inquiry of the debtor, and reliance upon the result of inquiry, a title apparently unincumbered, that may create an equity. Notice alone cannot create a right. A rule that requires notice but excuses inquiry is not a consistent rule of equity. A duty to give notice implies a duty to inquire. Halsbury's Law of Eng. vol. 4, § 821. Equity may require one to pay for the consequences of his negligence, but should not penalize negligence, when, as matter of fact, it did no harm.

Taking the decision in Dearle v. Hall as a whole, coupling together inquiry, reliance and notice, we have the rule as stated in Somerset v. Cox, 33 Beav. 634, 639:

"By means of it money may safely be lent on security of trust funds on ascertaining that the trustee has no notice of any prior incumbrance."

As an exception to the general rule that he who is prior in time is prior in right, this seems to be a reasonable rule, that can be administered without contradiction of the established principles of estoppel and laches. We are not required by the decisions of the Supreme Court to go further.

The further exception from that general rule of cases where the second assignee is prior merely in giving notice ex post facto is not supported by substantial reasons.

If it can be said that there is such a general probability of fraudulent action by an assignor as requires an assignee to take steps for the protection of third parties, in itself a doubtful proposition, it must also be said that this probability should equally call for an inquiry by an assignee for his own protection. It is not enough for him to inquire or give notice after he has expended his money. He cannot mend his

own neglect and protect himself by charging another with failure to protect him by giving notice which would not have warned him except on inquiry.

That the rule applied in Leterman, Becher Co., Inc., 260 Fed. 543, 549, 171 C. C. A. 327, is an arbitrary verbal formula, not based upon equitable principles, is illustrated by the decision on the facts of that case. The rights of assignees who dispatched notices by mail on the same day were determined by the comparative speed of a registered and an unregistered letter of notice in the mail. The first assignee, who took the reasonable precaution of registering his letter of notice, thereby made it slower and lost in the race. The clock created the superior equity.

The fact that the Supreme Court in Coleman & Co. v. Tawas Co., 250 U. S. 668, 40 Sup. Ct. 14, 63 L. Ed. 1198, denied certiorari in In re Leterman, Becher & Co., 260 Fed. 543, 171 C. C. A. 327, adds nothing to the authority of the case in the lower court. See Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U. S. 251, 257, 258, 36 Sup. Ct. 269, 60 L. Ed. 629.

Time is of the essence, or not of the essence, according to circumstances. When, as in this case, both notices reached the debtor long before the completion of the work, and long before the date of payment, and where the money was paid over upon the joint request of both, the time of the second assignee's notification seems wholly insignificant and unsubstantial.

As either assignment would exhaust the fund in controversy, it seems unnecessary, on the agreed facts, to discuss the difference between total and partial assignments, or between unconditional assignments and those made by way of mortgage or hypothecation. It is settled law that the legal effect of a transaction involving pledge or hypothecation depends upon the local law. Dale v. Pattison, 234 U. S. 399, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. (N. S.) 754; Taney v. Penn Bank, 232 U. S. 174, 34 Sup. Ct. 288, 58 L. Ed. 558.

I am of the opinion that we should give effect to the rights of the plaintiff appellant under the law of Massachusetts. I am also of the opinion that the defendant appellee has not established upon accepted principles of equitable jurisprudence a right to an equitable preference over the prior assignee.

UNITED STATES v. HOWE, District Judge, et al.

(Circuit Court of Appeals, Second Circuit. April 10, 1922.)

1. Criminal law ⇐1192—Trial court cannot change sentence after affirmance by appellate court.

Where the judgment in a criminal case has been affirmed by an appellate court, and a mandate issued directing its execution, the trial court is without power to change the sentence imposed on the defendant, though the term at which it was entered was extended and has not expired.

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

2. Mandamus ⟸58—Appellate court may enforce compliance with mandate by mandamus.

When a trial court proceeds contrary to the mandate of the appellate court, the latter court may enforce compliance with its mandate by writ of mandamus.

Original application by the United States for a writ of mandamus, directed to the Honorable Harland B. Howe, District Judge of the United States for the District of Vermont, and to the District Court of the United States for the Southern District of New York. Writ granted.

Certiorari denied, 257 U. S. —, 42 Sup. Ct. 590, 66 L. Ed. —.

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.

Samuel Hershenstein, of New York City (Edward T. McLaughlin, of New York City, of counsel), for respondent.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

ROGERS, Circuit Judge. This is an application by the government for a writ of mandamus directing the Honorable Harland B. Howe, District Judge of the United States for the District of Vermont, and the District Court of the United States for the Southern District of New York, commanding the cancellation and annulment of an order and certain proceedings taken by Judge Howe in the District Court for the Southern District of New York on December 3, 1921, in relation to and in connection with the judgment of conviction entered in that court against one Joseph Rosenblatt on February 21, 1920, to the end that such judgment may be carried into execution as it was originally entered.

It appears that on November 3, 1919, an indictment was returned into the District Court of the United States for the Southern District of New York which charged the said Rosenblatt and certain other persons named therein with having committed an offense against the United States in violation of the Act of Congress approved on February 13, 1913 (37 Stat. 670). Rosenblatt was convicted, the jury returning a verdict of guilty on certain of the counts, on February 20, 1920. On the next day, February 21, 1920, District Judge Howe, who presided at the trial, and who had been duly assigned and designated to hold the term of court, sentenced Rosenblatt to serve a term of six years in the United States penitentiary at Atlanta, Ga., upon each of the counts upon which he had been found guilty; such terms of imprisonment to run concurrently.

A writ of error was duly issued and allowed, and the case was brought to this court for review; and on January 12, 1921, the cause having been duly and regularly heard, the court filed its opinion affirming the judgment. Rosenblatt v. U. S., 271 Fed. 435. On January 31, 1921, the mandate of this court was duly issued. It was ordered, adjudged, and decreed that the judgment of the District Court be and the same thereby was affirmed, and the judges of the District Court for the Southern District of New York were therein commanded:

"That such further proceedings be had in said cause, in accordance with the decision of this court, as according to right and justice and the laws of the United States, ought to be had, the said writ notwithstanding."

Thereafter, and on February 2, 1921, an order was made by Hon. Augustus N. Hand, District Judge of the United States for the Southern District of New York, wherein it was ordered, adjudged, and decreed that the mandate of this court be made the judgment of the District Court of the United States for the Southern District of New York, and it was further ordered that the said judgment be carried into effect and execution; and on February 3, 1921, the said order and mandate of this court were filed in the office of the Clerk of the District Court.

Then it appears that thereafter, and on December 3, 1921, District Judge Howe caused an order to be entered in the office of the clerk of the District Court for the Southern District of New York in which he directed that the term and sentence of six years imposed upon Rosenblatt be stricken off, and that he be arraigned again, whereupon the said judge resentenced Rosenblatt and directed that he serve a term of imprisonment for 3 years on each count, the sentences to run concurrently. This he did over the objection of the United States attorney, an exception being taken and allowed.

The minutes of the clerk of the court show that this action was taken on hearing a motion for a new trial; that further evidence was introduced and considered; that the petition for a new trial was denied, and the action setting aside the original sentence for six years was "stricken off," and the new sentence of three years was imposed. Then follows this entry:

"The court thinks it has the power to do this because, during the trial, the term was extended for all purposes until January 1, 1925. Time for defendant to surrender to United States marshal is extended until December 12, 1921, 10:30 a. m."

The right of a trial court during the trial of a case, whether civil or original, to extend the term, is so well established a principle of law that any extended reference to the authorities is not necessary. We discussed the subject to some extent in Freeman v. United States, 227 Fed. 732, 142 C. C. A. 256 (1915), a criminal case, and we find no occasion now to add to what we then said. It will also be conceded that a court, both in civil and criminal cases, has power over its own judgments during the term at which they were made. The authorities hold that the court which pronounces sentence in a criminal case may thereafter, but during the same term, revise and correct the sentence imposed, and may increase or diminish the severity of the original sentence.

In 1869 the Supreme Court had occasion to consider this subject in Bassett v. United States, 9 Wall. 38, 19 L. Ed. 548. The court held it to be competent for the trial court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction on confession, though the defendant had entered upon the imprisonment ordered by the sentence. That case does not appear to have been very fully argued by counsel, and the opinion of the court, which covers little

more than a single page and was written by Mr. Justice Miller, states that "this control of the court over its own judgment during the term is of everyday practice." It cites two cases only. King v. Price, 6 East, 323; Sun Cheong-Kee v. United States, 3 Wall. 320, 18 L. Ed. 72.

In 1873 the court again had occasion to consider the subject, in Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Mr. Justice Miller again writing the opinion of the court. He refers to Bassett v. United States, and says:

"The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable. And this is the extent of the proposition intended to be decided in the case of Bassett v. United States. * * * In general terms, without much consideration, for no counsel appeared for the sureties, this court sustained the right. If it was intended in that case to raise the question of the right of the court to inflict a new and larger punishment on the prisoner, without reference to the time of his imprisonment on the one set aside, that point was not presented, so as to receive the attention of the court, and certainly was not considered or decided."

In Ex parte Lange the subject was carefully considered, and the decision of the court covers some 13 pages, and there is a long dissenting opinion by Mr. Justice Clifford, which occupies nearly 27 pages. Mr. Justice Strong dissented, but filed no opinion. The court held that, when a court had imposed a fine and imprisonment, where the statute only authorized punishment by fine or imprisonment, and the fine had been paid, it could not, even during the same term, modify the judgment by imposing imprisonment, instead of the former sentence. The defendant had been sentenced on November 3, 1873, to one year's imprisonment and to pay a fine of $200. On the next day he paid the fine to the clerk of the court, and the latter, on November 7, 1873, paid the same into the treasury of the United States. On November 8th of the same month the judge who imposed the sentence entered an order vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment from that date. The case came before the Supreme Court on petition for writs of habeas corpus and certiorari, and the court ordered the prisoner discharged. In the course of its opinion the court said (18 Wall. at page 174, 21 L. Ed. 872):

"If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term, and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for $200 fine after vacating the first. Nor are we prepared to say, if a case could be found where the first sentence was wholly and absolutely void, as where a judgment was rendered when no court was in session, and at a time when no term was held—so void that the officer who held the prisoner under it would be liable, or the prisoner at perfect liberty to assert his freedom by force—whether the payment of money or imprisonment under such an order would be a bar to another judgment on the same conviction. On this we have nothing to say, for we have no such case before us."

We shall not refer to the dissenting opinion, further than to point out that it proceeds upon the theory that the first sentence was void, the court's resentence was valid, and that the Supreme Court did not

possess appellate power over judgments in criminal cases, except in a limited class of cases, and that the case did not fall within the exceptions.

Counsel for the respondent relies, in the case now before us, upon Ex parte Lange, and especially upon the statement already quoted that—

"The general power of the court over its own judgments * * * during the existence of the term at which they are first made is undeniable."

But, while a court has, as a general rule, power over its judgments during the term, its power over them is clearly subject to certain restrictions. Thus it has been held that, after a sentence has been pronounced, but before the final judgment has been signed, the court may change the sentence. People v. Thompson, 4 Cal. 238; Jobe v. State, 28 Ga. 235. Ex parte Lange itself clearly indicates one of such restrictions. And another restriction is that if a sentence has been put into operation, and the person sentenced to imprisonment has been actually committed to prison and commenced to serve his term, the power of the court to alter or amend the sentence is gone. Thus in Commonwealth v. Weymouth, 2 Allen, 144, 147 (79 Am. Dec. 776), the Supreme Court of Massachusetts in 1861 said:

"Until something was done to carry the sentence into execution, by subjecting the prisoner to the warrant in the hands of the officer, no right or privilege to which he was entitled was taken away or invaded, by revoking the sentence first pronounced, and substituting in its stead the one under which he now stands charged. If it had appeared that the petitioner had actually been taken and committed under the first sentence, or if he had been thereby condemned to imprisonment in the state prison, so that the term of his sentence would be computed from the time he was first ordered to remain in the custody of the sheriff, according to St. 1859, c. 248, we might have arrived at a different result; but, on the record as it stands, we are all of opinion that the order must be: Prisoner remanded."

In People v. Dane, 81 Mich. 36, 45 N. W. 655, sentence was imposed on February 1, 1890, and on February 5, 1890, a different sentence was imposed. It was held that, as nothing had been done by way of carrying the first sentence into execution, the second sentence was valid. So in State v. Hughes, 35 Kan. 626, 12 Pac. 28, 57 Am. Rep. 195, it was held that until the term ends a trial court may revise or increase a sentence, where nothing has been done under the sentence first pronounced. In State v. Dougherty, 70 Iowa, 439, 30 N. W. 685, the court declares that the power of courts to revise their sentences—

"at the term at which they are pronounced, and before anything has been done under them, has long been recognized both in this country and in England, and the cases are numerous in which the power has been exercised."

In the case of In re Jones, 35 Neb. 499, 502, 53 N. W. 468, 469, the court declared that the trial judge had—

"no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court."

And the same doctrine is held in State v. Cannon, 11 Or. 312, 2 Pac. 191.

Bishop's New Criminal Procedure, vol. 2, § 1298, states that—

"The power of the court to alter its docket entries and records during the term wherein they are made includes the right within such time to revise, correct, and change its sentences, however formally pronounced, if nothing has been done under them. But steps taken under a sentence—for example, a substantial part execution thereof—will cut off the right to alter it, even during the term; and with the expiration of the term the power expires."

[1] Another restriction upon the power to alter or amend a judgment is that such power does not exist after the judgment has been affirmed by the appellate court. In the federal courts, after an appellate court has decided a case brought before it on writ of error, it sends its decision down to the court below, whose proceedings have been reviewed, by means of a mandate, which directs that court to enforce or reverse and set aside the judgment as the case may be; and the jurisdiction of the court below, which was lost by the suing out of the writ of error, is reacquired when such a mandate is filed with it. Now we understand it to be well-established law that a judgment which the appellate court has affirmed, and by its mandate directed the court below to enforce, cannot thereafter be altered in any way by the lower court, and that irrespective of whether the term was extended or not. In Encyclopædia of Pleading and Practice, vol. 13, p. 850, it is correctly laid down that—

"The judgment of the appellate court cannot be modified or vacated by the lower court on the remand to it of the case, nor can the lower court alter or modify the judgment originally entered by it."

In the case of In re Sanford Fork & Tool Co., 160 U. S. 247, 255, 16 Sup. Ct. 291, 293 (40 L. Ed. 414), the Supreme Court said:

"The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded."

The above statement of the law is alike applicable to civil and criminal cases, and the fact that the term has been extended is quite immaterial. The judgment which was before this court was in law disposed of and finally settled by our decision, and is the law of the case beyond the power of the court below, which must carry it into execution according to the mandate. Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167. And this principle of law cannot be set aside by the trial court, and its power enlarged, by merely extending the term for a period of years.

There is a phase of this matter to which reference may be made before bringing this opinion to a conclusion. This court sits to review *final* orders, decrees, and judgments. "Final judgment," according to Bouvier, "is one which puts an end to a suit." It is used in contradistinction to a judgment which is only intermediate, and does not finally determine or complete the suit, which is known as an interlocutory judgment. In Bishop's New Criminal Procedure, vol. 2, § 1364, that writer,

treating of writs of error, lays down the proposition that "this writ lies only to correct the final judgments of courts of record in their doings, after the course of the common law"; and it is added that if a proceeding has not progressed to final judgment, or if the court is not one of record the corresponding remedy is certiorari. And again in section 1366 the same writer says:

"Only a final judgment, disposing of the whole cause, including all the counts, can be reviewed on a writ of error."

If a judgment of conviction, after it has been affirmed by this court, and a mandate sent down directing it to be carried out, can be set aside by the District Court, and a new and different sentence imposed, it ought to be entirely clear to any one that the judgment which has been affirmed and sent down would not be a final judgment, because it would not be one which finally determined the suit; and if, by extending the term for a sufficiently long period, the court could reserve to itself the power to alter any judgment sent down, it could continue the process indefinitely, and no judgment could be final.

[2] When the lower court proceeds, contrary to the mandate of this court, it interferes with this court's jurisdiction, as we held in Muir v. Chatfield, 255 Fed. 24, 27, 166 C. C. A. 352. And there is no doubt as to the power of this court to issue a writ of mandamus to compel the court below to proceed to enforce the judgment according to the mandate. McClellan v. Carland, 217 U. S. 268, 280, 30 Sup. Ct. 501, 54 L. Ed. 762; In re Washington & Georgetown Rd. Co., 140 U. S. 91, 94, 95, 11 Sup. Ct. 673, 35 L. Ed. 339; United States v. Swan, 65 Fed. 647, 648, 13 C. C. A. 77.

A writ of mandamus is granted, commanding the respondents to vacate the order of December 3, 1921, which set aside the sentence of six years imposed upon Rosenblatt on February 21, 1920, and the resentence of Rosenblatt on December 3, 1921, to serve a term of imprisonment for three years, and commanding them to render judgment on the mandate of this court of January 31, 1921, in accordance with its terms and not otherwise.

SUGAR PRODUCTS CO. v. ST. THOMAS SHIP BROKERS' ASS'N.
THE EDGEWOOD.

(Circuit Court of Appeals, Third Circuit. April 4, 1922.)

No. 2702.

1. Admiralty ⇐103—Judgment confirming attachment on vessel and cargo held final and appealable.

A judgment rendered by the District Court of the Virgin Islands in conformity with the Danish law, confirming a writ of attachment against a vessel and her cargo for services rendered to her when she put into port in distress, and declaring plaintiffs entitled to execution against the vessel, her freight and cargo, is a final judgment entered in due course of local law, which was compatible with the changed sovereignty, and from which an appeal would lie.

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

2. Admiralty ⊜117—Case is tried de novo on appeal.
Where the claimants of a cargo appeared and gave bond to release the cargo from attachment after the attachment had been confirmed by the District Court for the Virgin Islands, and the record returned to the sheriff court for execution, and took an appeal on the record made in the District Court, without attacking the judgment of the District Court in the sheriff court, the libelant is entitled to have the case tried de novo on appeal; it being an admiralty case.

3. Admiralty ⊜117—Appeal held not to raise questions as to liability of freight and demurrage due vessel.
An appeal from a judgment of the District Court of the Virgin Islands, sustaining an attachment against a vessel and her cargo and freight, but awarding execution only against the vessel, and the cargo, does not raise any question as to the liability of the demurrage and freight due the vessel from the cargo owner for the charges of plaintiffs, which were for services rendered when the vessel put into port in distress.

4. Salvage ⊜37—Cargo of disabled vessel held liable only for charges for discharge and protection.
Where a vessel put into port in distress, the cargo is liable to attachment in a suit by those who rendered assistance to her in the port only for services rendered in the discharge and protection of the cargo.

Appeal from District Court of St. Thomas and St. John, Virgin Islands; Thiele, Judge.

Libel in attachment by the St. Thomas Ship Brokers' Association against the schooner Edgewood and her cargo, in which the Sugar Products Company appeared and gave bond to release the cargo from attachment. From a judgment sustaining the attachment, and awarding execution for the amount of libelant's claims, the Sugar Products Company appeals. Reversed in part, and affirmed in part, and case remanded for modification of the judgment.

Barry, Wainwright, Thacher & Symmers, of New York City (Dallas S. Townsend and James K. Symmers, both of New York City, of counsel), for appellant.

Purrington & McConnell, of New York City (Frank J. McConnell and William A. Purrington, both of New York City, Denzil Noll, John L. Curry, and A. E. Stakemann, all of St. Croix, Virgin Islands, of counsel), for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal in another case in admiralty against the Schooner Edgewood, prosecuted through courts of the Virgin Islands under Danish law. The origin of the case and the main features of its procedure are given in the opinion of this court in Sugar Products Co. v. A. H. Lockhart, just decided, 279 Fed. 348. There are differences in the two cases as tried below, but the main difference in the appeals is with respect to the appellate jurisdiction of this court. While the former appeal was taken from action of the court which was not final, the instant appeal was taken from a judgment which is, without doubt, final. This appeal, therefore, stands clear of any question of jurisdiction.

The Schooner Edgewood, bound from Barbados to New York with a cargo of 210,000 gallons of molasses, put into the port of St. Thomas in distress. The St. Thomas Ship Brokers' Association, a company or firm of two members, gave her assistance. Failing reimbursement, the Association filed in the Sheriff Court of St. Thomas and St. John a præcipe showing a claim for $16,904.79, local currency, for disbursements made; alleging that they had been necessary to preserve the schooner and protect her cargo; and praying for an attachment against the schooner "and her cargo." Attachment followed.

These proceedings, as in the other case, were then transferred by exemplified copy to the District Court of St. Thomas and St. John. From this court there issued a summons to the captain of the schooner to appear on a named day "to hear demands for the confirmation" of the attachment previously issued and also "to hear judgment for the payment of the aforesaid claim held by the said St. Thomas Ship Brokers' Association against the said Schooner Edgewood and her cargo and owners originating for disbursements made to the said vessel" for the amount named. Following the summons, the plaintiffs filed an itemized statement of their claim and a plea requesting that the proceedings before the Sheriff Court be confirmed. On the return of the summons, the District Court considered the plaintiffs' evidence, which so far as the record discloses consisted merely of a bill of particulars showing disbursements, supported by the captain's admission that the same were correct "as far as he saw."

The process, when analyzed, appears to be in the nature of foreign attachment based on the absence from the country of the owners of the attached property, supplemented by a proceeding peculiar to Danish law providing for a summons to the person in possession of the property attached. It may be said just here in answer to a point made by the appellant, that, while the captain of the schooner admitted the indebtedness, we do not understand that the court based its decision on his admission as binding the owner of the cargo, but rather on the plaintiffs' proofs of the indebtedness and the right which the Danish law gave them to proceed against property of an absent owner in the manner peculiar to foreign attachment.

[1] The District Court entered judgment for the plaintiffs, doing several things: First, it confirmed the writ of attachment; second, after reducing the amount of counsel fees, it awarded the plaintiffs Frcs. 78,759.50; and, third, it found that unless the same were paid within three days after notice to the captain the plaintiffs were "entitled to execution against the said British Schooner Edgewood of Montreal, her appurtenances and freight *and against her cargo,* as far as necessary to satisfy" the same. This we regard to be a final judgment, entered in due course of local law, which—the action being quasi in rem—is quite "compatible with the changed sovereignty." See Sugar Products Co. v. A. H. Lockhart, 279 Fed. 348.

[2] The plaintiffs then returned to the Sheriff Court where, presenting a copy of the judgment of the District Court, they requested execution against the schooner, "her hull and all standing and running gear and her cargo." Execution then issued against the schooner, "her

hull and all standing and running gear and also in 110,000 gallons of her cargo." It should be noted that the execution did not run against her "freight." As payment was not forthcoming, the plaintiffs then went into the Auction Court of St. Thomas and St. John and proceeded to have the schooner and "part of her cargo" appraised and advertised for sale. At this juncture the Sugar Products Company, owner of the cargo, appeared and gave bond for the purpose of taking this appeal, with the effect of releasing the cargo from the attachment. Without attacking the judgment in the District Court, as the plaintiffs claim it might have done under Danish law, Sugar Products Company took this appeal on the record made in the District Court, and now (this appeal being in admiralty) asks us, quite correctly, to try the case de novo. The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542; Reid v. American Express Co., 241 U. S. 544, 548, 36 Sup. Ct. 712, 60 L. Ed. 1156; Duche & Sons v. The John Twohy, 255 U. S. 77, 41 Sup. Ct. 251, 65 L. Ed. 511; Clen v. Jorgensen (C. C. A.) 265 Fed. 120.

[3, 4] What questions does the record raise for trial? The answer may be made by determining what questions are not raised for trial. Upon the case as made, we are not required to decide whether under Danish law a debt due by the cargo to the schooner for demurrage can be recovered only by the owner of the schooner or may be reached by an execution creditor. On a like question affecting freight due by the cargo to the ship, we say, without deciding, the appellant has not satisfied us that the local law is different from that under which the District Court included "freight" in its judgment. The reason these questions do not call for decision is, they are not raised on this appeal. The judgment of the court, confirming the attachment, awarded execution against the schooner "her appurtenances and freight and against her cargo" and the execution which later issued was against the schooner, her hull and gear "and also in 110,000 gallons of her cargo." The basis of this judgment and execution was "disbursements incurred as necessary expenses to maintain the vessel and protect the cargo." Obviously, the plaintiffs in this suit neither asked for nor were they awarded judgment against the cargo for demurrage due the schooner. Though awarded judgment against the "freight," the plaintiffs did not request execution against the freight but, pursuant to the terms of their request, had execution only against the schooner and "110,000 gallons of her cargo." The case as made on appeal, therefore, resolves itself into issues of fact as to the proper allowance of the many items in the plaintiffs' bill of particulars of disbursements. These stand or fall, in the dearth of supporting evidence, according as the items are such as, within principles of maritime law, can be asserted against cargo as distinguished from their assertion against the schooner. This is made the more difficult because of the paucity of evidence showing the date of the separation of cargo and ship and the termination of the venture. It should here be noted that we are dealing only with the items composing the money award of the judgment which have to do with the liability of the cargo for their payment, not with the liability of the schooner. Keeping in mind that the disbursements for the "cargo" for which it is liable in maritime law are, on the record, only those made

for its discharge and protection, as represented by the plaintiffs in their claim and plea and as forming the basis of the court's judgment in confirming the attachment and awarding execution, we shall, without discussing them, dispose of the items one at a time, resolving all questions of doubt in favor of the judgment.

Applying a maritime test to each item, the following are disallowed as claims against the cargo:

Sundry cables to owners in Montreal	$228.98
Cable to St. Johns, New Brunswick	4.40
Sundry automobile hire, cab hire, labor, messenger, etc.	40.40
Surveys on schooner as per receipt on surveys	104.64
Sundry ship's laundry	23.40
E. L. Simmons for survey on hatches of vessel	17.44
Bill Public Health Service for medical attendance	93.47
Sundry amounts paid out for repairs, motors, etc.	136.43
Bill Grand Hotel for meals supplied Capt. Richter	153.69
Bill Sailors' Home for feeding crew	28.61
Bill Royal Mail St. Thomas Dock Co. for repairs, etc.	152.26
Wages for Capt. Richter	1,500.00
Lawyers' fees for legal advice and detention on case	1,500.00
5% commission on disbursements ($14,671.23 local currency)	733.56
Agency fee attending to vessel's business	1,500.00
Total	$6,217.28

The amount of $6,217.28, local currency, must, therefore, be deducted from the total award of the judgment, leaving only the balance thereof with interest thereon to be asserted against the bond now standing in lieu of the lien.

The judgment of the District Court is reversed in part and affirmed in part and the case is remanded to the District Court for modification of its judgment in conformity with this opinion; the costs of this appeal to be divided equally between the parties.

JOSÉ TAYA'S SONS CO., OF NEW ORLEANS, v. COMPANIA ARRENDATARIA DE TOBACOS DE ESPANA.

(Circuit Court of Appeals, Second Circuit. April 3, 1922.)

No. 223.

1. **Admiralty ⇐5—Court held to have properly assumed jurisdiction.**
Libelant, an American corporation, as agent for a Spanish shipowner, contracted for carriage of a cargo from the United States to Spain with an American firm, which was acting as agent for a Spanish corporation, but such fact was not known to libelant. *Held*, that a court of admiralty of the United States should not decline to take jurisdiction of a suit by libelant against the undisclosed principal to recover freight under the contract.

2. **Evidence ⇐37—Laws of foreign country to be proved as facts.**
A law of Spain, which affects only persons within its jurisdiction, when invoked in a court of the United States, must be proved as a fact.

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3. Shipping ⟸147—Contract of carriage held valid under Spanish law.

Under a Spanish royal order fixing a maximum rate of freight on tobacco from the United States to Spain, with a proviso that "agents abroad of Spanish vessels shall charge freely according to the varying exigencies of the moment in the market, and shall abide by the prevailing rates," a contract for a higher rate, made by an American agent of a Spanish shipowner, *held* valid and enforceable.

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

Suit in admiralty by José Taya's Sons Company, of New Orleans, against the Compania Arrendataria de Tobacos de Espana. Decree for libelant, and respondent appeals. Affirmed.

Respondent appeals from a decree of the District Court awarding to libelant $36,107.98, with interest. Libelant will be referred to as Taya's Co., and respondent as Compania, and Kremelberg & Co. as Kremelberg.

Taya's Co. is a Louisiana corporation, which was acting as agent for the steamer Rita and its owner, Hijos de José Taya, a Spanish firm having its main office in Barcelona. Kremelberg was an American partnership, which was the agent of Compania, which is a Spanish company, familiarly referred to as the Spanish Tobacco Monopoly, having its office at Madrid. By Freije, its vice president, Taya's Co. entered into a freight contract with Kremelberg through Magnus, a ship broker, providing for the carriage of 1,000 hogsheads of Kentucky leaf tobacco on the Rita in February, 1919, to Santander, Spain, at an agreed rate of $66 per 40 cubic feet.

The District Court found as a fact, and we accept the finding, that Freije had no knowledge of the relations between Kremelberg and Compania and assumed that Kremelberg were acting for themselves in making the contract. After the cargo had been loaded, Kremelberg notified Taya's Co. that expected drafts had not arrived, and requested Taya's Co. to issue a bill of lading providing for payment of freight at port of destination. Under date of February 21, 1919, Kremelberg wrote a letter to Taya's Co., which, after making the request indicated, stated: "We acknowledge that freight is earned, ship lost or not lost, and consequently take this opportunity to assure you that we have insured the ocean freight charges against both marine and war risk." Complying with this request, Taya's Co. wrote on the bill of lading, which had been dated February 17, 1919: "Freight payable at port of destination."

The ship sailed in due course, and the tobacco was discharged in Spain in proper condition, but the freight was not paid in accordance with Kremelberg's agreement. The master then commenced what is known in Spain as a "voluntary proceeding" in an attempt to hold the cargo for the freight. This proceeding was of a kind familiar to our jurisdiction as a proceeding in rem, and was not a suit in personam against Compania, nor was it under Spanish procedure considered as a litigation between parties. Compania intervened, and raised the point that under Spanish law the steamship could not collect a rate higher than 66 centimos per kilo, which amounted to $97,395.51. This intervention ended the voluntary proceeding and created a situation of litigious proceedings. Compania thereupon tendered the amount of undisputed freight, offered a cash deposit to secure the disputed balance, and demanded the release of the tobacco. After protest, the master of the vessel consented to the order releasing the offered security and dismissing the proceedings without prejudice to Taya's Co.'s right to take any other action it might see fit for a recovery of the balance of freight. The cargo was released and an order without prejudice was duly made.

Demand of payment of the balance due on the freight was then made of Kremelberg by Taya's Co., and Kremelberg for the first time, on June 23, 1919, informed Freije that "they were only the agents in this country of the Compania," and could do nothing further than to submit the demand to their principals. Certain proceedings were had in the District Court for the South-

ern District of New York, in the course of which an agreement was entered into by which a New York bank agreed to hold $40,000 belonging to Compania to pay the amount of any ultimate recovery in either of the two suits brought by Taya's Co., namely, this suit and one against the Kremelberg partnership.

It appears that by virtue of a royal order of the Spanish government, dated January 31, 1919, the maximum rate of freight on tobacco from the United States to Spain was 66 centimos per kilo. On the current rate of exchange, if this royal order was applicable, Taya's Co. was not entitled to more than $97,395.51; i. e., less than the agreed freight. One of the provisions of this royal order was as follows:

"Article 3. The agents abroad of Spanish vessels shall charge freely according to the varying exigencies of the moment in the market, and shall abide by the prevailing rates."

Taya's Co. contends that, if the contract is controlled by the Spanish law, then this provision is in its favor and permitted it to contract freely in a foreign port with Kremelberg. Judge Augustus N. Hand held that Kremelberg was the agent for Compania, that the latter was liable under the contract, and that the clause quoted supra permitted Spanish shipowners freely to contract in ports outside of Spain.

George H. Corey and James K. Symmers, both of New York City, for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine and Harry D. Thirkield, both of New York City, of counsel), for appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge. [1] No question is raised as to the jurisdiction of the District Court as matter of right between the libelant Louisiana corporation and the respondent. The point most strongly urged and ably argued is that the court below, as matter of discretion, should have declined to entertain jurisdiction on the ground that the real contracting parties were Spanish subjects, that the subject-matter of the contract was controlled by Spanish law, and that, in view of the conflict of testimony as to the interpretation of the Spanish law, the courts of Spain were more competent to construe the Spanish law than the courts of this country.

If each contracting party knew that the other was a Spanish subject, the suggested question of discretion might be seriously debatable. The situation, however, is quite different when the fact, as found, is that one of the parties, in this instance the steamship company, supposed that it was contracting with American citizens and prior to the contract was not informed to the contrary. Had libelant known that it was contracting with Compania, it might very well have preferred to reserve this freight space for some shipper other than a Spanish subject, and thus have obtained freight at a rate in excess of that which was permissible under the royal order as between Spanish subjects. While libelant is the agent of a Spanish steamship, it is nevertheless an American corporation, and, as such, is subject to taxes and all the other duties and obligations resting upon similar corporations. It therefore is entitled to bring a cause into the appropriate court, and on the facts in this case we think we cannot justly shirk responsibility of decision and remit the parties to a litigation in Spain. If it be held that the Spanish law does not apply, obviously libelant was entitled to

the recovery asked, in view of the due performance of its contract, and the undisputed fact that Compania was the undisclosed principal, which is now known.

[2] Passing by various points urged by libelant in support of the decree below, we shall approach the consideration of the case from the standpoint most favorable to Compania and that is that the Spanish law applies. The royal order here involved was of a character which affected only persons within the jurisdiction of Spain, and comes within the class described by Chief Justice Marshall in The Amelia, sub nom. Talbot v. Seeman, 1 Cranch, 1 and 37, 2 L. Ed. 15, when he stated:

"That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts * * * cannot be questioned."

See Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 445, 446, 9 Sup. Ct. 469, 32 L. Ed. 788; Chamberlayne on Evidence, § 1211 et seq.; 16 Cyc. 896 et seq.; 15 R. C. L. 1069–1071; 25 R. C. L. 948; The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

[3] What, as matter of fact, is the Spanish law in this case, in the sense of its meaning and construction was therefore provable by expert testimony. The provision requiring construction is article 3 of the royal order, quoted supra. Experts were called by both sides, and there was an interesting conflict between their testimony. Leonardo Rodriguez had been minister of supplies, and as such had exclusive jurisdiction over the regulation of the freight charges set forth in the royal orders of the ministry, and had studied, among others, the royal order of January 31, 1919, promulgated by the ministry. On behalf of Taya's Co., he testified that, as the Rita was not under requisition, the freight rate "could be contracted freely under the provisions of article 3 of the aforesaid royal order of January 31, 1919, without being limited to the standard rate fixed in the same royal order, because such standard rate refers only to requisitioned vessels and to contracts made in Spain," and that in the circumstances of this case the contract was permitted by the terms of article 3, and that the freight should have been paid, at the contract rate.

With regard to the reasons for including the provisions of article 3 in the order of January 31, he testified that the ministry of supplies recognized the burden which the freight limitations placed on certain classes of citizens, and that the ministry was endeavoring to alleviate this situation as much as possible. He said:

"It was with this in view, precisely, that article 3 was inserted in the royal order above mentioned in order that the Spanish shipowners, who were already carrying the burden of certain restrictions for the benefit of the country at large, should not be subject to those restrictions except in those cases in which the state deemed it necessary for the national service. * * *"

Luis Rodriguez de Viguri, a member of the "illustrious bar of Madrid" and honorary academician of the Royal Academy of Jurisprudence, apparently an official of high equipment, testified to the same effect, and also testified that he had prepared a reply in response to a letter from Taya's Co. on behalf of the Spanish committee on

maritime traffic, which had issued the royal order, acknowledging the freedom of foreign agents to contract without respect to the freight rates prescribed by the order by reason of the provisions of article 3. Calvell, another witness, testified similarly.

In opposition to the foregoing, Manuel Andujar, a captain in the Spanish navy, testified to the contrary on behalf of the Compania, as did also Juan Romero Araoz, also a navy captain. These witnesses also testified that, in reply to the inquiry of Compania, the committee had ruled that the freight was subject to the limitation of 66 centimos per kilo; but on cross-examination it appeared that this inquiry was confined "to inquiring what the freight rate was on the transportation of tobacco made by the steamship Rita." In other words, it does not appear that the ruling of the committee was based on a full and correct statement of facts. While, therefore, the ruling of the committee ordinarily would have been a fact of great importance in determining what the Spanish law was, such importance does not exist when it does not appear that the vital fact was before the committee upon which to base a ruling serviceable for the purpose of interpreting the Spanish law, namely, that the contract was made in a foreign port and with an American business concern. In addition to the foregoing is the testimony of a similar tenor in support of Compania given by Edwardo Cobian y Fernandez de Cordobo, apparently a lawyer of standing.

Reviewing the testimony of the experts, we are of opinion that the District Court was fully justified in concluding that the "inevitable meaning" of article 3 was that the freight agreement was valid under the laws of Spain, and that its purpose was to give Spanish shipowners the same rights to contract freely as were possessed by foreigners in foreign ports. So holding, it follows that the decree below was right.

Decree affirmed, with interest and costs.

JOSÉ TAYA'S SONS CO., OF NEW ORLEANS, v. BRASSLER et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1922.)

No. 258.

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

Suit in admiralty by the José Taya's Sons Company, of New Orleans, against Charles A. Brassler and others, doing business as Kremelberg & Co. Decree for respondents, and libelant appeals. Affirmed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine and Harry D. Thirkield, both of New York City, of counsel), for appellant.

George H. Corey and James K. Symmers, both of New York City, for appellees.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge. In view of our decision in the case between this libelant and Compania Arrendataria de Tobacos de Espana, 280 Fed. 825, decided contemporaneously herewith, we regard this case as moot, and for that reason the decree dismissing the libel is affirmed, without costs.

PINTSCH COMPRESSING CO. v. BUFFALO GAS CO. NEW YORK TRUST CO. v. SAME. In re CHURCH.

(Circuit Court of Appeals, Second Circuit. April 3, 1922.)

No. 124.

1. **Corporations ⟨⟩476(1)—Mortgage by public utility corporation of after-acquired personal property necessary to operation valid.**

The rule of the New York courts, which governs the federal courts in dealing with local public utility corporations, is that a mortgage by such a corporation is valid in respect of after-acquired personal property necessary and appropriate for its physical operation under its franchises and the performance of its public duty.

2. **Gas ⟨⟩8—Gas company mortgage, with after-acquired personal property clause, held to cover implements, materials, and supplies necessary for manufacture and distribution.**

The after-acquired personal property clause in a mortgage given by a gas company to secure bonds *held* valid as to implements, tools, material, and supplies necessary and used in the manufacture and distribution of gas, but not to cover gas stoves and fixtures kept for sale to consumers.

3. **Gas ⟨⟩8—Earnings of gas company prior to receivership held not subject to mortgage.**

Under a provision of a mortgage by a gas company, giving it the right to the rents, income, and profits of its business until default, cash and accounts receivable in its possession at the time of a foreclosure receivership are not subject to the lien of the mortgage.

4. **Corporations ⟨⟩566(1)—Deposits by consumers with gas company held entitled to priority on insolvency.**

Deposits made by consumers with a gas company pursuant to a statute authorizing the company to require such deposits before supplying gas, and providing that it shall pay interest thereon and refund the same, when the depositor, having paid in full, shall cease to be a consumer, *held* entitled to priority of payment on insolvency of the company.

5. **Corporations ⟨⟩566(1)—Depositors with gas company for connections and extensions held general creditors.**

Property owners, who made deposits with a gas company to cover the cost of making connections from main to curb, under agreements for refund of the deposits if and when they became consumers of gas, and others who made deposits to cover the cost of main extensions under agreements for refund in installments based on consumption of gas from the extensions, *held* general creditors of the company with contingent claims, and on its insolvency entitled to share in the assets on making proof, after due notice, that their claims had become payable.

6. **Equity ⟨⟩429—Decree finally determining rights held not subject to change at subsequent term.**

A decree, not appealed from, which definitely determined the status of the claim of an intervener against the estate of an insolvent corporation, *held* final, and not subject to review and change at a subsequent term.

7. **Corporations ⟨⟩568—General claims against insolvent corporation entitled to interest to time of receivership.**

General claims against the estate of an insolvent corporation are entitled to interest, to be computed to the time of appointment of receivers.

8. **Corporations ⟨⟩565(1)—Mortgage trustee held entitled to prove as general creditor for deficiency.**

The trustee in a corporation mortgage securing bonds *held* entitled to share as a general creditor, to the extent of its deficiency decree, in the unmortgaged assets of the corporation in insolvency, though at the time of appointment of receivers in a creditors' suit there had been no default under the mortgage.

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

9. Corporations ⟸366(3)—Reorganization sale does not affect status of bondholders as general creditors for deficiency.

The fact that the property of a corporation is sold under foreclosure pursuant to a reorganization plan, where the court fixes an upset price, affords no ground for preferring general unsecured creditors to mortgage bond creditors for a deficiency, in the unmortgaged assets.

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

Suits in equity by the Pintsch Compressing Company and by the New York Trust Company, trustee, against the Buffalo Gas Company, in which George H. Church intervenes. Heard on cross-appeals. Decree modified.

Cross-appeals from a final decree of the District Court for the Western District of New York, entered May 9, 1921. One appeal is by George H. Church, intervener, and the other by William J. Judge, assignee of the purchaser at foreclosure sale.

Defendant Buffalo Gas Company is a New York public utilities corporation, and prior to September 24, 1914, was engaged in manufacturing and supplying manufactured gas to the city of Buffalo and consumers therein. On September 24, 1914, plaintiff Pintsch Company filed its bill in equity in the District Court, on behalf of itself and other creditors of the gas company, for the purpose of sequestrating the property of the company and applying the same to the payment of its debts. Jurisdiction was based on diversity of citizenship. On September 25, 1914, receivers were appointed to take possession of the franchises of the company, operate the same, wind up the business, convert the property into money, and, after the payment of the valid debts and obligations of the company, distribute the residue among the stockholders. On the same day, the receivers qualified and entered upon the discharge of their duties.

On April 15, 1915, New York Trust Company, as trustee, filed its bill against the gas company in the same court to foreclose two mortgages—one, dated October 1, 1897, given by Buffalo City Gas Company (consolidated with Buffalo Gas Company in July, 1899) to New York Security & Trust Company, as trustee, to secure $7,000,000 of bonds, of which $5,900,000 of bonds were subsequently issued; the other, dated October 17, 1899, given by Buffalo Gas Company to the same trustee as additional security for the $5,900,000 of bonds issued by Buffalo City Gas Company under the previous mortgage, and also to secure other bonds to be issued by Buffalo Gas Company in the amount of $1,100,000, the latter mortgage being given pursuant to a consolidation agreement between Buffalo City Gas Company and Buffalo Gas Company.

On April 26, 1915, the foreclosure suit was consolidated with the sequestration suit, and an order was made extending the receivership in the sequestration suit to the mortgage foreclosure suit. On April 11, 1916, a decree of foreclosure and sale was entered, foreclosing these mortgages, and adjudging the amount due thereon to be $6,730,496.21. The decree directed the sale of the mortgaged property, subject to any liens for unpaid taxes or assessments which might have priority over the liens of the mortgages. On May 24, 1917, the decree of foreclosure was amended nunc pro tunc, so as to provide that the bids should be rejected unless the amount should be sufficient to make a distribution of 40 per cent. of the par value of the bonds. On July 16, 1917, the property was sold for the minimum amount fixed by the amended decree to one Gethoefer, who was the only bidder. This bid was afterwards assigned to Judge.

After the sale, but before confirmation, Church filed a petition asking leave to intervene for the purpose of establishing his rights as a creditor of the gas company. The application was granted, and Church's claim was referred to Franklin R. Brown, special master, to take proof and report. The major part of Church's claim is founded upon money loaned by him to the gas company and used by it for the purpose of paying the interest due upon its mort-

gage indebtedness on October 1, 1913, and April 1, 1914, the coupons being held by Church as collateral. These coupons are included in the amount found due by the foreclosure decree. Church's claim was liquidated and undisputed. In this petition Church asserted a lien upon the property of the gas company sold under the foreclosure decree, superior to the lien of the mortgages, upon the theory that the income of the gas company, which would otherwise have been available to pay the interest on the bonds, was diverted to make extensions and betterments, essential to enable the company to compete with natural gas, which extensions and betterments became subject to the lien of the mortgage and inured to the benefit of the bondholders.

Special Master Brown reported, in substance, that the gas company was indebted to Church in the sum of $243,550, principal (with interest to be added), for moneys loaned by him to the company; that Church held certain coupons as collateral security, and also had a secondary lien on $95,000 par value of the bonds of the gas company, which were pledged to a Buffalo bank as security for the note of $22,500 of the gas company, held by the bank; that Church subsequently purchased said note from the bank, and became entitled to the benefit of all of said bonds, so pledged, having acquired by purchase the interest of the bank therein, and thus having become subrogated to its rights. The special master reported against Church's claim to a lien superior to the mortgage upon the mortgaged property or proceeds thereof, and found that the detached coupons held by him were not entitled to share in the proceeds of the sale under the terms of the mortgage.

On September 11, 1917, an order was made and entered on September 25, 1917, confirming the report of Special Master Brown, but reserving for future determination the questions: (1) Whether the cash, materials, supplies, and accounts receivable in the hands of the receivers "were or were not covered by the mortgage in suit and sold under the decree of foreclosure"; and (2) whether Church had or had not an equitable lien "on such cash, materials, and supplies in the hands of such receivers." In the same order it was provided that leave was given to Church to file a supplemental petition, claiming an equitable lien upon cash, accounts receivable, and materials and supplies in the hands of the receivers, and claiming that the mortgages and the judgment of foreclosure did not constitute a lien upon such cash, accounts receivable, and materials and supplies, and that the issues raised by such supplemental petition were to be referred to a special master thereafter to be appointed.

On the same day an order was made confirming the report of the foreclosure sale, and providing, in effect, that upon carrying out his bid the special master should transfer and deliver to Gethoefer the foreclosed property, "reserving, however, the cash, materials, supplies, and accounts receivable then in the hands of such receivers, the right to which shall be determined by the court, when such receivers file their final account and apply for a discharge." It was provided that the purchaser could elect to give a bond conditioned that he would pay the value of the reserved property, "as fixed by the receivers as of the date of transfer," to whomever was finally determined to be entitled thereto, and that upon giving such a bond the reserved property should be transferred to the purchaser. All questions concerning the right to "the cash, accounts, bills receivable, and materials and supplies in the hands of the receivers" were reserved until the receivers finally accounted and applied for their discharge, and jurisdiction of the cause was retained until the final disposition of all reserved matters.

The purchaser elected to take over the materials and supplies, accounts, and bills receivable at the values fixed by the receivers, to wit, materials and supplies $123,443.72, and accounts and bills receivable $89,678.08 (as later corrected), and gave an appropriate bond to the receivers. No appeal was taken from either of the orders above mentioned. Thereafter the receivers applied for discharge, and on October 23, 1917, an order was made referring their account and all questions reserved in prior orders and decrees and arising out of Church's supplemental petition to George Clinton, Jr., as special master, to take proof and report as to who were entitled to share in the distribution of materials and supplies, accounts and bills receivable, and cash in the hands of the receivers, and in what priority and proportion.

Upon the hearing before Special Master Clinton, a controversy arose as to the scope of the words "materials and supplies" as used in the order; counsel for Judge claiming that those words were confined to specific materials and supplies carried under that heading in accounts of the gas company, and counsel for Church and for minority bondholders contending that these words should be interpreted as including all after-acquired personal property of the gas company not subject to the liens of the mortgages. A motion was made to amend the orders confirming the sale and the report of Special Master Brown and the order of reference to Special Master Clinton. The court in an opinion held that the words used—i. e., "materials and supplies"—were sufficiently comprehensive to include all after-acquired personal property, and the special master was required to take proof in respect of "meters in stock, horses, wagons, office furniture and fixtures, cars, and other personal property not attached to the freehold." In other words, the court construed its own language, which it had used in its own orders or decrees. The special master held that the materials and supplies, accounts and bills receivable covered by the purchaser's bond, and the cash were not subject to the mortgage, and did not pass on the foreclosure sale to the purchaser; that the bondholders, as to the part of their bonds remaining unsatisfied, were general creditors, entitled to share equally with other general creditors in the unmortgaged or "free" assets. These assets were ultimately found to consist of materials and supplies, $123,443.72; accounts receivable, $89,678.08; and cash, $80,086.32, making a total of $293,208.06.

There were three classes of deposits so called, representing money deposited with the gas company prior to the receivership, with which the special master also dealt. These were: (1) Consumers' deposits; (2) main to curb deposits; and (3) main extension deposits. As to the first class, the special master held that such deposits were entitled to priority of payment over all claims, except expenses of administration. As to the second and third classes, the special master held that such deposits were debts of the gas company, and the depositors were general creditors. The details in regard to these deposits will be referred to infra.

The special master found against Church's claim for an equitable lien on earnings, and held that his status was that of a general creditor. It was stipulated between the parties that the amount of Church's claim was $251,629.97, with interest thereon from September 11, 1917. The special master found that the deficiency judgment in favor of New York Trust Company, as trustee for bondholders, was $4,638,049.48, with interest from July 16, 1917. The sole creditors were thus: (1) The trustee and (2) Church for the respective amounts above stated, and (3) the New York Central Railroad Company for a trifling claim of $7, with interest from November 1, 1916, unless the depositors, supra, were also creditors.

The special master, upon his theory of the case, failed to make any finding as to how much of the earnings of the gas company arose before and how much arose after the extension of the receivership to the foreclosure suit, and Church and Judge each excepted to the failure to make such finding. The reason why there are now only the creditors above noted is that all other claims existing prior to the sequestration receivership (aggregating $151,477.73) were paid by the receivers from time to time, pursuant to orders of the court from which there are no appeals.

Special Master Clinton took proof as to the meters in stock, horses, wagons, automobiles, fuel and lighting supplies, and other personal property which had not been included in the item of "materials and supplies" covered by the purchaser's bond, and reported the same without opinion. The court, in an opinion filed March 14, 1921, held that these items of personal property were required in the operation of the gas plant and were subject to the mortgage lien, but at the same time the court held that the cash, materials, supplies, and accounts receivable, aggregating $293,208.06, were not subject to the mortgage lien, and did not pass to the purchaser upon the foreclosure sale.

On the coming on of the motion for confirmation of Special Master Clinton's report, it was contended on behalf of Judge that Church was not entitled to receive any dividend on the $95,000 bonds referred to supra, on the ground that such payment would be equivalent to giving priority to the claim for

which the bonds were pledged. This contention was sustained by the District Judge. The decree, which confirmed the report of Special Master Clinton, as modified in accordance with the court's opinions, was entered May 9, 1921, and it is from this decree that the cross-appeals have been taken.

This decree provided, inter alia, as follows: That the receivers (not distinguishing between the sequestration and foreclosure receivers) were chargeable with the items of materials, accounts receivable, and cash aggregating $293,208.06, supra, plus any increment since Special Master Clinton's report, that Judge pay for the reserved materials and supplies $123,443.72, and accounts receivable $89,678.02, aggregating $213,121.74; that $18,938.77, being the amount of consumers' deposit made prior to the sequestration receivership, with interest from September 30, 1917, be paid into the registry of the court, for the benefit of the persons entitled thereto. After providing for the consumers' deposits and various expenses, it was decreed that the receivers should make pro rata distribution of the balance among the following creditors:

New York Trust Company, as trustee, with interest from July 16, 1917	$4,638,049.18
George H. Church, with interest from September 11, 1917	251,629.97
New York Central Railroad Company	7.00
Main to curb depositors	40,192.50
Main extension depositors	3,171.02

In confirming the report of sale on September 11, 1917, the court had decreed that the trustee was entitled to a deficiency judgment for $4,638,049.48, being the difference between $6,998,049.48, the amount due as found by the foreclosure decree, with interest, and $2,360,000, the sale or purchase price, less $225,725, representing the detached coupons held by Church.

The questions presented by these appeals may be broadly stated as follows: (1) Did Church have the equitable lien which he claimed? (2) Of the items designated as (a) materials and supplies, (b) meters in stock, etc., (c) cash, and (d) accounts receivable, which are or are not "free" assets? (3) What is the status of the consumers' deposits, main to curb deposits, and main extension deposits? (4) What are the rights of Church in respect of dividends on the $95,000 bonds? 5) How and for what property shall the sequestration receivers and the foreclosure receivers respectively account, and what, therefore, shall be the plan of distribution?

Necessarily bound up with these questions are others which will be developed in the course of this opinion. For brevity, it will be understood that any reference to general creditors includes the railroad's claim of $7.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (Daniel J. Kenefick and Charles Pascal Franchot, both of Buffalo, N. Y., of counsel), for appellant Judge.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (William L. Marcy and Helen Z. M. Rodgers, both of Buffalo, N. Y., of counsel), for appellant Church.

Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y., for receivers.

Penney, Killeen & Nye, of Buffalo, N. Y., for appellee Steele.

H. J. Kelly, of Buffalo, N. Y., for appellee New York Cent. R. Co.

Spooner & Cotton, of New York City, for appellee New York Trust Co.

Before ROGERS, MANTON, and MAYER, Circuit Judges.

MAYER, Circuit Judge (after stating the facts as above). 1. We agree with the conclusion of the District Court that Church is a general creditor and that the transactions between him and the gas company did not create an equitable lien in his favor on the earnings accruing prior to the extension of the receivership to the foreclosure suit, or

on the unmortgaged property. We place our decision primarily on the ground that the equitable lien contended for was not established by the evidence. It will not be profitable to analyze the facts nor the law applicable thereto, as this branch of the case was carefully and adequately dealt with in the reports of the special masters, which in this regard received the approval of the District Court.

2. (a) Materials and supplies; (b) meters in stock, etc. These two classes of items were separately considered, due to the fact that the existence of the items under (b) came to the attention of counsel and court after item (a) had been considered. Both classes of items, however, are governed by the same principles, and will be considered under the same heading. The point is raised by Judge that the decree of September 11, 1917, disposed of items under (b), and therefore that the court's order directing Special Master Clinton to take proof in respect of the items under (b) was too late, for the reason that the term had long since expired. The reservation in paragraph III of the decree of September 11, 1917, was that the right to "the cash, materials, supplies, and accounts receivable" should be determined by the court when the receivers filed their final accounts and applied for discharge. In view of this reservation, it was competent for the court at any time, at least up to the application by the receivers for their discharge, to construe the meaning of the words "materials and supplies," and thus to keep the question open notwithstanding the entry of prior orders or decrees. We are of opinion, therefore, that this branch of Church's appeal is properly here.

[1] The extent and nature of the lien of the mortgages is a question of local law. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577. It is, of course, settled that the New York rule is that a mortgage of after-acquired personal property is ineffective as against creditors of the mortgagor, and some further act is necessary in order to make it an effective lien as against creditors. Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083; Titusville Iron Co. v. City of New York, 207 N. Y. 203, 100 N. E. 806. 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 in the case of public utility corporations. It has long been recognized that property of such corporations, necessary for purposes of operation, is constantly subject to change and additions. Such corporations perform a public duty. Gas companies manufacture and distribute a necessary of modern life. It is important, therefore, to maintain, if possible, continuous operation, even though property is sold under foreclosure or execution. It is realized that, owing to the large sums required to finance such enterprises, there must be sound security offered to those who invest in bonds secured by mortgages on properties of this character. It is essential for the security of such bonds that a mortgage shall safeguard the existence of a going plant at the time that sale is had under a foreclosure decree, to the end that the purchaser can continue to perform

the obligations of the franchises and, as in this case, furnish the public with the product for the manufacture and distribution of which the franchise was granted.

In Platt v. New York & Sea Beach R. Co., 9 App. Div. 87, 41 N. Y. Supp. 42, the court pointed out the reasons why the mortgage of a railroad company covered after-acquired personal property and announced a doctrine affected by the nature of the property and its relation to public duty and convenience. The opinion, in construing the effect of a particular statute, is not to be read as being confined to the purposes of that statute, but as, in addition, announcing important useful principles of general application to similar subject-matter. This case was affirmed by the New York Court of Appeals on the opinion below in 153 N. Y. 670, 48 N. E. 1106. There is, of course, nothing to the contrary in Platt v. New York & Sea Beach R. Co., 63 App. Div. 401, 71 N. Y. Supp. 913. Again, in New York Security Co. v. Saratoga Gas Co., 88 Hun, 569, 587, 588, 34 N. Y. Supp. 890, the court laid down similar rules in respect of the property of a gas company, pointing out, inter alia, that the doctrine applied, not merely to land and buildings, but to implements, tools, and machinery, and, in brief to whatever was "necessarily used in carrying on the business." This opinion is also illuminating, and was likewise affirmed on opinion below in 157 N. Y. 689, 51 N. E. 1092.

It is suggested that in some manner MacDonnell v. Buffalo L. T. & S. D. Co., 193 N. Y. 92, 85 N. E. 801, modifies the force and authority of the two cases just referred to. In the MacDonnell Case the court was dealing with a peculiar state of facts, and further the clause relating to various kinds of personal property was restricted to such as might be acquired not only after the execution of the mortgage, but also "after default shall be made herein." In the case at bar, as will presently appear, the after-acquired clauses did not contain any restriction to the effect that the after-acquired property mortgaged would only be such as might be acquired after default. Some expressions in the MacDonnell Case, which we need not pause to analyze at length, are at most dicta, and cannot be held to have changed the doctrine of the Platt and New York Security Co. Cases, supra. In the opinion of the New York Court of Appeals in the MacDonnell Case, no reference whatever is made to these two preceding cases, and such omission strongly confirms the view that the court did not intend to modify the principles which it had previously announced.

In Met. Trust Co. v. Dolgeville Electric Lt. & P. Co., 35 Misc. Rep. 467, 71 N. Y. Supp. 1055, the present Chief Judge of the New York Court of Appeals followed the New York Security Co. Case, 88 Hun. 569, 34 N. Y. Supp. 890, and held that the terms of a mortgage on an electric light and power company covered certain supplies consisting of wire still in the coils. In brief, we understand the New York rule to be that, in the case of a public utility corporation, a mortgage is valid in respect of after-acquired personal property necessary and appropriate for the physical operation of its franchises and the performance of its public duty.

The Buffalo Gas Company manufactured and distributed gas. To do so, it required necessarily, not only holders, mains, and other similar equipment, but tools, implements, and the materials for manufacture and distribution. In each of the mortgages, the after-acquired personal property sought to be brought under the lien was very fully described, as will appear from the extracts in the margin.[1]

Gas coal, gas oil, and similar materials are obviously necessary for the manufacture of gas, and just as much a part of the plant in operation as any machinery attached to the freehold. So, also, tools and implements are clearly necessary for purposes of operation, whether used in connection with manufacture or distribution. The test is not whether property of this character is physically attached to the freehold. Plainly, certain of such property, such as tools and implements, by their very nature, would not be physically attached to land or buildings, and coal and oil would necessarily be used up in the process of manufacture. The fact that such materials or supplies as are necessary for the manufacture and distribution of gas are kept on hand, instead of in some way being attached to the freehold, is immaterial in determining the lien of the mortgage, because with this class of mortgages there is no reason why such necessary materials and supplies may not, as against general creditors, be covered by the mortgage, and every reason to the contrary.

[2] Applying these principles, we will examine the details listed in Exhibit 12. The items under the headings of gas, coal, oil, oxide, tar, and the like, aggregating $60,627.51, passed to the purchaser, and should not have been held to be unmortgaged assets. This is also true,

[1] Mortgage of 1897: "All and singular its personal property, its gas works, plants, and machinery for making, generating, and supplying gas, its service and other pipes, holders, mains, meters, purifiers, generators, cocks, tools, implements, and all apparatus, services, connections, fixtures, appurtenances, licenses, contracts, and agreements, and patented or other processes for making and distributing, gas now owned or which shall hereafter be acquired by the gas company, all of which personal property is hereby declared to be fixtures and appurtenances of said gas works and plants and parts of the same, but the particular description of personal property herein contained shall not be construed to exclude any other personal property which now belongs to or which may hereafter be acquired by the gas company, and also all improvements, additions made or to be made to said plants and properties, real and personal, and all replacements of the same or the appurtenances thereof, and also all and every other estate, right, and interest, privilege, and franchise, corporate or mixed, which the gas company now owns or holds, or may or shall hereafter acquire, own, or hold."

Mortgage of 1899: "All and singular its supplies of every name, nature, and description, * * * and all and singular the moneys, book accounts, bills receivable, and other property of every name, nature, and description, which have been or which shall hereafter be acquired by the party of the first part, whatever the particular description thereof shall be, * * * and also all and singular its personal property, plants and machinery for making, generating, and supplying gas, its service and other pipes, holders, mains, meters, purifiers, generators, tools, implements, and all apparatus, services, connections, fixtures, licenses, contracts, and agreements, now owned or which shall hereafter be acquired by the gas company, all of which personal property is hereby declared to be fixtures and appurtenances of said gas works and plants and parts of the same."

in the main, in respect of the item of $53,620.60 called "general materials and supplies (pipes, fittings, tools, etc., also lamps and portables)." It was testified by Humphreys, one of the receivers, and by Meyers, who seemed thoroughly familiar with the affairs of the gas company, that the coal, oil, etc., represented a reasonable amount to have on hand for the operation of the plant, and that "generally materials and supplies on hand were the materials and supplies in the way of pipes, fittings, tools, and things of that character used in connection with the everyday operation of the plant, and that was a reasonable account." Humphreys, one of the receivers, testified, however, that "portables" are the portable fixtures for lighting, sold by the gas company, for the purpose of pushing its business, and it may be that "lamps" are in the same category. The evidence is not clear as to "lamps."

The "gas stove stock," representing an item of $9,195.65, is on the same basis as portables. That item referred to a stock of gas stoves kept on sale to encourage the use of gas. Such articles were not necessary for the manufacture or distribution of gas, and must be regarded merely as merchandise, used to promote the sale of gas, but in no sense necessary to the operation of the plant. Such merchandise was not subject to the mortgage, and therefore the purchaser was not entitled to this item. As we are not advised as to the value of the "portables," or as to the nature or value of the "lamps," included in the item "general materials and supplies," we are unable to state the result in figures, and must remit that detail to the District Court.

In view of the foregoing, it is apparent that the District Court rightly decided that the items under (b), consisting of meters in stock, horses, automobiles, stable equipment, tools, etc., were subject to the mortgage lien, and passed to the purchaser, except the item of $2,847 for "fuel and lighting appliances." We gather from the testimony of Meyers and from Exhibit 19 that "fuel and lighting appliances" consisted of articles for rent or for sale, which were connected on consumers' premises, but not necessary to manufacture and distribution.

To summarize: Judge is entitled to all the articles under (a), except portables, gas stove stock, and possibly lamps, and to all under (b), except "fuel and lighting appliances." Under his bond, he must make payment to the receivers of $9,195.65 for the gas stove stock, and whatever may prove to be the value of the "portables," and possibly the "lamps," as of September 30, 1917. He must also make payment of $2,847 for "fuel and lighting appliances."

[3] 3. Cash and Accounts Receivable. The 1897 mortgage contained the following provisions:

"Until the gas company shall have made default in the payment of the principal or interest of any of the bonds hereby secured, or intended so to be, or in the performance of the covenants, or any of them, herein expressed to be kept and performed by the gas company, it shall have the possession, use, enjoyment, and control of all the property and franchises covered by this mortgage, with the appurtenances, and shall receive the rents, issues, income and profits thereof. * * *"

A similar provision was incorporated in the 1899 mortgage. In such a case, cash and accounts receivable existent prior to a mortgage fore-

closure receivership, and at that time not in the possession of the mortgagee, are not subject to the lien of the mortgage. The rule applies to public utility as well as to other classes of corporations. N. Y. Security Co. v. Saratoga G. & El. Co., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132; Gilman et al. v. Ill. & Miss. Telegraph Co., 91 U. S. 603, 23 L. Ed. 405; American Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144; Atlantic Trust Co. v. Dana, 128 Fed. 209, 62 C. C. A. 657; Platt v. New York & Sea Beach R. Co., 170 N. Y. 451, 457, 63 N. E. 532; Central Trust Co. v. Morton Trust Co., 200 N. Y. 577, 93 N. E. 975.

Whether the mortgage lien in respect of "rents, issues, income and profits" of the property and franchises covered by the mortgage attached at the date of filing the foreclosure bill, or at the date of the foreclosure receivership, is a question concerning which decisions are not in harmony. We need not however, determine this question, for the reason that, for purposes of convenient accounting, the litigants seem to have agreed on April 30, 1915, as the foreclosure receivership date. Thus, on April 30, 1915, the unmortgaged assets in the hands of the sequestration receivers, to the exclusion of the foreclosure receivers, consisted of certain materials and supplies, accounts receivable and cash in amounts to be referred to infra. Later there was received a refund for taxes, to which we shall also refer infra.

4. Creditors. There has been no separate accounting of the sequestration receivers, and no attempt to determine how much of the fund now awaiting distribution shall be credited, respectively, to the sequestration and the foreclosure receiverships. It is, of course, also necessary to ascertain who are the creditors. By reason of the course which the actual administration of these receiverships has taken, Church, the railroad, and the trustee are the only creditors remaining whose claims arose because of transactions prior to receiverships, unless the depositors are also creditors. The deposits are of three classes:

[4] (a) Consumers' Deposits Made Prior to September 24, 1914, Where the Depositors have Ceased to be Consumers. These were authorized under section 63 of the New York Transportation Corporations Law (Consol. Laws, c. 63), quoted in the margin.[2] The gas company availed of its right under the statute to demand a deposit as a condition of supplying gas to the consumer, and gave a receipt reading:

"It is hereby expressly agreed between the Buffalo Gas Company and the said depositor that this deposit shall be subject to the deduction of any indebtedness due from depositor to said company. Upon full payment of any such indebtedness, and return of this certificate, the said Buffalo Gas Company agrees to refund said deposit, with interest. Interest ceases on the day depositor ceases to be a consumer."

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[2] "Every gaslight * * * corporation may require every person to whom such corporation shall supply gas * * * to deposit with such corporation a reasonable sum of money * * * as security for the payment of the gas * * * rent or compensation for gas consumed, * * * to become due to the corporation, but every corporation shall allow and pay to every such depositor legal interest on the sum deposited for the time his deposit shall remain with the corporation."

The District Court held that these claims were entitled to priority. Church contends that these are general creditors' claims not so entitled. The basis of this contention is that the deposits do not constitute a trust fund, and that the relation of debtor and creditor is set up, as evidenced by the requirement as to interest. The relation of debtor and creditor, however, must be created by voluntary agreement, express or implied. Here the consumer has no choice (Hewsey v. Queens Borough Gas & El. Co., 47 Misc. Rep. 375, 93 N. Y. Supp. 1114), for, before he can obtain gas, he is compelled to make a deposit "as security." On the other hand, the requirement of the statute that the gas companies shall pay interest is some support for the contention that such corporations are authorized not to treat the deposits as inactive moneys, but to use them in their business, and hence to mix these deposits with general funds. Thus the case is sui generis.

Although the depositor has been lawfully compelled to deposit security, yet the corporation seemingly may so use the deposit as to deprive it of some of the characteristics of a trust fund. Thus the status of the deposit is different, on the one hand, from that of security for rent given as part of an agreement between landlord and tenant, as in In re Banner (D. C.) 149 Fed. 936, and, on the other, from that of property which may be reclaimed only if it or its proceeds can be traced, as instanced in In re J. C. Wilson & Co. (D. C.) 252 Fed. 631. Courts of equity have marshaled assets and assigned priorities in response to equitable requirements and business necessity, as is illustrated by the now well-established principle that preference will be accorded to claims for materials and supplies furnished to public utilities for current operation within a limited period prior to receivership. The fact that, because of statutory permission, such deposits are not made as the result of voluntary agreement, but compulsorily required as a condition of supplying gas, is sufficient to justify a court of equity in treating them as preferred claims.

[5] (b) The Main to Curb Deposits. These were made under section 288 of the old Buffalo City Charter, embodied in section 144 of the present City Charter, providing that the city may make connections from the gas company's mains in the street to the curb line, and then assess the cost upon the premises to which the connections are made. By virtue of certain contracts, the gas company did the work and was paid by the city, which in turn imposed the assessment. The gas company agreed with the city to refund the cost of the connection to the owner of the premises, if and when he should become a gas consumer. In some instances the property owner directly requested the gas company to make connections, and the gas company required him to deposit the estimated cost, and gave him a receipt, agreeing to refund the deposit when the service of gas actually commenced. These deposits do not carry interest. Meyers testified that some of these property owners did not begin to use gas until many years after the connections were made, "frequently 10 to 15 years and 18 to 20 years"; the oldest deposit on hand having been made in 1873. These deposits were used—and properly so—as a part of the general funds of the gas company. These depositors thus had contingent claims, certain as to amount, but

not ripened, because the contingency or condition upon which refund would be made—i. e., becoming consumers—had not occurred. They must be regarded as general creditors, whose rights can only be cut off as indicated infra.

(c) Main Extension Deposits. These deposits, without interest, were made under rules duly approved by the Public Service Commission, which provided that, in case the gas company deemed it inexpedient to extend a gas main at its own expense, it could require the applicant for the extension to make an advance deposit to cover the estimated cost, the gas company agreeing to refund the deposit in certain installments, based on the consumption of gas resulting from the extension. These deposits are in the same position as the main to curb deposits.

[6] 5. Church's $95,000 Bonds. In the original decree of foreclosure, dated April 11, 1916, the status of these bonds was determined. Church had not intervened at that time, and the amount of the debts secured by these bonds was therefore, as yet, undetermined; but this was one of the subjects dealt with by Special Master Brown. He found that Church was entitled to a lien upon these bonds to secure the amounts advanced by him to the gas company. In the decree confirming the special master's report, dated September 11, 1917, and entered September 25, 1917, the court fixed the net amount of Church's claim at $251,629.97, which sum was arrived at after deducting from the face of the claim, with interest to September 11, 1917, the payment of 40 per cent. on the $95,000 bonds, amounting to $38,000, out of the proceeds of sale of the mortgaged property. Paragraph V of the decree provided as noted in the margin.[8] This was a final decree which adjudicated the rights of the parties in respect of this particular subject-matter, and thus the time to appeal began to run from September 25, 1917, the date of entry. Long after the term had expired, and the time within which to appeal had likewise expired, the court held that Church should not participate in the distribution of the dividend to the trustee, as the holder of the deficiency judgment, and so provided in paragraph twelfth of the decree, dated May 9, 1921, now under review.

It is urged that the basis of the decree of September 11, 1917, was that Church should have the right to realize upon these bonds, through the deficiency judgment, only if that judgment obtained "a priority of any kind." We need not determine this, nor the contrary contention. The adjudication of September 11, 1917, was clear, and, the term hav-

[8] "V. The defendant, Buffalo Gas Company, is indebted to the intervener, Church, upon a note made by the said gas company and now held by said Church, in the sum of $22,500 and interest thereon from September 1, 1917, and the said Church has a lien upon $95,000 par value of the first mortgage 5 per cent. 50 year gold bonds of the Buffalo City Gas Company, first as security for the payment of said note and interest, and next as security for the indebtedness set out in paragraph IV, and said Church is entitled to share in the proceeds of the sale of the mortgaged property to an amount equivalent to 40 per cent. of the par value of said $95,000 of bonds by reason of such liens, and to any further sum that may be realized upon said $95,000 of bonds through the deficiency judgment recovered herein by the New York Trust Company against said Buffalo Gas Company."

ing expired, the District Court was without power to modify the 1917 decree in this regard, as it attempted in paragraph twelfth of the May 9, 1921, decree. This part of the decree must therefore be reversed, and paragraph V of the decree of September 11, 1917, must be followed.

6. The Accounting. Owing to the method of administration and the failure to state separate accounts for the sequestration and foreclosure receiverships, respectively, it is impossible for us to set up the figures of these accounts. We shall endeavor, however, to state the principles involved.

The sequestration and foreclosure receiverships are separate, but may, as matter of practical administration, run concurrently until the whole estate is wound up. This is because the sequestration receivership has possession of the unmortgaged assets, which, for accounting purposes, do not at any time go into the possession of the foreclosure receivers. Primarily the fund of the sequestration receivership is made up of the unmortgaged property on hand when the receivers take possession, whether physical property or accounts receivable and the like. At the conclusion of the sequestration receivership, this fund may be larger or smaller, dependent upon the results of the operation of the sequestration receivership. To illustrate, with arbitrary figures: At the inception of a receivership, there may be cash on hand $50,000, accounts receivable $50,000, and unmortgaged property worth $50,000, thus making an apparent total of $150,000. Assuming that the receivers continue business and are successful in increasing the value of the estate, they may have at the conclusion of their operation cash $100,000; the accounts receivable due prior to the receivership may have been collected to the extent of $40,000, and $20,000 may be due from purchasers and customers on good accounts receivable developed during the operation. Unmortgaged personal property, including prereceivership unmortgaged personal property, and such as may have been purchased by the receivers in the course of their operation, may amount to $60,000. The total would be $220,000. On the other hand, the receivership operation may have resulted in a loss, leaving on hand, say, only $50,000. It is the fund of $220,000 or $50,000, as the case may be, which is to be distributed in accordance with well-settled principles and practice. First, there must be paid the expenses of administration, then the debts incurred by the receivers for their operation. The balance is the fund distributable among preferred and general creditors. Out of such balance, there must be first paid the claims of preferred creditors, principal and interest, and the remaining sum, if any, constitutes the fund available for distribution to general creditors.

In the case at bar there is a statement, known as Exhibit 6, purporting to show assets and liabilities as of September 24, 1914, the date of filing the sequestration bill, April 30, 1915, the convenient date marking the commencement of the foreclosure receivership, and September 30, 1917, the date of the transfer to Judge, as a result of the sale under foreclosure. This exhibit may be useful for bookkeeping purposes, but is not to be taken as stating the account either of the sequestration or of the foreclosure receivership. The matter is further com-

plicated by the payment during administration of $151,477.73 in settlement of claims against the corporation existing prior to the sequestration receivership. The parties have stipulated that these amounts "were paid by the receivers during the receivership"; but, although it is stated by counsel that these amounts were paid by the foreclosure receivers, the record does not fully enlighten us as to what funds, if any, of either or both receiverships were used for this purpose. When the foreclosure receivers took possession, the sequestration receivers had in hand cash to the amount of $152,105.84, and this sum seems to have been turned over to the foreclosure receivers and utilized by them to pay off some pre-foreclosure receivership debts, and also utilized in connection with the operation of the plant by the foreclosure administration. The difficulty now presented is the determination of which of these debts, if any, should be paid by the sequestration receivership. We have not overlooked the provisions of the stipulation (appearing at pages 332 et seq. of the record), but these do not give us adequate information. Besides, while some of these items were preferred claims and others not, there still remain some the status of which is not clear. In view of the form which the record has taken in this case, we have concluded that these payments should be disregarded in the account, as the claimants are no longer creditors.

Applying the principle, supra, to the case at bar, the sequestration receivers at the conclusion of their receivership had in hand materials and supplies in the amount set forth in 2 (a) and (b) supra, cash to the extent of $152,105.84 and accounts and bills receivable. To arrive at this last item, it must be ascertained what accounts and bills receivable outstanding on April 30, 1915, were ultimately collected. The amount set forth in Exhibit 6 is roughly $87,600, less about $8,600 reserved as of April 30, 1915, for bad debts. By this time the receivers must know the exact figure for these items of accounts and bills receivable. To the foregoing must be added an item of $4,808.86 due to the following circumstances: In December, 1919, the receivers made an adjustment with the city of Buffalo on account of franchise taxes for the years 1912, 1915, and 1916, as a result of which they received a net refund of $11,066.16. This refund does not appear on Exhibit 6, because made after the date of that statement. Of this net refund, $4,808.86 was for the year 1912. Having thus ascertained the gross fund in hand, it is next necessary to determine who are the creditors entitled to share in this fund, and how the amount of their claims shall be ascertained.

There is an item in Exhibit 6 entitled "Trade and Other Acts." The pre-receivership claims of this character were paid, as above stated. It is also apparent that any of these obligations which may have been incurred by the sequestration receivers were also paid, so that there are now no creditors of this class. There was an item for current taxes which we assume were governmental in personam taxes against the corporation and the sequestration receivership. The record is not clear as to whether or when these taxes were paid, and this we must leave to be dealt with by the District Court. There is an item for city taxes for 1913 and 1914. The purchaser at foreclosure sale bought

subject to these taxes. They are no longer a debt, as Judge has settled with the city. In view of the fact that there was no appeal from this disposition, these taxes are no longer a claim, and, for purposes of accounting in this particular case, will be disregarded. The item of "Interest on Unfunded Debt" refers to interest on the Church coupons and on the consumers' deposits. The interest on the Church coupons is necessarily a part of his claim as a general creditor, and the interest on the consumers' deposits is part of the preferred claim of the consumers, to the extent indicated infra.

The foregoing analysis leaves as creditors sharing in the balance in the hands of the sequestration receivers, after payment of expenses of administration and debts incurred during receivership operation, and possibly current taxes: (1) Consumer depositors as preferred claimants; (2) the other two classes of depositors, and Church and the trustee as general creditors. In respect of all the three classes of depositors, there has as yet been no notice to file claims. The publication of such a notice was recommended by the special master and approved by the court, and it was ordered that funds to meet these claims should be deposited in the registry of the court. Such funds, however, should not be so deposited to remain there indefinitely. Persons who have made deposits and have ceased to be consumers should be required by appropriate notice to file their claims, and, failing so to do, all claims should be cut off which are not filed within the time indicated by the notice. The other two classes of depositors are entitled to share as general creditors, without interest, only if they have become consumers. They may never become consumers, and their claims should be similarly cut off by the same procedure as to notice. The procedure has been fully described in Pennsylvania Steel Co. et al. v. New York City Ry. Co. et al., 198 Fed. 721, 735, 117 C. C. A. 503, where, per Judge Noyes, this court laid down the rule in respect of proving claims.

[7, 8] In regard to those claims which bear interest, the controlling authority is American Iron Co. v. Seaboard Air Line, 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949. See also Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, at page 471, 132 C. C. A. 518. As, in the case at bar, it is apparent that the claims of creditors cannot be paid in full, interest on the principal will run to September 24, 1914, on the amount at that time due on the consumers' deposits and on Church's claim.

There is thus left in this connection only the question of the status of the trustee's deficiency judgment. The contention of Church is that the appointment of the sequestration receivers constituted an equitable lien in favor of the creditors then existing, and that, as the bonds were not then in default, they were not entitled to share in the fund of the sequestration receivership. An examination of the certified question in the Saratoga Gas Co. Case will show that all that was decided by the court was that the foreclosure receiver had no prior right to "the debts and accounts due to the corporation upon sales by it of products of its plant produced after the giving of the mortgage and before the appointment of either receiver." As the receivers in that case

were appointed contemporaneously, the application of the Saratoga Gas Co. Case to the case at bar is that the foreclosure receivers had no prior right to the pre-receivership debts and accounts due to the corporation.

The answer to the contention of Church is that in this circuit the rule as to the times of ascertaining provable claims against an insolvent estate is as stated by Judge Noyes in the Penn. Steel Co. Case, supra. The claim on the bonds is within the class described by Judge Noyes at page 738 of his opinion (198 Fed. 738, 117 C. C. A. 520) as "claims which at that time are certain, but which are not matured." Such claims are clearly provable, because "the right of a creditor to participate in the assets of an insolvent estate—a right in rem, and not in personam—is not dependent upon the existence of an accrued cause of action at the time of the receivership." This subject was considered in the Metropolitan Street Railway receivership by the late William L. Turner, a special master highly experienced in this class of litigation. In the receivership record in Pennsylvania Steel Co. v. Metropolitan Street Railway Co. (volume 32, p. 645), Mr. Turner held:

"The claimant trustee under the two Metropolitan mortgages have an unquestionable right under the authorities, federal and state, to prove claims to the extent of the face value of bonds secured, against general assets of the insolvent Metropolitan Company, subject only to the limitation that the amount of the deficiency decrees to be hereafter entered will suggest a maximum amount to be paid on the claims allowed. Merrill v. Bank of Jacksonville, 173 U. S. 131; People v. Remington, 121 N. Y. 328; Matter of Simpson, 36 App. Div. 562."

This was affirmed by Judge Lacombe on the special master's opinion. See page 763 of volume 32, supra. In addition to the cases cited by Special Master Turner, see Chemical Nat. Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231; Merchants' Nat. Bank. v. Flippen, 158 N. C. 334, 74 S. E. 101; Matter of Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; Third National Bank v. Haug, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; Detroit Trust Co. v. State Bank of Michigan, 150 Mich. 530, 114 N. W. 327. Judge Dietrich also recognized this principle in a careful discussion in Westinghouse Elec. & Mfg. Co. v. Idaho Ry. L. & P. Co. (D. C.) 228 Fed. 972, but held otherwise in view of certain provisions of an Idaho statute.

As the trustee has not appealed, we need not be concerned with proof of the whole amount of debt due on the bonds as of the time of the appointment of the sequestration receivers, but it will suffice for the purposes of this case (and we limit our decision to this case) that the trustee may come in as a general creditor to the extent of the deficiency, with interest figured however only up to September 24, 1914.

To summarize: The general creditors entitled to share in the balance in the hands of the sequestration receivers, after payment of expenses of administration, receivers' obligations, and preferred claims, are Church, the trustee, and the two classes of depositors, interest on the preferred claims of consumers and on Church's claim and on the trustee's claim to be calculated as of September 24, 1914. After April 30, 1915, the foreclosure receivers, under familiar and accepted principles, were entitled to the net income, if any, produced by their

operation. If the figures work out so as to leave any fund in the hands of the foreclosure receivers, such fund, as well as the proceeds of sale of the mortgaged property, was solely available to pay the bond indebtedness up to the point where that debt would be satisfied, and obviously in this case, as such debt cannot be satisfied, there is no fund arising out of the foreclosure receivership in which the general creditors share. Illinois Trust & Savings Bank v. Doud et al., 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

[9] In view of some observations at the conclusion of the opinion in the Saratoga Gas Co. Case, it is urged that there is a distinction between a case in which property is sold under foreclosure pursuant to a reorganization plan and a case in which property is bid for in an open market. We recognize that, in nearly every case of a corporation as large as the defendant, a foreclosure sale is had in connection with a plan for reorganization, although in the case at bar no such plan is before us. There is not, however, any legal reason for preferring general unsecured creditors to mortgage bond creditors in such a case. The court fixes the upset price in the exercise of its sound discretion, with the entire situation before it, and such price necessarily determines the deficiency. On principle and under the cases cited, the claims of mortgage bond creditors or the trustee are neither higher nor lower in equity than those of general creditors.

From the foregoing, it is apparent that the decree must be modified, and the cause returned to the District Court, with instructions to take such further proceedings as may not be inconsistent with this opinion.

Decree modified, without costs.

GENERAL ELECTRIC CO. v. CONTINENTAL LAMP WORKS, Inc. SAME v. UNITED LAMP MANUFACTURERS' CORPORATION.

(Circuit Court of Appeals, Second Circuit. April 3, 1922.)

Nos. 255, 256.

1. Patents ⇐312(1) **Defendant has burden of proving license to use patent.**

A defendant, who admits the validity of the patents and his infringement, has the burden of proving he had an implied license under the circumstances, which estopped plaintiff from enjoining the infringement.

2. Patents ⇐210—**Evidence held not to show implied license of lamp patents by sale of bases.**

Evidence that plaintiff had sold lamp bases to defendants knowing they were infringing plaintiff's patents for tungsten-nitrogen electric lamps, *held* not to establish an implied license to use the patent, where it also appeared that the bases formed a small percentage of the cost of the finished lamp and could be used with noninfringing lamps, and that they were sold with a notice of which defendants had knowledge, that they gave no license to use the lamp patents, because defendant had been previously sued by the government on a charge of monopolizing the electric lamp business.

3. Patents ⇐212(1)—**Inventor can impose any terms on licensee which do not violate other laws.**

Use of an invention can only be obtained on the inventor's terms, and whatever terms he may impose will be enforced by the court, provided

only that the licensee is not thereby required to violate some law outside of the patent law.

4. Patents ⊂=210—Sale of element does not give implied license to use combination.

The sale of one element of a patented combination does not necessarily imply license to use the whole combination; but the question always is, What is a fair inference from the entire transaction?

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

Separate suits in equity for infringement of patent by the General Electric Company against Continental Lamp Works, Inc., and against the United Lamp Manufacturers' Corporation. From orders denying injunctions pendente lite, plaintiff appeals. Reversed, with directions to grant the injunctions.

Howson & Howson, of New York City (Frederick P. Fish, of Boston, Mass., Hubert Howson, of New York City, and Albert G. Davis, of Schnectady, N. Y., of counsel), for appellant.

Richard Eyre and W. N. Seligsberg, both of New York City, for appellees.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

MANTON, Circuit Judge. The appellant is the owner of the Langmuir patent, No. 1,180,159, granted April 18, 1916, which covers a new type of incandescent lamp. It was sustained in this court in General Electric Co. v. Nitro-Tungsten Lamp Co. (C. C. A.) 266 Fed. 994. These are separate suits, one against the Continental Lamp Works, Inc., and the other against United Lamp Manufacturers' Corporation. The former was organized in February, 1920, after the decision in the District Court in the Nitro-Tungsten Case. It has since advertised the tungsten or vacuum lamps which do not infringe the patent in suit, but it has engaged in business exclusively since its organization in the manufacture of lamps of the gas-filled type, which lamps embody the invention of Langmuir, and it is claimed by the appellant to be identical with the lamps enjoined in the Nitro-Tungsten suit, and in a subsequent suit by General Electric Company v. Alpha, where the District Court again affirmed the finding that the Langmuir patent was valid.

The appellee the United Lamp Manufacturers' Corporation was organized July 29, 1921. It is said to be a consolidation of interests of companies which were not licensed to use the invention of the patent in suit. It has been engaged in selling lamps of the Langmuir type. It sells vacuum tungsten lamps and vacuum carbon lamps. A patent was issued to Just and Hanaman, which is now owned by the appellant, and which was held valid and infringed in General Electric Co. v. Laco-Philips, 233 Fed. 96, 147 C. C. A. 166. This patent was for a tungsten lamp, and was like the carbon lamp, in that it operated in a vacuum. Both of these inventions were of a high order, and recognized by judicial decision as such. Dr. Langmuir was able to produce a lamp which in large size consumed one-half a watt for each candle power which it produced. It meant one-half of the energy consumed by the

vacuum tungsten lamp and one-sixth of the energy consumed by the carbon lamp, and resulted in a great saving to the public.

On this application for an injunction pending the final hearing, the affidavits offered in defense did not plead invalidity or noninfringement of the patent; but a defense was made on the contention that the lamps were sold by the appellees lawfully because of an implied license by reason of the sale of bases. The lamp base is an appendage which is fastened permanently to the incandescent lamp before it is sold. It costs, at retail, 1 or 2 per cent. of the selling price of the lamp, and it is used as a base for the lamp of the Langmuir patent. When the appellant sold these bases, the contract of sale provided in red letters as follows:

"The sale of bases by us confers on the purchaser no license under any patents of the General Electric Company covering or relating to the structure of INCANDESCENT LAMPS, or the materials, machines, or processes used in their manufacture."

Knowledge by the appellees of this notice, so written on the terms of sale, is conceded. The defense contends that by reason of the purchase of the bases there was an implied license to use the lamps constructed under the Langmuir patent. The court below sustained the contention of the appellees, upon the theory that the bases which the appellant sold to the appellees were sold with the knowledge that these manufacturers were making the lamps under an implied license from the appellant, and that because the bases which were sold could be used only in constructing a patented article (Langmuir construction), it is presumed to be intended, both by the buyer and seller, to be used for that specific purpose, and, when appellant made a sale, it carried with it to the appellees an implied license. The bases in question were standard articles of manufacture, and were constructed under patent for many years before the Langmuir lamp was invented. It was because the appellant did not wish to license the appellees in the use of the Langmuir patent, or any other patent which had to do with incandescent lamps, that they inserted the notice in the terms of sale.

It is claimed that if the appellant sold the bases without knowledge or notice of the possibility or probability of the infringing use, no implication of license could have been raised, and the notice would have been unnecessary. But the very act by which the appellant is now charged with having waived notice seems to us to be the one means it might have employed in serving notice upon the purchaser that it would not permit the bases to be used in connection with the sale of the Langmuir lamp. The issues in both cases are alike. The lamp base is a device external to the lamp. The Langmuir patent does not show any base. It shows two wires projecting from the bulb. These wires may be connected with an electric circuit, and the lamp will burn without a base. The ordinary way, however, of making such a connection, is through a base, and this consists of a screwed shell adapted to screw into an Edison type lamp socket and a center contact fastened mechanically to the screwed shell, but electrically insulated from it. The screwed shell of the lamp socket is connected to one of the terminals of the electric circuit. The lamp socket contains a center contact,

which is connected with the other terminal of the electric circuit, and it is adapted to connect with the center contact of the base. Two styles of bases are used on the infringing lamps, to wit, the "standard medium" and the "mogul." It appears that the base is merely a means of supporting the lamp and carrying current to it. The standard medium base is used by all parties for the various types of lamps, patented and unpatented. It is used for the carbon lamp, which was covered by patents which have now expired. It is also used in the manufacture of attachment plugs, which are devices attached to lamp cords and screwed into lamp sockets, in order to connect in circuit electric fans and similar devices. The mogul base was one time restricted to the carbon lamps, and has been used on both carbon and tungsten, whether or not embodying the invention of the Langmuir patent. It is used on certain vacuum tungsten lamps and employed in series circuits. It is not restricted to gas-filled lamps, as contended for by appellees. It also appears that the standard medium bases sell at from $5.50 to $6.50 a thousand, and the mogul at $26 a thousand, while the gas-filled lamps with the standard medium bases list at from 65 cents to $2.60 each. The gas-filled lamps with the mogul base are listed at from $3.15 to $9 each. It thus appears that the value of the base is small compared with the value of the lamps, and indicates the improbability of the appellant wishing to license the manufacture of the patented lamp from the mere sale of the base.

It is admitted by the appellant that it continued to sell the bases to the appellee Continental Lamp Works, Inc., after it knew or had reason to believe that it was using these bases in the manufacture of lamps infringing the Langmuir patent. Its claim is that in making such sales it was not granting a license under the lamp patents, and felt that it had good reason for this business conduct. The claim is that in 1911 the government filed a bill against the appellant, complaining of certain practices which it said created a monopoly, in violation of the federal statutes, in relation to its manufacture of incandescent lamps. It was claimed that the appellant, by controlling the commercial source of supply of useful or necessary parts of the lamp, were attempting to control the lamp business, including the business in vacuum carbon lamps. It also complained that the appellant had entered into unlawful contracts with the only base manufacturer in the United States, to wit, the Providence Gas Burner Company, which was made a defendant in the suit. As a result of all this, the independent lamp companies were compelled to pay excessive and unfair prices for the bases, and thus were placed at an unlawful disadvantage as competitors. A decree was entered in the government suit, which required the appellant openly to take over its lamp subsidiaries, and enjoined it from utilizing any patents as a means of controlling the manufacture or sale of any type or types of lamps not protected by lawful patents, such as the carbon lamp, or the tungsten lamp, the patents on which had not yet been issued.

Under this decree the General Electric Company took over the factory of the Providence Gas Burner Company and made it the Providence Gasworks of the General Electric Company. It thereafter carried

on the base business in its own name. The company was thereupon obliged to decide upon a business policy. It appears that about one-half of the lamps which were made in the country were vacuum tungsten lamps, which would be covered by the Just and Hanaman patent, which was soon to issue to the appellant. The Langmuir patent did not exist commercially at the time. The General Electric Company owned some other patents, covering bases and covering the machines by which they were manufactured. It thus had to decide whether it should or should not sell the bases to other lamp manufacturers, including those manufacturers who were making tungsten lamps. Tungsten lamps were then unpatented, because the patents had not been issued, and the carbon lamps were unpatented and never could be patented, because patents which covered them had expired years before. Whether or not this business policy was required, either by the decree or by good business, it afforded sufficient ground for the present claim of good faith in the sale by the appellant, and its present position that it did not intend, by sales of bases, to license the sale of lamps under the Langmuir patent. It also showed justification for incorporating in the terms of sale the red-lettered notation above referred to. It justified the Base Works Company selling over the counter without inquiry as to what use was to be made of the base. The appellant had a right to rely on its monopoly granted by the issuance of the patents for its lamp under Langmuir. It also appears that after granting the patents, the appellant has prosecuted suits for infringement, and has shown a clear desire to establish the validity of its patent. The bases sold to the appellees could be used for other purposes than using with them the lamp which was protected to the appellant by the patents.

[1] The burden was upon the appellees to establish that the parties agreed, by a meeting of the minds, that the licenses contended for should be granted, or that when the bases were purchased, the parties understood, and the appellees had adequate reason to assume, that they had received an implied license under the circumstances, which estopped the appellant from denying that such was the intention of the parties at the time of the transaction. The appellant's affidavits show that the appellees knew of this situation, that they knew about appellant's practice in selling bases, and that they knew the patents in suit were in process of being sustained in litigation, and were subsequently enforced.

[2] The affiants show that this was known to the trade, and in the answering affidavits there is no claim that, at the time when the bases were bought, the appellees understood they were getting a license under the lamp patents. There is no intimation or suggestion that, when the appellees purchased these lamps, they were obtaining a license under the lamp patents, and it also appears that they knew of the red ink notice. The claim is simply that they were encouraged by the conservative and moderate manner in which the appellant dealt with its patents, and believed that they would never suffer loss, and that they were encouraged because the bases were so easily obtainable from the appellant. Nowhere is it shown that by written or spoken word was an implied license granted, and, on the contrary, we think the conduct of the

appellant shows that they were not granting licenses; on the contrary, they instituted suits for infringement against infringing tungsten lamp makers, who were buying bases from the appellant and using the patented lamp. We think there was nothing in the sale of these bases which justified the claim of estoppel against the appellant enforcing its rights against infringers.

[3] Use of an invention can only be obtained on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempt from his right to exclude, and, whatever the terms, the courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. 358, 83 C. C. A. 336. In United Nickel Co. v. California Works (C. C.) 25 Fed. 475, it was said:

"The selling of the solution does not authorize, inferentially or otherwise, the use of it for the purpose of nickel-plating, whatever else it may be used for, without also procuring a license to nickel-plate under the first and fourth claims, which are separate inventions."

[4] So, where the owner of a patent sells a patented article subject to a restriction, the purchasers, with notice of this limitation, could acquire no better right than strangers to infringe upon that part or claim of the monopoly still secured to the patentee. Dickerson v. Tinling, 84 Fed. 192, 28 C. C. A. 139. The sale of an element of a patented combination does not necessarily imply license to use the whole combination. There is always a question of what is a fair inference from the transaction. Leeds & Catlin Co. v. Victor Talking Machine Co., 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816; Amer. Graphophone Co. v. Amet (C. C.) 74 Fed. 789. In Edison Electric Co. v. Peninsular Light Co., 101 Fed. 831, 43 C. C. A. 479, Judge Lurton pointed out that there may be circumstances under which the sale of a patented article by the patentee will carry with it the right to use another in co-operation with the first, although the thing be covered by a second patent, such as where an article of a peculiar construction is sold which has no practical use, unless it be used in combination with some subordinate part covered by the patent of the vendor and their right to use the latter in co-operation with the former might be implied under the circumstances. In 101 Fed. at page 836, 43 C. C. A. 479, 484, Judge Lurton said:

"The limitations upon this is that the things which pass by implication only must be incident to the grant, and directly necessary to the enjoyment of the thing granted. The foundation of the maxim lies in the presumption that the grantor intended to make his grant enjoyable. * * * It is evident that the extent of an implied license must depend upon the peculiar facts of each case. The question in each case is whether or not the circumstances are such as to estop the vendor from asserting infringement."

We accept this statement of the law, and with it as a guide we think the parties here did not intend that an implied license be granted. The mere sale imports no license, except where the circumstances plainly indicate that it did, or except where good faith required it, or where it cannot be doubted that the vendee understood that they were getting a license. We are convinced that, in view of what was written in the terms of sale, there was no justification for the vendee's being thus

persuaded. Natl. Cash Register v. Grobet, 153 Fed. 905, 82 C. C. A. 651; Thomson Co. v. Ill. Tel. Const. Co., 152 Fed. 631, 81 C. C. A. 473; Montross v. Mabie (C. C.) 30 Fed. 234. We find nothing in the conduct or language which would justify the appellees to be led to any course of conduct justifying their use of the patented lamp in connection with these bases. The bases were capable of noninfringing uses, and the notice on its face was intended to warn against the use by infringement of the patent in suit.

Orders reversed, with directions to grant the injunction pendente lite as prayed for.

GENERAL ELECTRIC CO. v. ALEXANDER et al.

(Circuit Court of Appeals, Second Circuit. April 10, 1922.)

No. 262.

1. **Patents ⟸97—Prior foreign patent does not invalidate, unless it claims same invention.**

   The defense of invalidity because of a prior foreign patent, under Rev. St. § 4887 (Comp. St. § 9431), puts a heavy burden on defendant, who, must show that the invention actually claimed in the foreign and domestic patents are identical; it being insufficient that the foreign patent discloses, but does not claim, the invention claimed in the domestic patent.

2. **Patents ⟸97—Foreign yrocess patent prevents subsequent patent for product of process.**

   A foreign patent for a process, whose only use is to make a particular product, prevents a subsequent attempt more than two years later to get American protection for the product.

3. **Patents ⟸97—Foreign patent for inoperative process cannot defeat subsequent product patent.**

   A foreign process patent, disclosing an inoperative process, which, therefore, could not produce plaintiff's product, does not invalidate a subsequent American patent for the product which the process attempted to obtain, since the process and product patents manifestly do not claim the same invention.

4. **Patents ⟸328—1,018,502, for tungsten lamp filament, held infringed.**

   The Just and Hanaman patent, No. 1,018,502, for electric lamp filament composed of pure, coherent, or homogeneous tungsten, *held* infringed by a lamp filament made of tungsten, in which there was a small quantity of thoria, to stiffen the filament.

5. **Patents ⟸226—Substantial appropriation of function by substantially patented means is infringement.**

   While impairment of function is no defense to infringement, and improvement of function is oftentimes patentable, the substantial appropriation of the function of a patent by using substantially the patented means is always infringement.

6. **Appeal and error ⟸959(2)—Equity ⟸297—Whether supplemental bill may be filed rests in court's discretion.**

   Whether a supplemental bill may be filed, or plaintiff required to file a new bill, usually rests in the discretion of the trial court, and is not subject to review, if no abuse is shown, and the procedure of permitting supplemental bills should be favored.

7. **Patents ⟸287—Infringing business by partnership and by corporation held continuing infringement.**

   Where two partners were engaged in an infringing business, and one of them bought the interest of the other and formed a corporation, of which

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he was sole stockholder, president, and treasurer, which continued the infringing business, both the purchasing partner and the corporation have been engaged in one continuing infringement and may be jointly sued.

8. Patents ⟸285—Joining separate causes of action against partners and subsequent corporation held proper.

Even if a suit against a corporation for infringement of a patent was a separate cause of action from the suit against its sole stockholder for infringement before he formed the corporation, there were sufficient grounds for uniting the causes of action against the two defendants to promote the administration of justice, under equity rule 26.

9. Patents ⟸290—Sole stockholder and manager of corporation may be enjoined.

In a suit for infringement of a patent brought against a corporation, the sole stockholder of the corporation who was its president and treasurer, may properly be joined with the corporation.

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

Suit in equity for infringement of a patent by the General Electric Company against F. Alexander and another. Decree for plaintiff (277 Fed. 290), and defendants appeal. Affirmed.

Action is upon the Just and Hanaman patent, No. 1,018,502, and the Langmuir patent, No. 1,180,159. Both patents have been sustained in this circuit; the former in General Electric Co. v. Laco-Phillips Co., 233 Fed. 96, 147 C. C. A. 166, and the latter in General Electric Co. v. Nitro-Tungsten Lamp Co. (C. C. A.) 266 Fed. 994, in which reported decisions the patent claims are sufficiently set forth. The trial court upheld both patents and declared infringement. Defendants appealed.

Charles J. Holland and Cornelius C. Billings, both of New York City, for appellants.

Frederick P. Fish, of Boston, Mass., Hubert Howson, of New York City, and Albert G. Davis and Alexander D. Lunt, both of Schenectady, N. Y., for appellee.

Before HOUGH and MANTON, Circuit Judges, and GARVIN, District Judge.

HOUGH, Circuit Judge. The subject-matter of this litigation is the commercial article known as the tungsten-nitrogen lamp, in making which both the patents in suit are used, as is also the Coolidge patent 1,082,933, lately considered at length and broadly upheld in General Electric Co. v. Independent, etc., Co. (D. C.) 267 Fed. 824. The exhaustive opinion of Mayer, J., resulting in the decree appealed from, is reported in General Electric Co. v. Alexander (D. C.) 277 Fed. 290.

Reported decisions have, we think, rendered unnecessary further discussion of what may be called the history or technical literature of the three patents mentioned. Adhering, as we do, to our previous rulings above referred to, we shall now treat everything but what are called new questions of law, largely by reference to reports.

It is proved, and indeed admitted, that both the individual and cor-

porate defendants have made and/or sold tungsten-nitrogen lamps substantially identical with those made and sold by plaintiff under the asserted protection of the Just and Hanaman, Coolidge, and Langmuir patents. Indeed, defendant's lamp is the same thing as that which was before us in 266 Fed. 994, except that it appears to be somewhat better made. That this product of defendants infringes the Langmuir patent we hold to be too plain for discussion; all that need be said on this subject has been said either in our previous decision on the subject, or in this case, and by the court below in 277 Fed. at page 291.

The defenses urged against the Just and Hanaman patent are:

(1) That the same patentees obtained German patent, 154,262, valid from April 15, 1903, for substantially the same invention as is revealed by their patent in suit applied for July 6, 1905; wherefore the patent at bar is invalidated under Rev. Stat. § 4887 (Comp. St. § 9431).

(2) There is no infringement, because defendant's filaments contain an extremely small quantity of thoria, which prevents said filaments being the "pure, coherent, or homogeneous" tungsten filaments of Just and Hanaman. Vide claims, 233 Fed. at 971, 147 C. C. A. 166. In point of fact defendant's filaments are admittedly made in the manner of Coolidge, and contain thoria for the reasons and purposes set forth in Coolidge's disclosure. Cf. (D. C.) 277 Fed. 292, 293, and (D. C.) 267 Fed. 839.

[1] 1. The defense of invalidity under section 4887 puts a heavy burden on a defendant. The various amendments to that section have not changed the truth of Judge Putnam's statement in Westinghouse, etc., Co. v. Stanley, 138 Fed. 823, 71 C. C. A. 189, that the act applies only to cases where the inventions actually claimed in the foreign and domestic patents are identical. It is not sufficient that the foreign patent may disclose the invention of the later United States patent where it is not therein claimed. We agree also with the somewhat similar language of Judge Coxe on this subject in Brush, etc., Co. v. Accumulator Co. (C. C.) 47 Fed. 48.

The claim of the German patent is for a process, and we agree with the court below (vide 277 Fed. 295–299) that the German process is wholly inoperative, in that it cannot produce the product covered by the patent in suit. The essential reason for this conclusion is that doing what the German patent calls upon one to do will never replace carbon by tungsten. The process rests upon the theory of replacement, and that theory has no substratum of fact.

[2, 3] The German patent being for a process, and the one at bar for a product, it is true that, if the only use of the process is to make the product, such foreign process patent would and should affect an attempt to get American protection for the product. But that is not here true; this German process patent will not make, and never has made, anybody's incandescent lamp filament, and especially will it not make the product of the patent in suit. Therefore in no sense are the two patents for the same invention (Holmes, etc., Co. v. Metropolitan, etc., Co. [C. C.] 22 Fed. 341) whether one regards the proven facts, or the language of disclosures and claims. In point of fact this defense is not new, as appears from our records. It was formally pleaded, but

early abandoned by the very skilled counsel for the defense in the Laco-Phillips Case, 233 Fed. 96, 147 C. C. A. 166.

[4] 2. The defense based upon the presence of thoria may be thus stated: Defendants admit the use of Coolidge's thoria-containing filament; but, as they are not now sued on the Coolidge patent, they cannot infringe here. To be sure, our decision in the Laco-Phillips Case, supra, specifically held that a Coolidge drawn filament infringed the Just and Hanaman patent, although it was an improvement of such a striking nature that it completely drove all other tungsten filaments from the market. But it does not appear that this court has heretofore recognized Coolidge filaments as normally containing thoria, although it is fairly certain that they have usually contained that substance, and of course it has always functioned in the mechanical way now proven and sufficiently stated in the opinion below, 277 Fed. 293.

[5] While fully adopting what was said below on this subject, it may be pointed out that while impairment of function is no defence to infringement, and improvement of function is oftentimes patentable matter of a very valuable kind, if the functioning of a patent is substantially appropriated by substantially using the patented means, infringement always exists. The object of all makers of incandescent light filaments is to get the best light, and what at present makes the tungsten filament the best light-giving means is pure, cohering, and homogeneous tungsten. Tungsten of that kind is functioning just the same with or without the mechanical thoria stiffener. This is true, no matter whether the slender thread of incandescence is made by Just and Hanaman, or by Coolidge; by this plaintiff, or these defendants. On this subject of substantial appropriation of another man's protected concept and means of expression thereof, reference may be made (in addition to the cases cited below) to Treibacher v. Roessler, 219 Fed. 210, 135 C. C. A. 108, affirming (D. C.) 214 Fed. 410.

Defendants further object to the bringing or maintenance of this particular suit. Defendant Alexander and one Fabian were once partners trading as Alpha Electrical Laboratories. This concern sold infringing lamps, whereupon this action was brought against the partners trading as aforesaid. Subsequently plaintiff learned that, before bill filed, the business had been incorporated as Alpha Laboratories, Inc., at which time Alexander had bought out Fabian and become the owner of all the shares in the new company, as well as its president and treasurer. Thereupon by leave of court supplemental bill was filed, bringing in the corporate defendant; and there is proof that the corporation continued to do the same business and make and sell the same infringing lamps as did the partnership. At trial bill was dismissed as to Fabian, and injunction given and accounting ordered against both Alexander and the corporation.

[6] On this state of facts it is asserted (1) that there is an improper joinder of causes of action, in that no single liability has been asserted or proven against both defendants, and that (2) no decree should have passed against Alexander because he was "merely a stockholder or treasurer" of the infringing corporation. Whether a supplemental bill may be filed, or plaintiff driven to filing a new bill, is usually mat-

ter of discretion in the trial court. Rosemary, etc., Co. v. Halifax (C. C. A.) 266 Fed. 363. Discretion is the subject of review, if abused, but no abuse is shown here; on the contrary, the procedure, though of modern growth, tends to economy and speed and is to be favored.

[7] Defendant's argument rests on the thought that there are two infringements, and no legal connection between them; because one was committed by Alexander as a partner and the other by a corporation of which Alexander is President, Treasurer and sole share owner. What is infringement is largely matter of fact, and the fact is that this infringement was one continuing act, in which Alexander participated, first as partner, and then in his various corporate capacities. Ordinarily the treasurer (or the like) of a corporation is, if not a servant, at any rate but a part, of the corporate organization; a man who in matters of infringement oftentimes differs in degree only, and then but slightly, from a salesman or agent. This is not true here, for Alexander with a partner began infringement, bought out the partner and continued infringement, by means of a corporation which for all purposes of direction and profit is no more than Alexander himself.

[8, 9] The answers to defendant's position are three: (1) Both defendants have been and are engaged in one continuous and continuing infringement. (2) Even if this were not true, there are "sufficient grounds" for uniting the causes of action against the two defendants "in order to promote the convenient administration of justice." Equity rule 26; Marcus Brown Co. v. Feldman (D. C.) 269 Fed. 306, affirmed 256 U. S. 170, 41 Sup. Ct. 465, 65 L. Ed. 877. (3) Under the circumstances shown, Alexander would still be a proper person to enjoin with his corporation. Prest-o-Lite Co. v. Acetylene, etc., Co. (D. C.) 259 Fed. 940, and cases cited.

Decree affirmed, with costs.

GENERAL ELECTRIC CO. v. INCANDESCENT PRODUCTS, Inc.

(District Court, D. New Jersey. May 22, 1922.)

1. **Patents ⟸297(2)—Showing infringement of patents sustained in other jurisdiction generally entitles patentee to preliminary injunction.**
   Ordinarily a patentee, who has shown that the validity of its patent has been sustained in other jurisdictions, is entitled to a preliminary injunction on a showing of infringement.

2. **Patents ⟸328—1,180,159, for nitro-tungsten electric lamps, held infringed.**
   The Langmuir patent, No. 1,180,159, for electric lamps composed of a tungsten filament in nitrogen gas, particularly claims 4 and 5, was not limited to the specific sizes or quantities of the elements employed to achieve the result disclosed, which quantities were not specified in the claims, and is infringed by a lamp containing the same elements operating in substantially the same way, though the quantities of the elements are not the same, and the result produced is not as efficient.

3. **Patents ⟸328—1,180,159, held not anticipated.**
   The Langmuir patent, No. 1,180,159, for an electric lamp having a tungsten filament in nitrogen gas, *held* not infringed by prior patents for a vacuum tungsten lamp, or for a lamp having a carbon filament in nitrogen gas.

In Equity. Suit for infringement of a patent by the General Electric Company against the Incandescent Products, Inc. On application for a preliminary injunction. Application granted.

Frederick P. Fish, of Boston, Mass., Howson & Howson, of New York City, and Albert G. Davis, of Schenectady, N. Y., for plaintiff.

Richard Eyre, W. N. Seligsberg, and Harvey C. Price, all of New York City, for defendant.

BODINE, District Judge. The present application is for a preliminary injunction. At the time of the argument, the plaintiff seemed so clearly entitled to its remedy that an injunction would have been immediately granted, but for the request of defendant's counsel that he be given time to file a brief.

The General Electric Company is the owner of United States letters patent dated April 18, 1916, No. 1,180,159, issued to Irving Langmuir. The defendant, a New Jersey corporation, was organized October 28, 1921, for the purpose of engaging in the general contracting business, including the manufacture of things electrical.

The scope of plaintiff's patent, so far as material to this issue, is set forth in claims 4, 5, 12, and 13 of the patent, which are as follows:

4. The combination of a lamp bulb, a filling therein of dry nitrogen at a pressure materially in excess of that corresponding to 50 millimeters of mercury and a filament of tungsten of large effective diameter, the filament being thereby adapted for operation at a temperature higher than that which it would have if operated in a vacuum at an efficiency of one watt per candle.

5. An incandescent electric lamp having a filament of tungsten of large effective diameter and a bulb or globe therefor filled with dry nitrogen at a pressure as high or higher than that corresponding to 300 millimeters of mercury, the filament being thereby adapted for operation at a temperature higher than that which it would have if operated in a vacuum at an efficiency of one watt per candle.

12. In an incandescent lamp, the combination of the lamp bulb, a tungsten filament therein, and a gaseous filling, the effective diameter of the filament being sufficiently large and the heat conductivity of the filling being sufficiently poor to permit the lamp to be operated with a filament temperature in excess of that of a vacuum tungsten lamp operating at an efficiency of one watt per candle and with a length of life not less than that of such a lamp.

13. An incandescent electric lamp having a closely coiled tungsten filament, the coil giving the effect of a filament of large diameter, an inclosing bulb and a filling of gas having a materially poorer heat conductivity than hydrogen and at a pressure as high or higher than 300 millimeters of mercury, the filament being adapted for operation in said gaseous filling at a temperature higher than that which it would have if operated in a vacuum at an efficiency of one watt per candle.

The validity of these particular claims was upheld in General Electric Co. v. Nitro-Tungsten Lamp Co. (D. C. Oct. 27, 1919) 261 Fed. 606 (opinion by Judge Mayer), affirmed June 2, 1920 (C. C. A.) 266 Fed. 994 (opinion by Judge Hough); General Electric Co. v. Continental Lamp Co. (C. C. A.) 280 Fed. 846 (April 3, 1922, opinion by Judge Manton); General Electric Co. v. Alexander et al. (D. C. Oct. 29, 1921) 277 Fed. 290 (opinion by Judge Mayer), affirmed April 10, 1922 (C. C. A.) 280 Fed. 852 (opinion by Judge Hough). The corresponding British patent was upheld by the House of Lords in British Thomson-

Houston Co., Ltd., v. Corona Lamp Works, Ltd., decided December 19, 1921.

[1] The plaintiff ordinarily, having shown that the validity of its patent had been sustained in other jurisdictions, would be entitled to an injunction upon the showing of infringement. Cary v. Lovell Co. (June 12, 1885) 24 Fed. 141 (opinion by Judge Acheson); Edison Electric Light Co. v. Electric Mfg. Co. (C. C. July 20, 1893) 57 Fed. 616 (opinion by Judge Seaman); Wallerstein v. Christian Feigenspan (June 8, 1914) 215 Fed. 919, 132 C. C. A. 157 (opinion by Judge McPherson); Elite Pottery Co. v. Dececo (Jan. 16, 1907) 150 Fed. 581, 80 C. C. A. 567 (opinion by Judge Buffington).

The defendant's business is of most recent origin. Its first price list appeared the latter part of December, 1921, nor were any business steps taken by it until long after the validity of the plaintiff's patent had been sustained, after exhaustive litigation in other jurisdictions, as above indicated. The courts have written the history of incandescent electric light lamps prior to the Langmuir invention. See the opinion of Judge Lacombe in Edison Electric Light Case (1892) 52 Fed. 300, 3 C. C. A. 831.

The Edison elements were three—a carbon filament, in a vacuum, inclosed in a glass chamber. These elements remained the same, with refinements, until Langmuir introduced into the art, as shown by the claims in suit, a co-ordination between a coiled tungsten filament in nitrogen, argon, or mercury vapor gas, inclosed in a glass chamber under pressure. The results obtained and reasons for the success of the Langmuir invention are admirably expressed by Judge Mayer in the Nitro-Tungsten Lamp Co. Case, supra, 261 Fed. 607:

"The Langmuir lamp has proved extraordinarily successful. In street and display illumination it dominates the commercial field, and from the standpoint of aggregate product for use in many ways, and return in dollars and cents, the record demonstrates unquestioned commercial utility. With this indisputable success, the question is whether Langmuir has merely taken advantage of well-known facts and data to an extent within the knowledge of only a man having the qualifications of one skilled in this art, or whether the accomplishment was so advanced as to rise to invention. Langmuir is a scientist of extensive education and extraordinary ability, possessed of persistency and patience, and gifted with the kind of imagination which is valuable, when curbed by analysis. With this equipment he undertook the task, which resulted in his 'present invention,' which 'relates to improvements in incandescent electric lamps whereby it is possible to produce a lamp capable of operating at extraordinarily high efficiency and giving a light of marked increase in intrinsic brightness and whiteness.'"

Prior to the Langmuir invention, it was well known to electrical engineers that an increase in temperature would increase the power of the light, but lamps to be ordinarily useful must have life as well as power. The increase in temperature would increase the evaporation of the carbon, resulting in short life and the blackening of the glass container. Experimentations carried on by Mr. Edison in the early stage of lamp building indicated that gas under pressure would retard the evaporation of the carbon filament. Experimentations, however, indicated that the gas carried away heat from the filament by convection, resulting in no gain whatsoever. Further the carbon filament then used acted badly in gas.

Langmuir's contribution to science lay in increasing the *effective diameter* of the filaments, thereby compensating for the convection losses, which were not increased in the same ratio as the light emissions were increased. When Langmuir commenced his experimentations, the voltage and type of lamp used throughout the country was fixed. His success was obtained by increasing the effective diameter of the filament in use in the standard lamp. It was sometimes necessary to reduce the actual diameter of the filament, in order that the same might be properly coiled and its effective diameter thereby increased. The co-ordination or correlation of the parts used is fully disclosed in the patent. Judge Hough, in the Nitro-Tungsten Case, 266 Fed. 1000, said:

"He did not invent any nitrogen-filled bulb with any tungsten filament in it, but a special article of special proportions and a carefully stated co-ordination of parts."

The defendant's lamps are designed for use in the ordinary circuits. Those manufactured directly are rated at 150, 100, and 75 watts. The imported Austrian lamps sold by the defendant are rated at 40 and 25 watts. There is in each a glass container with a coiled tungsten filament, filled with nitrogen gas under pressure. In the Austrian lamp the gas is a mixture of argon and nitrogen. There is nothing to distinguish the defendant's lamps from the plaintiff's, and the entry of the defendant into business, after the establishment of the validity of the plaintiff's patent in another jurisdiction, indicates not only a slavish imitation, but a willful disregard of established rights.

[2] These circumstances alone would justify, under the authorities above cited, the granting of a preliminary injunction; but the contention of the defendant is that, nowithstanding the number of times the courts have upheld the patent, new facts are herein involved which affect the scope and validity of the patent, so that a preliminary injunction is not now proper. The defendant cites the Nitro-Tungsten Case, 266 Fed. 994, 996, where the description of the particular infringing lamp is set forth as the bright limit of judicial determination with respect to the scope of that decision. The infringing lamp was described as follows:

"The subject, then, of this litigation, is what defendant has made and sold, viz. the 'comet' or 'standard multiple gas-filled tungsten' lamp, having (in a typical lamp) a tungsten filament .003 inch in diameter, helically coiled to a coil diameter of about .017 inch; dry nitrogen in the bulb at a pressure (cold) of about 700 mm.; and a starting efficiency of .82 to .95 watt per candle. After 500 hours' operation at rated voltage, the temperature of the filament will still be approximately 2520° C., or about 400° higher than that of one of same metal in a vacuum lamp operating at about 1 watt per candle."

The court, however, did not decide that the plaintiff's patent had only such limits. It did, however, decide that the claims in suit were novel and that—

"It was impossible to give exact measurements, because the economic object of the lamp was to diminish the wattage per candle, and dimensions must be proportioned to the designed wattage; i. e., substantially to the size of the lamp—something to be worked out according to rules presumably long familiar to a competent electrical engineer. It was unnecessary to do more than

state the limits of invention in terms of result, because the results desired are not functional, and do indicate limits in terms of lamp life and candle power which are likewise presumably quite familiar to any competent electrician. When a claim defines achievement in words no broader than the disclosure, and in phrases which, as interpreted by competent workers in the art, tell one how to do what the patentee did, it can rarely be called indefinite."

Clearly the decision is not confined to lamps containing certain definite and specific dimensions because these specific dimensions Langmuir never disclosed.

The defendant further contends that the plaintiff's patent is limited by the measure of the effectiveness and life of the lamps, as contrasted with those in which a vacuum was used. The patent was granted on a structure definitely described and clearly portrayed. The Patent Office granted a privilege for the structure and not for the result. O'Reilly v. Morse, 15 How. 112, 14 L. Ed. 601. The courts protected the patent, because it described a novel and mechanical arrangement. It was a device, and not a result, which was patented, and the defendant can avail itself of nothing because in its manufacture the parts used by Langmuir are so inartistically correlated as to produce a less efficient result. Judge Buffington said, in Mitchell v. Ewart Mfg. Co., 81 Fed. 391, 395, 26 C. C. A. 443, 447:

"While the appellant has avoided a mere servile copy of form, he has appropriated the substance of the Dodge invention. That in doing so he has rendered inoperative the function on one groove will not suffice to relieve him from the charge of infringement. * * * He gets the same result, which Dodge first showed, by substantially the same means, and in substantially the same way."

The defendant in this case has not even avoided the servile copy of form which Judge Buffington referred to. It has copied everything, but in its manufacture it may or may not have fallen below the standards attained by the plaintiff. On such shifting ground it cannot predicate a defense.

Further, in the fourth and fifth statements of claim there is no limitation of lamp life or efficiency expressed as in some of the other claims. The precise limitation is that the filament shall be "adapted for operation at a temperature higher than that which it would have, if operated in a vacuum at an efficiency of one watt per candle." Clearly the defendant's lamps attain a temperature higher than they otherwise would attain, and fall within the scope of the patent in suit.

[3] Defendant further calls attention to the prior French patent, La Tang No. 384,915, as an anticipation. This patent was for a vacuum tungsten lamp having a coiled filament. Gas under pressure was not used in this lamp, and the reason for the coiling was to concentrate the light. The result was a detriment to efficiency. Such a lamp was clearly not an anticipation. It also refers to the Edison patent, No. 274,295, of March 20, 1883. This patent was before Judge Mayer in the Nitro-Tungsten Case, 261 Fed. 608, 609, who said:

"Edison, in his patent No. 274,295, of March 20, 1883, made a serious attempt to produce a gas-filled nitrogen (inter alia) lamp. He failed, and Howell graphically describes how completely he failed."

Lord Finlay said, in the House of Lords, speaking of Edison's British patent, corresponding to his American patent here cited:

"This proposal never worked in practice, and the evidence in the present case shows that a lamp with a carbon filament in such a gas as nitrogen could never work."

The plaintiff having established its patent in other jurisdictions, and having shown a slavish imitation, by the defendant, of the product manufactured under its patent, is entitled to an immediate preliminary injunction.

GUARDIAN LIFE INS. CO. v. ROSENBAUM et al.

(Circuit Court of Appeals, Third Circuit. April 18, 1922.)

No. 2846.

1. **Insurance ⟸222—Rights of assignee of life policies held not to have lapsed.**
Where life policies were assigned to secure payment of notes, the assignee's right to amount of notes out of proceeds of policies was not barred by laches because of the long period which had elapsed since the notes were made, since, if notes had lapsed, all conditions to the return of the policy had also lapsed, so that assignor could not successfully demand payment of policies without first paying the moneys which the assignment was made to secure.

2. **Interpleader ⟸35—In insurance company's suit, begun by bill of interpleader, prevailing defendant not entitled to costs or attorney's fees as against other defendant.**
In suit begun by insurance company's bill of interpleader, under Act Feb. 22, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991a), the prevailing defendant will not be allowed costs and attorney's fees, where the fund was not created by the defendant claiming it.

Appeal from District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Bill of interpleader by the Guardian Life Insurance Company, a corporation chartered under the laws of the state of New York, against Oscar H. Rosenbaum and Martin Rosenbaum. From a decree for the last-named defendant, the first-named defendant appeals. Affirmed.

Oscar H. Rosenbaum, R. L. Crawford, and Van A. Barrickman, all of Pittsburgh, Pa., for appellant.

Geo. J. Campbell, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

PER CURIAM. Notwithstanding the very able argument made by the plaintiff in error, we find no warrant for convicting the court below of error. The opinion [1] quoted in the margin sets forth the facts

[1] Under the Act of Congress approved February 22, 1917 (39 Statutes at Large, p. 929 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 991a]), a suit in equity, begun by bill of interpleader was filed by the plaintiff against Oscar H. Rosenbaum and Martin Rosenbaum; the defendants each claiming the proceeds of certain life insurance policies. Said proceeds were paid to the clerk of this court. It appeared by the bill that the adverse claimants were residents of different states, and that one of them, namely, Oscar H. Rosen-

and so thoroughly vindicates itself that we adopt it as the views of this court.

baum, resided within the jurisdiction of this court. The bill was entertained, both claimants made answer, a decree was entered discharging the company from every liability on its policy, and defendants required to interplead between themselves on their respective claims to the fund.

Two policies of life insurance, amounting to $8,000, were issued on the life of one Leopold Rosenbaum, and made payable to his wife, or their children if she died before the insured. In 1907 and 1908 the insured made out and delivered three promissory notes payable one day after date, to Martin Rosenbaum, one of the claimants, for which he received from the insured's brother, Joseph Rosenbaum, $1,000 in 1907 and from Joseph Rosenbaum's estate at a later time $3,000. Joseph Rosenbaum resided in Nuernberg, Germany, and died in 1907 leaving by will one-fifth of his estate to the insured for life. Martin Rosenbaum acted as agent for testator during testator's life, and for his personal representative after his death, in the matters in question. The one-fifth of Joseph Rosenbaum's estate, according to the evidence, amounted to $8,106.20. On June 10, 1908, the insured, his wife, and Oscar H. Rosenbaum their only child, who was of legal age, assigned under seal these policies to Martin Rosenbaum to cover this $4,000 represented by the said promissory notes. Martin Rosenbaum then continued to pay quarterly, until the death of the insured, $51.33, which represents 5 per cent. interest on the one-fifth of the said Joseph Rosenbaum's estate. The insured's wife died before him, leaving her only child, the said Oscar H. Rosenbaum. Martin Rosenbaum now claims the sum of $4,000 as due him on the said notes, without interest, because the interest for which they called is set off by the interest due insured as income for life from his brother Joseph's estate. He also lays claim to a counsel fee and expenses connected with this litigation.

[1] The cross-petitions, answers, testimony, and exhibits are voluminous, and impliedly raise a number of questions as to payment, statute of limitations, fraud, and conspiracy, much of which is set up in the form of conclusions of law, and which cannot be considered by the court. Because of the long period which has elapsed since these notes, evidencing the $4,000, were made, which, standing alone might be held to indicate payment or laches, yet such claim cannot be successfully maintained. A sufficient answer to the contention is that, if the notes have lapsed, all conditions to the return of the policy would also have lapsed, thus apparently giving Martin Rosenbaum a right to the whole of the policies under the assignment. The assignment being valid and under seal, the assignor could not successfully demand payment of the policies without first paying the moneys which the assignment was made to secure.

[2] It is also true that neither payment nor the statute of limitation is set up in the pleadings. Fraud and deceit and conspiracy have been set up, but merely as conclusions of law. None of these have been established by the evidence. The court can find no ground for holding the defendant Martin Rosenbaum guilty of laches. He is therefore entitled to the $4,000 claimed, upon the delivery of the notes; but the court does not feel justified in allowing the counsel fees and expenses. The fund in no way was created by the defendant claiming it. Harrison's Estate, 221 Pa. 508, 70 Atl. 827.

An order will therefore be made, directing payment of $4,000 to the defendant Martin Rosenbaum, upon the surrender of the notes, and payment of the remaining $4,000 due to the defendant Oscar H. Rosenbaum, less $3,000 paid him under order of court since the hearing in this case, less, also, actual court costs, for which deduction shall be made by the clerk of this court.

STERNBERG v. FIRST NAT. BANK OF CAMDEN.

(Circuit Court of Appeals, Third Circuit. April 26, 1922.)

No. 2795.

1. **Judgment ⟸199(1)—Notwithstanding verdict entered only when adverse party is not entitled in law to judgment.**
The judgment notwithstanding the verdict is entered for the plaintiff when it appears on the record, either from some matter growing out of the pleading or because the fact found by the jury is immaterial, that the defendant is not in law entitled to the judgment.

2. **Judgment ⟸199(3)—Notwithstanding verdict cannot be entered, where material issue of fact was submitted on conflicting evidence.**
Where a material issue of fact has been raised by proper pleadings and submitted to the jury on conflicting evidence, the court has no authority to review the facts or to make a different finding, even if it were disposed to do so, and cannot, therefore, grant plaintiff's motion for judgment notwithstanding the verdict for defendant.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action at law by B. Wm. Sternberg against the First National Bank of Camden. Judgment for defendant, and plaintiff brings error. Affirmed.

B. Wm. Sternberg, of Philadelphia, Pa., in pro. per.

Fell & Spalding and Henry Spalding, all of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. The single question is whether the trial court erred in refusing judgment non obstante veredicto. In a review of this nature we look very carefully into the issues raised by the pleadings and the testimony submitted to the jury.

The plaintiff, by his statement of claim, averred that the defendant bank is indebted to him in the sum of $3,340 for deposits made in 1899 and ever since remaining to his credit. The defendant, by its affidavit of defense, admitted that at one time the plaintiff had a deposit account with it, but averred that in 1898 he closed the account by drawing against it for the full amount; that since that time the plaintiff has made no deposits; and that, accordingly, it owes him nothing. This sharp issue of fact raised by the pleadings was tried to a jury. Conflicting testimony in support of these opposite averments was introduced and the case submitted without exception by the plaintiff to any ruling or to the charge of the court. The verdict was for the defendant. The plaintiff moved for judgment non obstante veredicto on the contention that the evidence for the defendant was both false and insufficient. The court denied the motion and the plaintiff sued out this writ of error.

Laying aside any question of the plaintiff's right to maintain this writ, we are disposed to give consideration to the ground on which

it is based, especially as the plaintiff, who appeared and tried the case in propria persona, is not trained in the law. We are constrained to believe, however, that the grievance he feels is due to a misconception of the law which he invoked.

[1, 2] Judgment non obstante veredicto, technically, is entered for the plaintiff, on his motion, when it appears on the record, either from some matter growing out of the pleading or because the fact found by the jury is immaterial, that the defendant is not, *in law,* entitled to the judgment; as, for instance, where a verdict has been found for the defendant on an insufficient plea in avoidance, Jones v. Fennimore, 1 G. Greene (Iowa) 134; Dewey v. Humphrey, 5 Pick. (Mass.) 187; or where the plea confesses the action and fails to avoid it, Martindale v. Price, 14 Ind. 115; or where the plea, though true, is neither a bar nor an answer, Sullenberger v. Gest, 14 Ohio, 204. But where a material issue of fact has been raised by proper pleadings and submitted to the jury on conflicting evidence, the dispute belongs exclusively to that tribunal. The court has no authority to review the facts and, as matter of law, make a different finding even if it were disposed to do so. Blazosseck v. Remington & Sherman Co. (C. C.) 141 Fed. 1022; Slivitski v. Wien, 93 Wis. 460, 67 N. W. 730; Bouvier's Law Dictionary, 1719, 2357, 2358.

As the evidence on the one material issue of fact in the case was conflicting, the trial court was without power to grant the plaintiff's motion for judgment non obstante veredicto. Therefore, the judgment entered on the verdict must be affirmed.

LEADY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1922.)

No. 5946.

Criminal law ⊂=424(1)—Conspirators' statements after offense held inadmissible.
Testimony of statements made by alleged coconspirators, after commission of the offense charged, is not competent to connect a codefendant therewith.

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

Criminal prosecution by the United States against R. B. Leady and others. Judgment of conviction, and defendant Leady brings error. Reversed and remanded.

Seth W. Richardson, of Fargo, N. D. (William H. Barnett, of Fargo, N. D., on the brief), for plaintiff in error.

S. L. Nuchols, Asst. U. S. Atty., of Fargo, N. D. (Melvin A. Hildreth, U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before LEWIS, Circuit Judge, and TRIEBER and POLLOCK, District Judges.

LEWIS, Circuit Judge. This writ of error, sued out by R. B. Leady and E. O. Haugen, brings up the record, wherein it appears that Leady, Haugen, and Theodore Musgjerd were jointly indicted, tried, and convicted of the offense of violating section 37 of the Penal Code (Comp. St. § 10201), in that they conspired, in October, 1920, to transport intoxicating liquor in violation of the Act of October 28, 1919 (41 Stat. 305), from North Dakota and Minnesota to Sioux Falls, South Dakota. The overt act was the transportation of 120 quarts of whisky from Moorhead, Minnesota, to Sioux Falls, South Dakota.

Haugen has abandoned this proceeding. He does not appear here, and has not assigned errors. The judgment as to him will, therefore, be affirmed.

The record plainly discloses prejudicial error as to Leady, in the admission of incompetent evidence over his objection. Haugen and Musgjerd did not testify. After the whiskey was delivered they talked freely, both in and out of jail, at Sioux Falls and later at Fargo, North Dakota, when they returned there. They said Leady advised with them and assisted in planning the transaction. Over Leady's objections the court permitted several witnesses to testify to what Haugen and Musgjerd said after the crime had been committed about Leady's connection with the transaction. Heard v. U. S., 255 Fed. 829, 167 C. C. A. 157; Harrington v. U. S. (C. C. A.) 267 Fed. 97. There is a pretense that this was unavoidable, because the parts of their statements connecting Leady were so intermingled with the body of the confessions that they could not be excluded. This contention cannot be accepted. It would have been an easy matter for the prosecution to have omitted the incompetent parts. Furthermore, the contention is refuted by the fact that the court permitted questions and answers, over objection, calling only for what Haugen and Musgjerd had said about Leady's part in the transaction. It is quite obvious that Leady would not and could not have been convicted if this incompetent and highly prejudicial testimony which was mere hearsay, had been excluded.

Reversed and remanded.

WOLFFGRAM v. MARSH.

In re ERIE-BUFFALO TUBE CO.

(Circuit Court of Appeals, Third Circuit May 12, 1922.)

Nos. 2873, 2887.

Bankruptcy ⇐264—Confirmation of sale to first mortgage creditor held proper, in absence of probability of better bid.

Where property of the bankrupt was sold to the creditor holding the first mortgage lien, who was required to credit its indebtedness with the full value of the property, in making proof of its claim and participating in other assets, the sale was properly confirmed, where the objecting creditors made no showing that a better bid could be obtained on resale.

Petition to Revise from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of the Erie-Buffalo Tube Company, bankrupt. On separate petitions by Ludwig Wolffgram against Ritchie T. Marsh, as trustee in bankruptcy, to revise an order of the District Court refusing to set aside a sale of property of the bankrupt. Orders affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for petitioner.

Gunnison, Fish, Gifford & Chapin and Orson J. Graham, all of Erie, Pa., for respondent.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

PER CURIAM. The error alleged in this case is the refusal of the court below to set aside a sale of bankrupt property which was approved by the referee. We find no error in the court's action. The purchaser was a first mortgage creditor and the court below, in its confirming opinion, directed such lien creditor must, in proving its claim and participating in other assets, credit its indebtedness with the full value of the property bought. In view, therefore, of the fact that on a resale the property would have to be bid to a price in excess of the liens before the general creditors would be benefited, and considering the fact that the objector to this sale has given neither the referee, the court below, nor this court any assurance of the property being bid in excess of such liens, however interpreted, we see no benefit and very probable injury would accrue by setting aside this sale.

Accordingly we are of opinion the action of the court should be affirmed, and to avoid further delay the mandate of this court be issued forthwith.

In re HOOD BAY PACKING CO.

(District Court, W. D. Washington, N. D. January, 1922.)

1. **Sales ⟹451—Contract held to show delivery was intended to be made in Alaska.**

A conditional sale contract, stating that vendor had delivered to buyer property at a designated point in Alaska, with evidence that property had not then been delivered, but that vendor thereafter put it on shipboard at Seattle, and that physical possession of it was not taken by buyer until it was delivered by ship in Alaska, where the conditional sale contract was recorded, shows that, between the parties, delivery was to be in Alaska, and that no creditor was misled by failure to file the conditional sale contract in Washington.

2. **Bankruptcy ⟹141—Adjudication vests in trustee title to property, wherever situated.**

The adjudication of bankruptcy vests in the trustee the title of the bankrupt, wherever the property is situated.

3. **Bankruptcy ⟹151—Trustee's title is that of an execution creditor.**

An adjudication in bankruptcy operates as a judgment in favor of the creditors, and gives the trustee the title of an execution creditor, under Comp. St. § 9631.

4. **Bankruptcy ⟹184(2)—Creditor, petitioning for delivery of certain property in Alaska to him, is not regarded as seeking relief in the courts of Washington.**

Where a bankruptcy court sitting in Washington has taken possession of property of the bankrupt located in Alaska, a creditor, who petitions

for delivery of the property to him under a conditional sale contract, is not to be regarded as seeking to enforce its remedy in the courts of Washington, within the rule that a party so seeking is governed by the law enforced by those courts, since the creditor did not come into that court voluntarily, but because it was the only forum where relief could have been obtained.

5. Bankruptcy ⟸184(2)—Conditional sale contract held governed by laws of territory of delivery.

Where goods sold under conditional contract were delivered in the territory of Alaska, where physical possession of them was first taken by the bankrupt, so that no creditor could have been deceived by apparent possession in the state of Washington, where both seller and bankrupt had their principal place of business, and there was no showing as to where the contract was executed, the right of the seller to the property as against the trustee is to be governed by the laws of Alaska (Laws 1913, c. 66), which do not require the conditional sale contract to be recorded.

In Bankruptcy. In the matter of the Hood Bay Packing Company, bankrupt. On petition to review an order of the referee denying petitioner's claim to property in the hands of the trustee under conditional sale contract. Modified, so as to direct the trustee to pay the petitioner the balance due on the contract from the proceeds of the sale of the property.

Farrell, Kane & Stratton, of Seattle, Wash., for petitioner.
Frank E. Hammond, of Seattle, Wash., for trustee.

NETERER, District Judge. The bankrupt is a Washington corporation, and on the 15th of January, 1919, it entered an order with the Seattle-Astoria Iron Works, a Washington corporation, for a line of machinery and equipment for its fishing plant, which it was constructing at Hood Bay, Alaska, "for the account of the Hood Bay Packing Company," in which order was contained:

"We will give you definite shipping instructions when we have arranged with the shipping company to send ship to our plant."

On the 30th day of April, 1919, a conditional sale contract was executed by the vendor and vendee, which recites that the "vendor has delivered to Hood Bay Packing Company, hereinafter called the vendee, at Hood Bay, Alaska, the said property therein described," and further recites, "possession of all of said property under which conditional bill of sale was taken by the vendee on this 30th day of April, 1919." The testimony shows that the property was "ordered for Hood Bay, Alaska, and to be used in the plant at Hood Bay, Alaska," and the said machinery was loaded on a boat and shipped then direct to this company at Hood Bay, Alaska, where it has remained ever since. The shipment was made several days subsequent to April 30. The equipment was not in the actual possession of the vendee prior to shipment. The conditional bill of sale also provided that the vendee shall keep "said property insured in a sufficient sum in favor of the vendor to cover its interests at all times before the vesting of the title of the said property in the vendee, * * * loss, if any, payable to Seattle-Astoria Iron Works, as its interest may appear."

The principal place of business of both corporations was Seattle. The conditional sale contract was not filed for record in the office of King county, Wash. Section 3670, R. & B. Code Wash. It was recorded in Alaska. But the Alaska statute (Laws 1913, c. 66) does not require filing or recording to preserve the title in the vendor under a conditional sale. Default was made in payment. No demand for return of the property was made prior to adjudication. Demand was made upon the trustee, and, upon refusal, petition was filed before the referee. Upon the hearing the trustee contended that the property was delivered to the vendee in Washington. The conditional sale contract not being filed within 10 days, the title vested, and the vendor has no right in the property. The referee found in favor of the trustee. The matter is before the court for review.

The conditional sale contract upon its face shows delivery at Hood Bay, Alaska, upon the date of its execution. The place of execution is not disclosed. It is shown that the goods were not shipped until after the execution of the contract, and were manufactured by the vendor at its Seattle plant prior to April 30. One of the machines was not shipped until May 28; none of the property is shown to have been in the actual possession of the vendee. There was no visible, open, change manifested by any outward signs prior to shipment. The machinery was loaded on the boat by the vendor, and the only evidence of possession is that which is disclosed by the order of January 12, 1919, the conditional sale contract, and the shipment. The testimony is silent as to the payment for the transportation.

[1-3] From the record I think the conclusion is inevitable that, as between the parties, delivery was to be at Hood Bay, Alaska. The parties acted in good faith. No creditor was misled by reason of the failure to file and record the conditional sale contract in King county. No question is raised as to the title to the property in controversy, or as to the extent of the interest of the bankrupt. The adjudication vested in the trustee the title of the bankrupt, wherever the property is situated (see Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, 30 Am. Bankr. R. 611; Section 9631, Comp. St.), and operated as a judgment in favor of the creditors (York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782, 15 Am. Bankr. R. 633), and the title of the trustee should be regarded as that of an execution creditor. In re Hess (D. C., Pa.) 138 Fed. 954, 14 Am. Bankr. R. 635, 138 Fed. 635. Mr. Justice Bradley, in Harkness v. Russell, 118 U. S. 663, 679, 7 Sup. Ct. 51, 59 (30 L. Ed. 285), quotes Mr. Justice Davis:

"It was decided by this court in Green v. Van Buskirk, 5 Wall. 307, and 7 Wall. 139, that the liability of the property to be sold under legal process, issuing from the courts of the state where it is situated, must be determined by the law there rather than that of the jurisdiction where the owner lives. * * *"

In Pritchard v. Norton, 106 U. S. 124, 136, 1 Sup. Ct. 102, 112 (27 L. Ed. 104), Mr. Justice Matthews, in discussing the relation of lex loci contractus and lex loci solutionis, said:

"It has never been better described than it was incidentally by Mr. Chief Justice Marshall in Wayman v. Southard, 10 Wheat. 1, 48, where he defines

it as a principle of universal law—'the principle that in every forum a contract is governed by the law with a view to which it was made.' The same idea had been expressed by Lord Mansfield in Robinson v. Bland, 2 Burr. 1077, 1078. 'The law of the place,' he said, 'can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.' And in Lloyd v. Guibert, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter.' Le Breton v. Miles, 8 Paige (N. Y.) 261."

Wheaton on Conflict of Laws, § 401, says:

"Obligations, in respect to the mode of their solemnization, are subject to the rule, 'locus regit actum'; in respect to their interpretation, to the 'lex loci contractus'; in respect to the mode of their performance, to the law of the place of their performance. But the lexi fori determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."

In Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245, the Supreme Court held that the validity of a contract, the interpretation and execution, are determined by the law of the place where it is made, but the remedy depends upon the law of the place where the suit is brought, and held that the acceptance of a bill executed in Missouri depended upon the law of Illinois where the acceptors lived. Loveland's Bankruptcy, 873.

"Where a conditional sale is made in one state, and contemplated or expressly provides that the property is to be delivered or used in another state, the law of the latter state controls." In re Wall, 207 Fed. 994.

In Beggs et al. v. Bartels, 73 Conn. 132, 135, 46 Atl. 874, 875 (84 Am. St. Rep. 152) the court said:

"The property was delivered upon the cars at New York, to be transported to Connecticut. In pursuance of the terms of the agreement, it was taken by Roberts [the vendee] to Stamford, and a year afterwards was attached there by a Connecticut creditor of Roberts. While the formal execution of the contract was in New York, the principal acts necessary to effect its objects were by the terms of the contract to be performed in Connecticut. As affording to the plaintiffs a security upon the property described, and as transferring to Roberts the apparent ownership of the property by giving to him the possession, the right to use, and even the right to affix it to realty, and as granting him the absolute title upon payment of the purchase price, the contractor was intended to have its operation upon property situated in Connecticut. * * * The transaction was begun in New York, but was to be performed and completed here [Connecticut], and the parties must be held to have contracted with reference to the law of this state, and that law must govern. * * *"

In Cable Co. v. McElhoe, 58 Ind. App. 637, 649, 108 N. E. 790, 795, said the Appellate Court of Indiana:

"In the case at bar the situs of the involved property was in Illinois at the time of the execution of the contract; * * * the contract was executed in Illinois, and the vendor was domiciled there; * * * the contract was * * * executed in contemplation that Attica, Ind., should immediately become the situs of the property. * * * 'Attica, Indiana' * * * was named in the contract as the address of the vendee. * * * The contract recognized that the vendee was already, or at least soon to be, domiciled in

Indiana, and consequently that he should perform the conditions and covenants of the contract, * * * including the payment of the purchase money. * * *"

The contract construed the thoughts of the parties as limited or granted by the law of Indiana. The property delivered was a piano.

The trustee strongly urges that this court is not concerned with any rights the vendor might assert under the Alaska laws, since the contract was made in Washington, and relief is now sought within this state; that the laws of this state are therefore conclusive. While this court has jurisdiction of the res and the parties (Robertson v. Howard, supra), and may direct its officer, the trustee, to convey this property, which is in another jurisdiction, under its equity powers aside from the Bankruptcy Act, being Comp. St. §§ 9585–9656 (Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. [N. S.] 924, 17 Ann. Cas. 853), the right of the parties must be determined in the light of the facts, and from all of the facts there is no doubt that the situs of the property, at all times, was to be Alaska. It was shipped to Alaska; it was received in Alaska, the first actual physical possession; the contract of sale was recorded in Alaska, though not required by law; the res has at all times been in Alaska. The transaction was begun in Washington, but was to be performed and completed in Alaska.

[4, 5] The petitioner is not seeking to enforce its remedy in the "courts of Washington," as stated by the trustee. It did not come into this court from choice, but this court, by virtue of vested power, stretched its arm to Alaska, took the property within its jurisdiction, and this is, therefore, the only forum where the issue may be determined. Under these circumstances, the petitioner may not be denied any rights which the Alaska law may afford. The fact that the trustee's title is that of an execution creditor also tends to that conclusion.

From what has been stated, it must follow that the rights of the parties should be determined by the Alaska law, and, as so concluded, the finding of the referee should be modified, so as to direct the trustee to pay the petitioner the balance due on the contract upon the sale of the property.

ANCHOR LINE (HENDERSON BROS.), Limited, v. ALDRIDGE, Collector of Customs.

(District Court, S. D. New York. October 21, 1921.)

1. **Intoxicating liquors ⇐138—National Prohibition Act prohibits transshipment from one foreign vessel to another in United States port.**

Even if the words "transport" and "transportation," as used in National Prohibition Act, are not given their literal meaning, but are to be construed in the light of legislative intent, the prohibition in that act of the transportation of intoxicating liquors, except as permitted therein prohibits the transportation in a port of the United States from one foreign vessel to another of intoxicating liquors brought in from a foreign country and consigned to another country.

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

2. Customs duties ⇐49½, New, vol. 6A Key-No. Series—Statute permitting transportation of liquors across country in bond was repealed by National Prohibition Act and Eighteenth Amendment.

Rev. St. § 3005 (Comp. St. § 5690), permitting transportation across the United States in bond of merchandise arriving from outside the United States and destined for a foreign country, was repealed, in so far as it permitted the transportation of intoxicating liquors intended for beverage purposes, by Const. Amend. 18, and National Prohibition Act, tit. 2, § 3, prohibiting the transportation of intoxicating liquors for beverage purposes, and title 2, § 35, repealing laws inconsistent with the provisions of that act.

3. Statutes ⇐159—Later statute repeals plainly inconsistent prior statute.

Repeals by implication are not favored, but where a later statute is plainly inconsistent with a prior statute, the later one necessarily repeals the prior one.

4. Treaties ⇐8—Presidents' holding that clause of treaty was abrogated will be upheld by courts of the first instance.

A court of the first instance will not take a position contrary to the holding by Presidents Cleveland and Harrison that article 29 of the treaty with Great Britain of July 4, 1871, had been abrogated.

In Equity. Suit by the Anchor Line (Henderson Bros.), Limited, against George W. Aldridge, Collector of Customs for the Port of New York, to enjoin defendant from interfering with a transshipment in the port of New York from one foreign vessel to another of five cases of whisky. Motion for relief denied, and bill dismissed.

Lord, Day & Lord, of New York City (Lucius H. Beers and Franklin B. Lord, both of New York City, of counsel), for the motion.

William Hayward, U. S. Atty., and John Holley Clark, Jr., Asst. U. S. Atty., both of New York City, opposed.

MAYER, Circuit Judge. This is a motion by plaintiff on the bill of complaint and answer for a decree according the relief demanded in the complaint. The essential facts set forth in the bill and answer are not disputed, and may be briefly stated as follows:

Plaintiff, a British corporation, contracted with Gilmour, Thompson & Co., of Glasgow, Scotland, to transport five cases of whisky from Glasgow to Hamilton, Bermuda, there to be delivered to Burrows & Co., agents of Gilmour, Thompson & Co. These cases were shipped on plaintiff's steamship Cameronia, which sailed from Glasgow July 17, 1921, and arrived at the port of New York on July 27.

These cases were to be transhipped in the port of New York from the Cameronia to a vessel of another British corporation, the Quebec Line, running from New York to Bermuda. Both the plaintiff's vessels and the vessels of the Quebec Line are British steamships, of British registry, and flying the British flag, and Bermuda is a British possession. The cases are covered by a through bill of lading from Glasgow to Burrows & Co., in Bermuda. A bill of lading also accompanies the shipment to New York, calling for the delivery of the cases at the port of New York to the Quebec Line.

The defendant threatened to seize these cases under instructions received from the Treasury Department, dated July 8, 1921, which ad-

vised him to refuse transportation and exportation entries for all intoxicating liquors not covered by a prohibition permit. A prohibition permit is issued for liquor to be used for other than beverage purposes. These instructions stated that this direction was given pursuant to an opinion of the Attorney General. The opinion thus referred to is one issued under date of February 4, 1921, and affirmed after a rehearing on June 30, 1921.

That opinion in effect advised that section 3005 of the Revised Statutes (Comp. St. § 5690), which relates to the transshipment of merchandise in bond, does not now apply to intoxicating liquors for beverage purposes, and that the National Prohibition Act (41 Stat. 305) prohibits "in transit" shipments of such liquors touching at the ports of or moving through the United States, though the same originate in and are destined to foreign countries. By order of this court the marshal took possession of those five cases on arrival of the Cameronia, and holds them pending the decision of this motion.

The plaintiff for many years, as a part of its business, has carried liquors from Glasgow to the port of New York, where such liquors have been transshipped to destinations in the British possessions in North America and to foreign ports in the Gulf of Mexico and South America. This carriage of liquors by plaintiff to be transshipped in New York has yielded a large revenue to the plaintiff, and has continued since the adoption of the National Prohibition Act.

If this carriage is now prevented by the stoppage of these "in transit" shipments, liquor, it is claimed, will be sent from Great Britain to the British West Indies and South America countries by other routes, and plaintiff will suffer a severe loss, for which plaintiff alleges it has no adequate remedy at law. It is also claimed that, if such shipments should continue to be made for transshipment in the port of New York, there will be seizures here, which will involve a multiplicity of suits.

Plaintiff contends that the Attorney General was in error in the conclusion arrived at in the opinion of February 4, 1921, and that the Secretary of the Treasury exceeded his authority in directing the defendant to stop transshipments of liquor. Plaintiff accordingly presents the shipment of these five cases from Glasgow to Bermuda as a test case, and brings this suit to enjoin the defendant from stopping transshipments of this character. The answer contains some allegations which are argumentative in character, but no question of fact is raised as to the essential features of the controversy.

[1] Passing by any question as to whether plaintiff has sought the proper remedy, and assuming for the purposes of this opinion that it has so done, it is desirable to settle as promptly as possible the fundamental questions of the case. Such disposition, when ultimately had, will define the rights of the plaintiff and others similarly situated and the rights of the government. The Eighteenth Amendment provides as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

It will be noted that not only is transportation prohibited, but exportation as well. In other words, in order to carry out this change in national policy, the exportation of liquor for beverage purposes was prohibited, even though a citizen of the United States or a person resident in the United States possessed liquor lawfully prior to the time when the constitutional amendment became effective.

The Congress enacted the National Prohibition Act in accordance with the power conferred by the constitutional amendment. Section 3 of title 2 of said act provides:

"Sec. 3. No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

"Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided and the commissioner may, upon application issue permits therefor. * * *"

There is no provision in the National Prohibition Act which authorizes the transportation here desired in order that the transshipment sought may be accomplished. If, therefore, "transport" is taken in its literal and ordinary sense, then the transportation which plaintiff would find necessary for its purposes is absolutely prohibited by the act. It is said, however, and correctly, that the principle of Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, should be here applied, and that the court should look beyond the literal definition of "transport," or "transportation," to ascertain the true meaning of these terms in the light of the legislative intent.

Considering and resorting only to the act itself, there is nowhere any indication that the Congress intended to except this kind of transportation from the prohibition of section 3. The act does permit the transportation of intoxicating liquor for purposes and under safeguards in the act set forth, and necessarily, in order to follow the mandate of the Constitution, such transportation or other dealing with intoxicating liquor must be for nonbeverage purposes. The Congress had plenary power to prohibit the transportation of liquor for beverage purposes, even though the liquor was destined for some place outside of the United States or territory subject to the jurisdiction thereof. It has the right to set up barriers and safeguards against the wrongful or improper diversion of intoxicating liquors, and it is well known in legislation that a statute will not only define offenses and prescribe the punishment therefor, but will also endeavor to surround the business or traffic dealt with in the statute with safeguards calculated to prevent offenses. It is therefore no answer to the provision as to prohibition of transportation to say that it must be presumed that the intended transportation would be lawfully carried out, and that therefore the Congress did not intend to prohibit a transaction which, if carried

to its orderly conclusion, could not have resulted in the use of intoxicating liquors in the United States for beverage purposes. The act provides a method by which intoxicating liquor intended for nonbeverage use may be, inter alia, transported, and the fact that transshipment of the character here concerned is not within any of the permit provisions of the statute illustrates the point that the Congress desired to safeguard against the illegal use of liquor destined to a foreign port, but needing transshipment within the United States, by not allowing it to be transported within the United States, and this, even though it be assumed, as it may be, that the foreign shipper intended that no part of the liquor should remain or be used in the United States for beverage purposes.

The act, in line with the constitutional amendment, forbids exportation for beverage purposes. The purpose of the constitutional amendment and of the act thus forbidding exportation was to destroy the traffic in liquor for beverage purposes, and thus to prevent manufacture, sale, or transportation in the United States, even though by exporting such liquor it would be used for beverage purposes outside of the United States and territory subject to the jurisdiction thereof. The doctrine of practical construction of a constitutional provision by legislative enactments is familiar and useful. An interesting illustration of this principle in respect of the New York state Constitution will be found in People ex rel. Einsfeld v. Murray, 149 N. Y. 367, at page 376, 44 N. E. 146, 32 L. R. A. 344.

The National Prohibition Act has thus practically construed the constitutional provision as to transportation, and, in any event, has not authorized the kind of transportation here desired. It may be within the power of the Congress to permit such transportation as was necessary to transship this liquor to a vessel destined for a foreign port, just as it permitted transportation of intoxicating liquors under various circumstances and for various purposes mentioned in the act. If the Congress had this power, it declined to exercise it, and, on the contrary, in simple and clear language indicated that transportation of intoxicating liquor was prohibited for any and every purpose, "except as authorized in this act," and, to repeat, the transportation here involved is not within the statutory exception.

It is quite true, as pointed out by the learned counsel for plaintiff, that the words "transportation" and "transport" must be construed in respect of the subject-matter which is being dealt with, as illustrated in Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548. The court in that case said:

> "That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section, is too apparent to justify detailed consideration *of the many provisions of the act inconsistent with a construction which would render such removal unlawful.* * * *" (Italics mine.)

It is urged, however, by parity of reasoning, that United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, is warrant for the proposition that the Congress did not intend by the National Prohibition Act to stop transshipments of this character. The so-called

Reed amendment to the Act of March 3, 1917 (39 Stat. 1058, 1069 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a]), read as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be *transported in interstate commerce*, except for scientific, sacramental, medicinal, and mechanical purposes, *into any state* or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state."

This case might be likened to one where a foreign vessel stops at an American port, and then proceeds to a foreign port, without, however, transshipping the liquor destined for a foreign port. If, for instance, in the Gudger Case, Gudger had hired a vehicle to transport the liquor from Lynchburg, Va., to another place in Virginia, and thence to North Carolina, the case would have been different from that actually considered; i. e., that Gudger had a through ticket from Baltimore, Md., to Asheville, N. C., and at no time transported the liquor into Virginia. The court read the statute in accordance with its normal meaning and intent and with its simple language and said:

"Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any state or territory the laws of which state or territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context. If there were need to resort to it, since the context makes clear that the word 'into' as used in the statute refers to the state of destination and not to the means by which that end is reached—the movement through one state as a mere incident of transportation to the state into which it is shipped."

The Gudger Case is quite different in principle from that at bar, where any transportation is prohibited except that which is definitely excepted.

[2] It is urged, however, that section 3005 of the United States Revised Statutes (Comp. St. § 5690) has not been repealed. That section provides:

"All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Title 2 of section 35 of the National Prohibition Act provides:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

[3] Repeals by implication are not favored; but, where a later statute is plainly inconsistent with a prior statute, the later statute necessarily repeals the prior statute. Section 3005 was a revenue act, or, in other words, it exempted from customs duties merchandise which otherwise would have been subject to duty. In the case at bar the

liquor was not subject to duty. It could not be imported. The introduction into this country from some foreign port of liquor for beverage purposes has no relation to revenues. Such liquor could not be lawfully introduced into this country because of the change in the national policy.

The very reason, therefore, for section 3005 disappears so far as affects intoxicating liquor for beverage purposes. In United States v. Yuginovich, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043, the court said:

"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 revenue from taxing the business, which it 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. * * * 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. * * * 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. * * *"

In other words, section 3005 and section 3 of title 2 of the National Prohibition Act are inconsistent, and the former cannot stand. If the Congress has the power to permit this transshipment, it must indicate its purpose so to do, and this it has not done.

[4] Finally, it is said that the transshipment is allowable within the treaty rights of the Treaty of Washington proclaimed July 4, 1871 (17 Stat. 863), between the United States and Great Britain. Presidents Cleveland and Harrison held that article 29 of the treaty was abrogated. A court of first instance will not take a contrary view.

Nor does the case come within the Treaty of December 22, 1815 (8 Stat. 228). An elaborate discussion by this court of these treaties is deemed not necessary.

Motion denied, and bill dismissed, with costs.

THE SIBONEY.

(District Court, E. D. New York. January 14, 1921.)

Towage ⇐18—Tug held at fault for not sooner attempting to extricate herself from danger.

A tug, which was placed at the port quarter of a steamer to tow the steamer from a pier, and which started backward in obedience to a signal from the steamship, which was in charge of the operation, and was brought into collision with barges on the other side of the slip, *held* at fault for not observing the danger, which was as apparent to the tug as to any one else, when the tug had ample time for escape, so that a libel for damages to the tug must be dismissed.

In Admiralty. Libel by the Crew Transportation Corporation against the steamship Siboney, of which the New York & Cuba Mail Steamship Company was claimant. Libel dismissed.

Decree affirmed 280 Fed. 878.

Foley & Martin, of New York City, for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for the Siboney.

GARVIN, District Judge. On February 4, 1920, the tug Neponset was engaged with three other tugs to tow the Siboney from the pier at Eighteenth street, New York, to Erie Basin. The Siboney was bow in; the tide flood. The Neponset was placed at the port quarter by three lines. Across the slip on the south side were several barges, and there was a dredge anchored some 400 feet out in the river, about opposite the Eighteenth Street pier. The Siboney, which was in charge of the operation, signaled to the Neponset to go back, in order that the Siboney might be moved out of the slip.

The captain of the Neponset obeyed the direction given, but saw that his boat would sag over on the barges. He testified that he signaled to the Siboney and was told to come ahead; that he tried to do so, as his boat was in danger of being caught and damaged; that he thereupon immediately cut the lines leading to the Siboney, but was unable to extricate himself; and that the Siboney crushed him against the barges. The proctors for the Siboney correctly state that the real question is whether the tug had time to get out.

The testimony of both sides establishes beyond question that any attempt to move the Siboney in the manner desired would involve some, if not considerable, risk, as a strong northeast wind was blowing, which would have a tendency to swing the Siboney over toward the barges as she went out of the slip. This was as apparent to the tug as to the ship. But the testimony also establishes, I think, that the operation of moving the boat out consumed several minutes at least, and that the tug should have observed that she was gradually being forced into a dangerous position, from which she had ample time to escape. In the case of The Olympic, 224 Fed. 436, 140 C. C. A. 130, there was greater reason for holding the steamer liable, yet she was exonerated.

The libel is dismissed.

THE SIBONEY.

(Circuit Court of Appeals, Second Circuit. March 20, 1922.)

No. 192.

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

Libel by the Crew Transportation Corporation against the steamship Siboney, of which the New York & Cuba Mail Steamship Company was claimant. From a decree dismissing the libel (280 Fed. 877), libelant 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 George A. Morse, both of New York City, of counsel), for appellee.

Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decree affirmed.

In re GRIFFITH et al.

(District Court, D. Delaware. March 21, 1922.)

No. 410.

Bankruptcy ⟸81(1)—Petition against partnership for insolvency must allege insufficiency of firm and individual assets to pay firm debts.

A petition praying that a partnership, but not its members, be adjudged a bankrupt because of the insolvency of the firm, which does not allege either that the members of the partnership are insolvent or that firm assets, combined with the assets of the members in excess of their individual debts, are insufficient to pay the partnership debts, must be dismissed.

In Bankruptcy. Involuntary petition against William W. Griffith and another, trading as Griffith & Son. On motion to dismiss the petition. Motion sustained, unless the defects in the petition are cured by amendment.

Charles W. Cullen, of Georgetown, Del., and Wilbur L. Adams, of Wilmington, Del., for petitioning creditors.

Caleb S. Layton, of Wilmington, Del., and Daniel J. Layton, of Georgetown, Del., for alleged bankrupts.

MORRIS, District Judge. An involuntary petition in bankruptcy was filed, praying that Griffith and Son, a partnership, but not its members, be adjudged bankrupt. The act of bankruptcy charged is founded upon insolvency. The partnership has moved that the petition be dismissed upon the ground that it is not therein alleged, either that the members of the partnership are insolvent or that the assets of the firm combined with the assets of the members in excess of their individual debts, are insufficient to pay the partnership debts. The motion to dismiss must be sustained, upon the authority of Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706,

and 186 Fed. 481, 108 C. C. A. 459, and Vaccaro v. Security Bank of Memphis, 103 Fed. 436, 442, unless the defects in the petition be cured by amendment within 15 days after the date hereof. Western Union Telegraph Co. v. Atlanta & W. P. R. Co., 238 Fed. 36, 151 C. C. A. 112; General Order in Bankruptcy No. 37 (89 Fed. xiv, 32 C. C. A. xiv).

PORTSMOUTH COTTON OIL REFINING CORPORATION v. FOURTH NAT. BANK OF MONTGOMERY.

(District Court, M. D. Alabama, N. D., at Montgomery. May 17, 1922.)

1. **Banks and banking ⇐260(1)—National bank held liable for money acquired through fraud of subsidiary.**
   A bank, which organized a subsidiary corporation to handle property it owned, which corporation had no capital or property, except that supplied by the bank, *held* liable for damages sustained by a purchaser of property from the corporation, which paid the bank for the same, where the property was not as represented and warranted.
2. **Corporations ⇐487(1)—That contract through which corporation obtained money belonging to another was ultra vires no defense.**
   That a contract through which a corporation obtained money that in equity belonged to another was ultra vires is no defense to an action for its recovery.
3. **Money received ⇐15—Action governed by equitable principles.**
   The action for money had and received is in its nature equitable, and is governed by equitable rules and principles.

At Law. Action by the Portsmouth Cotton Oil Refining Corporation against the Fourth National Bank of Montgomery. On motion to direct verdict for plaintiff. Granted.

Steiner, Crum & Weil, of Montgomery, Ala., for plaintiff.
Weil, Stakely & Vardaman, of Montgomery, Ala., for defendant.

CLAYTON, District Judge. The plaintiff, the Portsmouth Cotton Oil Refining Corporation, sues the defendant, the Fourth National Bank of Montgomery; the complaint containing the common counts including the count for money had and received by the defendant to the use of the plaintiff, and also special counts whereby the plaintiff seeks to recover damages growing out of a transaction had between the plaintiff and the Montgomery Oil & Feed Company (hereafter named by its initials), in which the latter sold to the plaintiff a tank or quantity of oil represented and guaranteed to be of a certain grade or quality. The M. O. & F. Co. drew upon the plaintiff a draft therefor in the sum of $9,292.50 and attached the same to the bill of lading for the oil, and this draft was paid in due course and in advance of its receipt of the oil. The draft was payable to the Fourth National Bank of Montgomery, who indorsed and transmitted it for collection for its account. Plaintiff charges that the oil, when received, was inferior in grade and quality, that in consequence thereof it sustained the damages sued for, and the plaintiff insists further that the M. O. & F. Co. was merely a nominal party, and that the defendant, the Fourth National Bank, was

the real party in interest, and therefore liable for loss or damage suffered by plaintiff. The defendant by pleas denies the allegations of the complaint and also asserts that the transaction mentioned by the plaintiff as a part of its complaint is ultra vires its charter, and that it cannot, therefore, be made liable.

[1] The essential and undisputed facts are that the Planters' Cotton Oil Company, a corporation, was indebted to the defendant in a large sum, approximating $20,000, secured in part by a mortgage made to the Montgomery Bank & Trust Company, as trustee, which mortgage the defendant foreclosed or caused to be foreclosed, and itself became the purchaser of property sold, bidding therefor approximately $12,000. Shortly after it had thus acquired this property, a corporation was formed under the name of the Montgomery Oil & Feed Company, the stockholders being G. F. Mertins, B. L. Gaddis, and John R. Montgomery. Mertins was the attorney for and a director in said bank, Gaddis was its vice president and also a director, and Montgomery was a stockholder. Mertins was made president of the oil and feed company, and Gaddis secretary and treasurer. The capital stock of this corporation was $5,000, consisting of 50 shares, of $100 each, of which Mertins as trustee, subscribed for 48 shares, Gaddis 1, and Montgomery 1. This entire capital stock was paid for by the defendant bank. None of the subscribers had any personal interest in the corporation, and never paid any part of the subscriptions, nor did they become obligated to repay the sum to the defendant bank. The amount of these subscriptions, $5,000, was credited by the defendant upon its books to the M. O. & F. Co., which subsequently withdrew or had the right to withdraw the same. Simultaneously with this transaction the defendant conveyed all the property purchased at the said mortgage sale to the M. O. & F. Co. Subsequently this corporation executed a mortgage to T. J. Reynolds, the then president of the defendant bank, as trustee, securing or purporting to secure an issue of $75,000 of bonds. This, the evidence shows, was done pursuant to advice of one or more of the national bank examiners, and for the purpose of enabling the bank to carry the asset upon its books as a chose in action or personalty, rather than as real estate.

The M. O. & F. Co., on or about June 8, 1918, executed to the defendant bank its demand note in the sum of $7,000, which bears a credit on May 18, 1919, of $4,000, and on May 15, 1918, likewise its demand note in the sum of $30,000, which note bears a credit on May 8, 1919, of $10,000. On the organization of this corporation the management thereof was turned over by the representatives of the bank to one Stanton, who had general charge thereof during its operation. Stanton from time to time consulted with the president and also the vice president and the finance committee of the defendant bank with reference to the business affairs of the oil and feed company, and daily made report of its operations to the president or vice president of the defendant bank. In the conduct of its business the M. O. & F. Co., on or about the 1st of May, 1919, sold and shipped to the plaintiff a tank of oil under a written contract or agreement, whereby the M. O. & F. Co. guaranteed the grade and quality of the oil. A draft was drawn

by the M. O. & F. Co. on the plaintiff for the purchase price, payable to the Fourth National Bank of Montgomery, which, together with the bill of lading for the oil, was turned over to the defendant bank, and that bank in the usual course indorsed the draft and forwarded the same for collection for its account. This draft was in due course and before the arrival of the oil at its destination paid by the plaintiff. Thereafter, upon the arrival of the oil, it was examined by the plaintiff and found to be inferior in grade and quality; whereupon notice thereof was immediately given by wire to the shipper, and as a result of negotiations between them the matter relating to the grade and quality of the oil was submitted to arbitration, and an award made in favor of the plaintiff for the amount sued for. Undoubtedly, if the plaintiff is entitled to recover, it should be for the amount sued for, $5,474.46.

This corporation, the M. O. & F. Co., was for a time operated in the manner which I have stated, and subsequently its property was leased to another concern—a corporation organized by independent parties. The M. O. & F. Co. thereupon ceased business and became and is insolvent. The defendant, the Fourth National Bank, itself entered into the lease contract, and by the provisions thereof granted to the lessee an option to purchase the assets of the M. O. & F. Co. It does not appear that the M. O. & F. Co. really owned any assets other than those that formerly belonged to the Planters' Cotton Oil Co. and that were transferred to the M. O. & F. Co. by the defendant bank.

It is manifest, upon a consideration of the whole evidence, that the defendant bank resorted to the device or plan of organizing the corporation and directing its management, in the effort to recoup the loss which it had sustained on account of the original indebtedness to it of the Planters' Cotton Oil Co. The M. O. & F. Co., as I have stated, had no assets or property, except that conveyed to it by the defendant bank, and no credit, except that which was supplied in its formation and subsequently by the defendant bank from time to time as occasion required, and it must be admitted that from the very beginning and afterwards such company was in fact a mere subsidiary of the defendant bank. It is not denied that the plaintiff has suffered the loss and damage resulting from the wrong done it in the sale of the oil, which the M. O. & F. Co. nominally sold, but the proceeds of which went to the defendant bank. Primarily, of course, the M. O. & F. Co. may be liable to the plaintiff for this damage, but the plaintiff has its election to pursue either that company or the party who in reality is responsible for its obligations. Upon the receipt by the defendant bank of the proceeds of the draft drawn upon the plaintiff, the defendant bank credited the proceeds to certain past-due obligations of the M. O. & F. Co.; but in doing this it had full knowledge of all the facts and circumstances relating to the transaction, and in legal contemplation received the benefit thereof.

[2] In National Bank of Commerce v. Equitable Trust Co. (8 C. C. A.), 227 Fed. 526, 142 C. C. A. 158, which was a case of similar import to this, the court said:

"One of the defenses set up in the answer was that the contract between Nicholson and Perry, as representing the bank, was an agreement and transaction into which the bank could not enter, that it was ultra vires the bank, and that the bank is not liable for any of its acts under that contract; and this is now relied upon. That this position cannot be maintained, where the proceeding is to recover moneys which have gotten into the hands of the bank but belong to the plaintiff, we need only to call attention to what is said in Louisiana v. Wood, 102 U. S. 294, 299, * * * and Citizens' National Bank v. Appleton, 216 U. S. 196."

And in the case of First National Bank of Aiken v. Mott Iron Works, 257 U. S. —, 42 Sup. Ct. 286, 66 L. Ed. —, the court said:

"In such circumstances, whether the contract is valid or not, the contractor is accountable to the contractee, up to the amount of its undertaking, for the proceeds coming to his hands from the contractee upon the inducement of the contract." Cases cited.

In this case, therefore, the plaintiff is entitled to recover the amount for which it has declared; and as the case has been fully tried upon the merits, the distinction between a recovery on the guaranty, as having been necessarily incident to the business of banking, and a recovery of the amount received on account of the guaranty becomes purely formal. To the same effect is the well-considered case by the Supreme Court of the United States in Citizens' Central National Bank v. Appleton, Receiver, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443.

[3] It is unnecessary, perhaps, to refer to the well-recognized principle of law that, whenever one party has received money which in equity and good conscience belongs to another, it cannot be retained against the demand of the true owner. The action for money had and received is in its nature equitable, and is guided by equitable rules and principles. Under the undisputed evidence here the defendant has, in my opinion, received money which in good conscience belongs to the plaintiff, and ought to be accounted for by the defendant.

It may be observed, however, that the conduct of the defendant bank in its efforts to recoup its losses by resorting to the organization of the M. O. & F. Co., in furnishing its entire capital and according to it a credit or checking account, calls for no sort of criticism; but the device and method employed cannot relieve the matter of its true legal aspect or character.

There are many cases decided by the Supreme Court of the United States and other federal and state courts to the effect that, while a corporation such as a national bank may not as an original or independent enterprise organize and conduct the affairs of a separate corporation, yet it may do so for the bona fide purpose of recouping losses; and when it becomes such owner and proprietor that enterprise will be regarded as a mere trade-name, and the real owner and operator cannot escape liability on the ground that the transaction was in excess of the charter power.

None of the defenses presented here are tenable, and under the application of plain legal principles the plaintiff, in my opinion, is entitled to recover. Accordingly, the request of the plaintiff for a directed verdict in its behalf is granted.

DUKE, State Supervisor of Banking, v. PIONEER MINING & DITCH CO.

(District Court, W. D. Washington, S. D. May 17, 1922.)

No. 3430.

1. **Mines and minerals ⟹108—Foreign mining corporation held not "doing business within the state."**

A mining corporation of Nevada, engaged in mining in Alaska, owned stock in a bank in Washington in which it kept a checking account, and from which it borrowed money, giving notes payable at the bank. It also on three occasions in three years bought supplies in Washington for its Alaska business. *Held*, that no one nor all of such acts constituted "doing business within the state," within the meaning of Rem. & Bal. Code Wash. § 226, which subjected it to suit in that state on the notes.

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

2. **Corporations ⟹642(6)—Single business transaction in state held not to render foreign corporation subject to suit in relation thereto.**

A single business transaction in a state by a foreign corporation, incidental only to the business for which it is incorporated, as borrowing money from a bank and the giving of a note therefor payable at the bank, does not give a court in that state jurisdiction of an action against it on the note.

At Law. Action by John P. Duke, Supervisor of Banking of the State of Washington, in charge of liquidation of the Scandinavian-American Bank of Tacoma, against the Pioneer Mining & Ditch Company. On motion by defendant to quash service of summons. Motion granted.

Kelly & MacMahon, of Tacoma, Wash., for plaintiff.
Weter & Roberts, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. [1] Defendant moves to quash service of summons. The general statute of the state of Washington concerning service of such process provides:

"The summons shall be served by delivering a copy thereof, as follows: * * *

"9. If the suit be against a foreign corporation or nonresident joint stock company or association *doing business within this state*, to any agent, cashier or secretary thereof."

Rem. & Bal. Code, § 226.

The affidavits show the defendant to be a corporation of Nevada, principally engaged in mining in Alaska. Defendant has no mines, keeps up no office or place of business in this state, and maintains no agent therein. It carries on no general business in this state.

In brief, the plaintiff contends that defendant (having owned stock in the Scandinavian-American Banks of Tacoma and Seattle, carried a general checking account in those banks, and borrowed money of them) was doing business within this state so as to bring it within the statute, and further contends, because of the nature of the particular transaction which forms the basis of this action (the borrowing of the

money for which the suit is brought and giving a note therefor in this state, payable in this state), that there was such a particular doing business within the state as to support the jurisdiction and that a general agent of the defendant corporation, a resident of California (he being a director, assistant secretary, treasurer, and general manager thereof) while he was passing through the state of Washington from California on his way to Alaska, and while undertaking in the state a negotiation with a public officer in charge of the liquidation of the insolvent bank from which the money had been borrowed (such negotiation being concerning the legality of an assessment upon the capital stock of the bank), was an agent of the defendant upon whom service of process may be made under the statute.

All of these acts are incidental to the business of the corporation, whose principal business is that of mining. Do they constitute "doing business" as these words are ordinarily understood? A statute of California (Code Civ. Proc. § 411) provided for service of summons upon a foreign corporation "doing business * * * within this state." (As shown above, these are the words of the Washington statute.) Under the California statute the Circuit Court of Appeals for this Circuit has said:

"* * * Th question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the Circuit and Supreme Courts of the United States, and the general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state." Doe v. Springfield Boiler & Mfg. Co., 104 Fed. 684, at 687, 44 C. C. A. 128, 131.

The acts done by or on behalf of the defendant in the state of Washington, while they may constitute a substantial part of the acts incidental to doing its general or ordinary business, would not constitute "part of its ordinary business," except as each incidental business transaction connected with the business in which a corporation is engaged is part of its ordinary business.

The defendant, upon three occasions during the three years preceding the giving of the note in question, purchased in Washington certain supplies for its business in Alaska. It has been contended that such action constituted a doing of business in Washington in the statutory sense. In the foregoing case, in the course of Judge Hawley's opinion, he cites with approval the following from Judge Thayer's decision in St. Louis Wire Mill Co. v. Consolidated Barb Wire Co. (C. C.) 32 Fed. 802, 805:

"* * * When it is said that a corporation is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating service of process on foreign corporations, reference is plainly had to business operations of the corporation carried on within the state through the medium of agents appointed for that purpose *that are continuous, or at least of some duration*, and not to business transactions that are merely casual, such as an occasional purchase of goods or material within the foreign state." 104 Fed. at page 688, 44 C. C. A. 131.

The decisions are very numerous upon this question, but none of them called to the court's attention hold that doing such acts as those of the defendant, described above, constitute "doing business" in the state, particularly as Justice Field defines that expression in St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; that is, as equivalent to "engaging in business." Substantially the same question has been lately considered by Judge Bledsoe, in Knapp v. Bullock Tractor Co. (D. C.) 242 Fed. 543, by Judge Van Fleet, in Moore Dry Goods Co. v. Commercial I. Co. (D. C.) 276 Fed. 590, by Judge Learned Hand, in Hunau v. Northern Region Supply Co. (D. C.) 262 Fed. 181–183, and by Judge Hough, in Day & Co. v. Schiff, Lang & Co. (D. C.) 278 Fed. 533. In Hayworth v. McDonald, 67 Wash. 496, 121 Pac. 984, the bond sued on was an attachment bond; that is, a bond given in a pending action.

If the meaning of the statute had been as contended, the more appropriate phrase of "doing *any* business within the state," or "concerning any business transaction within the state," or an expression of similar import, would doubtless have been used, instead of the words "doing business," which are equivalent to "engaging in business." There may be lines of business in which acts and transactions such as those here shown would encompass or permeate such business to such an extent as to appropriately fall within the statutory language, but such is not the mining business.

[2] It has been argued that, in the present suit, a different rule obtains because the suit is upon a purely Washington transaction. In Hunau v. Northern Region Supply Co., supra, where a similar contention was made, Judge Learned Hand, speaking for the court held:

"I do not mean to suggest, however, that the service will stand upon the second ground suggested by the learned master. I know of no authoritative decision that a corporation submits itself to local jurisdiction as to any single transaction performed in a foreign state. If so, it would be suable upon all local causes of action, regardless of any other business. Such, indeed, appears to have been the notion in Premo Specialty Co. v. Jersey Creme Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015, and was in 33 Harv. L. R. 10, attributed to my decision in Smolik v. Phil. & R. Ry. Co. (D. C.) 222 Fed. 148, though I was, at least consciously, quite innocent of any such purpose. I do not, however, understand this to be the law at all. How far a corporation is imminent in every authorized act of its agents anywhere, and what will be the eventual basis of its subjection to foreign process, it is not necessary to consider; but it is clear that at present some general activities are necessary. The last expression of the Supreme Court (Flexner v. Farson, 248 U. S. 289, 293, 39 Sup. Ct. 97, 63 L. Ed. 250) gives little encouragement to the 'realists'; but it must be owned that no consistent theory can at present reconcile all the cases, certainly not all the opinions. At any rate, this case ought not to be the excuse for a general essay." 262 Fed. at page 183.

The case of Premo Specialty Co. v. Jersey-Creme Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015, to which Judge Learned Hand makes reference is a decision by the Circuit Court of Appeals of this Circuit, Judge Morrow writing the opinion. Being a later case than the decision by Judge Hawley, already cited and quoted, this court would be bound to hold the latter decision (Doe v. Springfield Boiler & Mfg. Co., 104 Fed. 684, 44 C. C. A. 128) overruled, provided Judge Learned Hand is right in saying that, in this decision of Judge

Morrow's, it "appears to have been the notion" that a single business transaction in a state would be sufficient to uphold the jurisdiction of its courts over a foreign corporation in a suit arising out of such transaction.

In the case referred to the suit was to recover for certain merchandise sold in California to the defendant (a Texas corporation) and delivered to the defendant in California; that is, f. o. b. Los Angeles. The service of summons was made in September, 1910. The evidence showed five sales by defendant upon mail orders for goods shipped by it to California between July 1 and November, 1910. Upon motion to quash, an affidavit was filed in which affiant stated:

"* * * That since the month of February, 1909, he had been the sales agent at San Francisco of and for the defendant, and was the distributor at San Francisco for the product manufactured by the defendant; that for the purpose of advertising said product, and also for the purpose of indicating to the public, the affiant was and had been the agent of the defendant at San Francisco for the sale of said product, and affiant, about March, 1910, had caused to be painted and lettered upon the entrance door to affiant's said office, and underneath affiant's name, the words 'Jersey-Creme', and affiant had the same words and letters painted upon the window of affiant's office looking out upon Market street, the principal street and thoroughfare in the city of San Francisco; that since he had become the agent of the defendant he had sold for the defendant its products in a number of cities in the state of California, mentioned in the affidavit." 200 Fed. at page 354, 118 C. C. A. 460, 43 L. R. A. (N. S.) 1015.

This affidavit was later contradicted in important particulars by the affiant, who sought to place the responsibility for the first affidavit upon plaintiff's attorney; but, the above statements being against interest, their probative value would not, necessarily, be destroyed by affiant's repudiation. Judge Morrow states that—

"While there may be a question * * * whether the defendant was doing business within the state of California with respect to the sale" of its wares, "there can be no question about the business of defendant in California in its dealings with the plaintiff."

It will be noted that the opinion describes this single transaction with plaintiff as "business," which it was, and "dealing," which it was, but carefully refrains from describing it in the statutory words of "doing business." The question with which the writer of that opinion was chiefly concerned was whether "Blanchard, the treasurer and secretary of the defendant," a resident of Texas, who was in California for the sole "purpose of conferring with the officers and directors of the plaintiff company concerning matters relating to this contract, and for the adjustment of differences arising under its terms," was such an agent as that described by the statute, which provided for service upon a corporation "having a managing or business agent, cashier or secretary within the state."

The quotations made from the decisions reviewed by the court go rather to this latter point than particularly to the question of whether the corporations considered in those decisions were "doing business within the state." After reviewing and commenting upon these decisions, the court sums up its ruling on the entire case as follows:

"The service of process upon an agent of a foreign corporation, who comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which service is made, appears to be above all other classes of agents the one upon whom service should be made, in order that notice may be promptly given to the corporation, and that it may be fully advised in the premises, and we see no reason *why the foreign corporation doing business within the jurisdiction* under such circumstances should not be bound by such a service." 200 Fed. at page 359, 118 C. C. A. 465, 43 L. R. A. (N. S.) 1015.

Unless Judge Morrow held the defendant to have been doing business within the state, other than the single transaction in the suit, the words above italicized (the italics being those of this, and not that, court) are superfluous. I therefore conclude that the opinion in the case has been misconstrued and that it is in accord with the other decisions herein cited. No mention is made by Judge Morrow, in his opinion, of the earlier decision by Judge Hawley in Doe v. Springfield Boiler & Mfg. Co., 104 Fed. 684, 44 C. C. A. 128. If it had been the intention of the Court of Appeals in the later decision to depart from or qualify the rule laid down in that case by Judge Hawley—he having held that a corporation is not doing business within a state within the statutory meaning, unless it transacts within the state some substantial part of its ordinary business, and that the transaction of an isolated business act is not carrying on or doing business in a state—it would, doubtless, have made express reference to that decision. U. S. v. Moreland, 257 U. S. —, 42 Sup. Ct. 368, 66 L. Ed. —.

Judge Hanford, in Olson v. Buffalo Hump Min. Co. (C. C.) 130 Fed. 1017, was not considering the statute now before the court, but had before him a statute regulating service upon the agent required by the statute to be appointed for the purposes of service by a foreign corporation before being authorized to do business in the state. The two statutes are dissimilar. While, under the statute with which we are concerned, it is necessary that the foreign corporation be doing business within the state, section 3722, Rem. & Bal. Code (which was before Judge Hanford), provides that the agent shall be authorized to accept service or process in any action or suit pertaining to the business, property, or "transactions" of such corporation within this state, in which suit the corporation may be a party.

Motion to quash granted.

LION COAL CO. v. BUNTEN, County Treasurer, etc.

(District Court, D. Wyoming. May 13, 1922.)

No. 1226.

1. **Courts ⇐262(4)—Authority of federal court of equity to enjoin collection of state tax.**

To authorize a federal court of equity to enjoin collection of a tax imposed by state authority as confiscatory, it must appear that there is a systematic overvaluation or undervaluation of certain classes of property, which defeats the constitutional or statutory requirement of uniformity.

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

2. Taxation ⊜40(8)—Taxation of coal mines under Wyoming law properly levied on value of coal after it is mined.

Under Const. Wyo. art. 15, § 3, providing that all mines from which valuable deposits are produced shall be taxed in addition to the surface improvements, "and in lieu of the taxes on the lands on the gross products thereof," in proportion to the value thereof, the annual tax on a coal mine may properly be levied on the assessed value of the coal produced during the year after it has been taken from the mine, though it is shipped and sold as fast as produced, and the assessment is not illegal because such value includes the cost of mining.

3. Taxation ⊜611(5)—Bill for injunction to restrain collection of tax held not to state cause of action.

Bill for an injunction to restrain collection of a tax *held* not to allege facts which entitled complainant to equitable relief on the ground that its property was assessed at a higher percentage of actual value than other classes of property.

In Equity. Suit by the Lion Coal Company against Matthew Bunten, County Treasurer and ex officio Tax Collector of Sweetwater County, Wyo. On motion to dismiss bill. Motion granted.

T. S. Taliaferro, Jr., of Rock Springs, Wyo., for plaintiff.

W. L. Walls, Atty. Gen., of Wyoming, D. G. Thomas, Co. and Pros. Atty., of Rock Springs, Wyo., and W. E. Mullen, of Cheyenne, Wyo., for defendant.

KENNEDY, District Judge. The above-entitled cause is a suit in equity, by which the plaintiff seeks to restrain the collection of an alleged illegal tax. The matter is before the court upon a motion to dismiss the bill of complaint upon three grounds: First, that the bill fails to allege any matter of equity entitling the plaintiff to the relief prayed for; second, that the bill fails to allege facts sufficient to constitute a valid cause of action in equity; and, third, because of a nonjoinder of necessary and indispensable parties defendant.

The latter or third ground of the motion will not be considered by this court, further than to suggest the belief that, under the statutes of the state of Wyoming, the proper party has been made defendant, and is the only party necessary to entitle plaintiff to the relief sought, in the event it should be found that the plaintiff is otherwise entitled to such relief. The other two grounds of the motion being failure to allege a matter of equity entitling the plaintiff to the relief prayed for and the failure of the bill of complaint to state facts sufficient to constitute a cause of action in equity, it seems to this court that they may well be considered as one ground.

An examination of the bill of complaint, first as to jurisdictional facts, discloses that the plaintiff is a citizen and resident corporation of the state of Utah, authorized to conduct business under the laws of the state of Wyoming; that the cause is brought against the county treasurer and ex officio tax collector of Sweetwater county, in the state of Wyoming; that the plaintiff is the owner of certain real estate in said county and is engaged in the occupation of coal mining; that during the calendar year of 1920 it extracted in excess of 291,000 tons of coal from the lands described; that the state board of equalization

of the state of Wyoming assessed the said coal at the value of $3 per ton, and that a tax was thereupon assessed aggregating in excess of $16,000, which the defendant tax collector threatens to enforce through the laws and with the penalties provided by the statutes of the state of Wyoming for failure to pay taxes so assessed; and that the plaintiff under protest has paid to the said tax collector an amount in excess of $11,000 as part payment upon said tax so assessed, and alleges that the payment of the balance, if enforced by said tax collector, will work a great and irreparable injury to the plaintiff, which will amount to a confiscation of its property in violation of law.

[1] The bill further sets forth the constitutional and statutory provisions of the state of Wyoming with relation to assessment for taxation and taxation generally, and particularly the provisions with reference to the assessment and taxation of the products of mines in the state. The bill contains no complaint in regard to any of these provisions, but is specifically directed to the administration of the assessment and taxation provisions by the state board of equalization.

It does not appear from the citation of authorities by counsel on either side that the exact question presented in the cause has been considered by the Supreme Court of Wyoming, although there are decisions of that court holding generally that the equitable jurisdiction of courts will not be invoked to enjoin the collection of tax assessments, unless illegal taxes have been levied, or the transaction is one which brings it within the classification of fraud, mistake, or something of a similar nature. We may therefore well look for a rule as laid down by the federal courts, if any there be, which will apply to the case at bar, and in fact counsel for plaintiff relies upon several of these cases in supporting his bill of complaint against the attack made by the motion to dismiss.

Before going into a discussion of what may be denominated the "gravamen of the offense" set forth in plaintiff's bill, it might be well to briefly review the leading federal cases upon which the plaintiff relies in order to ascertain, if possible, under what circumstances the federal courts have intervened to grant equitable relief in tax cases, and as to whether or not the plaintiff by its bill is brought within the rule. In the opinion of this court the rule contended for by plaintiff may be considered as being contained in three leading cases: Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903; Taylor v. Louisville & N. R. Co., 88 Fed. 350, 31 C. C. A. 537; and Greene v. Louisville Ry. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

In the last-named case the Supreme Court has cited with approval the case of Taylor v. Louisville, supra, which is a decision of the Circuit Court of Appeals of the Sixth Circuit, and in which Judge Taft, now Chief Justice of the Supreme Court, voiced the opinion of the court. As the plaintiff has relied strongly upon this particular case to support its contentions as set forth in the bill, an examination of the general principles there disclosed will probably suffice to discover the rule, if any, which would entitle plaintiff to the relief prayed for in its bill.

In the Taylor Case Judge Taft has discussed generally the circumstances under which federal courts should assume equitable jurisdiction in tax cases, and this court considers it unnecessary in the present discussion to follow generally his reasoning along this line, but to consider particularly that feature of the case discussed which must bring the case at bar within the rule there laid down upon the ground that the cases are analogous in point of facts. In that case the court found as a matter of fact that through an intentional, systematic, and uniform administration of the assessment and education laws of the state of Tennessee the complainant's property and other property of a similar character had been assessed at 100 per cent. of value for taxation purposes, and that other general classes of property had been intentionally, systematically, and uniformly assessed at less than 100 per cent. value for taxation purposes; that this policy was pursued in each county of the state where the property of the class owned by complainants was located; and that the law was administered in said manner for the purpose of reducing the proportionate burden of taxes upon the general classes. Another element taken into consideration by the court in that case in retaining jurisdiction was that to refuse to retain said jurisdiction would be to require the complainant, a railroad company, to go before the taxing authorities in each county in order to secure a proportionate increase in the taxation of other classes of property, which would be a futile course, and would involve such an enormous expense and length of time to follow it that it could not be considered as an adequate remedy.

Considering the fact that the motion to dismiss in the case at bar is virtually in the nature of a demurrer, which searches the record here, it may be enlightening to quote a portion of the opinion in that case, found in 88 Fed. 365, 31 C. C. A. 552:

"The question presented is, then, whether, when the sole object of an article of the Constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the Constitution and the law for attaining its sole object. We say 'apparent' departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent., and a smaller part at 100 per cent. The method of assessing one species of property cannot be said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity cannot be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The same dilemma has been presented to other courts. They have not

always taken the same horn. There is a conflict of authority, but we are glad to say that the adjudications of that court whose decision we must follow support the views we have above expressed."

Then follows in the opinion a discussion of the views of other courts, including a number of cases by the United States Supreme Court. In the closing portion of the opinion (88 Fed. at page 374, 31 C. C. A. 561), the court analyzes its conclusion as a basis for a decree in favor of the plaintiff in the following language:

"If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination. Therefore the injunction might issue against the assessment upon the fully assessed property, as void altogether, until a new and uniform assessment upon all property according to law could be made."

If it be true that a formal compliance with the law by two separate assessment boards would create such an inequality or discrimination as would constitute a fraud upon the right of property owners, it might logically follow that the same condition would prevail, where the assessment for taxation purposes was made on different classes of property by the same board, and therein would lie the relief sought by the plaintiff, if at all.

This court now reaches the point at which it must be decided as to whether or not the bill of complaint sets up a condition of facts which, standing as a pleading under the rule laid down, brings it within the rule, and this necessitates a careful examination of that portion of the bill which states the acts of which the complainant feels aggrieved. This particular phase of the bill of complaint may be found in the fourteenth and fifteenth clauses, which may be analyzed for the purpose of brevity as alleging materially the following facts:

That the state board of equalization fixed the value of the complainant's coal at $3 per ton, which was a false, fraudulent, confiscatory, unlawful, and ununiform method, and a method forbidden and prohibited by the laws of the state of Wyoming, in that the board had fixed such valuation by taking the sale prices of said coal in foreign markets and foreign states, thereby including as a part of the value of said coal the costs, charges, and expenses of making sales and disposing of the gross product in the aforementioned markets and communities; that the method by which the plaintiff mines its coal is to bring it to the surface, and, with that production for a period of two weeks disposed of, to use the proceeds in paying its miners for the labor in such production for a two-week period, and therefore its operation of producing coal is virtually a separable one into 24 different transactions throughout a year; that on account of this method there is on hand at no time during the year more than a small portion of the product, and that on account of other classes of property being assessed as found at one particular time of the year, the product of the mine is, as compared with such other classes of property, not uniformly assessed; that the as-

sessment as so made includes the wages and expenses of extracting the coal and bringing the same to the mouth of the mine, which was erroneous and violative of the plaintiff's rights, in that it exceeded the value of the coal as it lay in the ground and the value of any coal which the plaintiff had on hand at any one time, either at the mouth of the mine or elsewhere, except as in the original formation; that on account of such assessment by said board the coal product of the plaintiff was unfairly assessed for an amount in excess of its real value, while other property in the state was assessed at a rate not exceeding 70 per cent. of its real value; that on account of the peculiar formation in which plaintiff's coal rests, thereby making the process of mining more difficult, the value of plaintiff's coal is 5 cents less per ton than the value of the coal of other mine owners in the state, which the said board of equalization has intentionally disregarded.

This court believes it will be sufficient to dispose of the last-mentioned contention of the plaintiff by saying that the allegations attempting to sustain it are not sufficient in setting forth in specific detail any alleged discrimination in comparison with other coal mine products in the state, and this portion of the bill will therefore not be discussed further. This leaves for consideration four elements of the bill of complaint, so far as it purports to allege sufficient facts to entitle plaintiff to relief in a court of equity.

The first is that allegation of the bill which charges that the board has fixed a valuation for assessment purposes by taking the sale prices of said coal in foreign markets and foreign states, thereby including as a part of that valuation, costs, expenses, and charges of making such sales. This is answered by the suggestion of counsel for defendant in that the subsequent paragraphs of the bill in effect negative this allegation, for such subsequent paragraphs allege that the assessed valuation is greater than the real value by virtue of the inclusion in such assessed valuation of expenses of bringing the coal to the mouth of the mine. In these subsequent paragraphs the amount of the assessed valuation in excess of the real value claimed by plaintiff is fixed definitely by alleging that certain elements were improperly and erroneously included by the board in fixing the real value, which elements are specifically named. Yet the element of including costs and expenses of making sales in foreign markets is not contained in these subsequent paragraphs where the real value of the product contended for is fixed by plaintiff. This charge, therefore, is inconsistent with the subsequent allegations of the bill, and the contention of counsel for defendant with relation thereto will be sustained.

[2] The second is the matter of the coal produced during a year in the form of 24 different transactions, and the specific property not therefore being on hand or in the possession of the owners at any one time when the assessment is made, as in the case of other classes of property in the state. I take it that this is fairly well answered by reference to the provision of the state Constitution concerning the taxation of mines. This is found in article 15, § 3, of that document, and is as follows:

"All mines and mining claims from which gold, silver and other precious metals, soda, saline, coal, mineral oil or other valuable deposit, is or may be produced shall be taxed in addition to the surface improvements, and in lieu of taxes on the lands, on the gross product thereof, as may be prescribed by law: Provided, that the product of all mines shall be taxed in proportion to the value thereof."

It will be noted that this specifically provides for a tax on the gross products of the mine in lieu of a tax on the lands. This constitutional provision recognizes that the products of mines within the state are of a different class, especially for the purposes of taxation, and should be taxed in a different manner than other classes of property. This principle of classification has been recognized by the courts as proper, even in many instances where not specifically authorized through a constitutional provision. The rule is clearly stated in the case of Pacific Express Co. v. Seibert, 142 U. S. 339, at page 351, 12 Sup. Ct. 250, 253 (35 L. Ed. 1035), in the following language:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

If this premise be correct, then, in order that the taxing officials may carry it out under the provisions of the statute in fixing the assessment for taxation upon the "gross products," it becomes necessary to take into consideration the entire product. The method contended for by plaintiff in this case would not be an assessment upon the gross product, but only upon a small portion of the gross product, or in effect that proportion which might be found in the possession of the mine owner at the time the assessing official purported to make his assessment. The plan of adopting the product of the preceding year as the basis of the tax for the current year is merely a ministerial function of the board clearly made necessary for the purpose of ascertaining the gross product for a given period, to the end that the constitutional and statutory provisions may be carried into effect.

The third is that the inclusion in the assessment valuation of the expense of bringing the coal to the mouth of the mine, either on account of the so-called semimonthly pay rolls and the disposal of the property during the same periods, or on account of that expense not being properly a part of the value of the coal at the mouth of the mine, is erroneous, and this charge cannot be sustained as being violative of any of plaintiff's rights. The cost of production of any property is certainly a part of its value as a finished product. In many instances the value of the article produced rests much more largely in the cost of production than in the intrinsic value of the substances of which it is composed. In this Western country, the court takes it as almost an elementary proposition that, in fixing the value of a steer at a certain time the cost of maintaining it, including the feed which it has eaten in order to bring it to its then present condition, must be an essential

part of its value. This court is unable to discover a satisfying differentiation between the production of a steer for the consumer and a ton of coal for the consumer, so far as the expense of producing it is concerned. An unmined ton of coal is of as little value intrinsically as an unborn calf. Coal in the ground in its original state and before being brought to the surface can scarcely be called a product.

[3] This brings the court to the consideration of the fourth and final charge of the bill in the outline adopted by the court, that the property of plaintiff is assessed in excess of its real value while other property of the state is assessed at a rate of not exceeding seventy per cent. of its value, which in effect comes more nearly bringing the bill within the rule laid down in Taylor v. Louisville than any other feature of the bill. But the bill must be found sufficient in this particular as to the allegation of facts, if it be sustained as against the motion to dismiss. In order to analyze this particular portion of the bill, it becomes necessary to examine it as to the basis upon which that allegation rests, which charges that the property of plaintiff has been assessed for more than its real value.

This brings us again to the point, before discussed, that the alleged overvaluation for assessment purposes is on account of the inclusion of the expense of bringing the coal to the mouth of the mine, which theory of the plaintiff has heretofore been rejected by the court. There is, therefore, found no allegation in the bill which could be interpreted to charge, with this element omitted, what the proportionate assessed valuation of mine products are with relation to the assessed valuation of other classes of property, or that there is any disproportion. In other words, the allegation of overvaluation of mine products is built upon a false theory, so far as the decision of this court is concerned, which appears upon the face of the bill, and therefore is not sufficient, taken in connection with the allegation that other classes of property are assessed at not exceeding 70 per cent. of their real value, to state in this phase of the case a sufficient ground to invoke the equitable jurisdiction of this court to restrain the collection of the tax.

Other discrepancies in the bill have been referred to by counsel for the defendant, in that in one portion of the bill it is alleged that the erroneous assessment valuation exceeded the real value of the product by $1.50 per ton, and in another portion that the alleged erroneous assessment valuation exceeded the real value of the product by $1.80 per ton. This is apparently an inconsistency, which makes it more difficult to ascertain what the real contention of the plaintiff may be.

Counsel for the defendant have also called attention to the allegation of the bill with respect to the amount paid of the tax complained of, which allegation is that the tax was paid upon a valuation of $2.20 per ton. This is likewise inconsistent with the allegations of the bill in other places, as before stated, that the assessed valuation exceeded the real value by $1.50 per ton, which would make the real value $1.50, and in another place that it exceeded the real value by $1.80 per ton, which would make the real value $1.20. By the Wyoming Compiled Statutes 1920 (section 6305) it is provided that the plaintiff in an action to enjoin the collection of taxes, if he admit a part thereof to have been

legally levied, he must pay or tender the sum admitted to be due. This apparently the plaintiff has not done, if its allegations in regard to the real value of the property are to be considered, but by its payment has admitted as legal a portion of the tax now challenged as illegal.

The bill also fails to disclose that the acts complained of by the assessment and taxation officers of the state apply generally to other property of the same class within the state, or property of the plaintiff in several different counties, which two elements were particularly cited in the Taylor Case to sustain the jurisdiction of the federal court. The plaintiff's bill also lacks any allegation of a uniform and systematic method of the board in fixing the alleged illegal assessment valuations, which was found in the Taylor Case to be a matter of fact. So far as the bill shows, the act complained of is an isolated transaction.

For the reasons stated, the motion to dismiss will be granted, reserving to the plaintiff its proper exceptions.

ARMSTRONG v. BELDING BROS. & CO.

(District Court, D. Connecticut. May 8, 1922.)

No. 1217.

1. **Patents ⟸318(4)—Where infringing part alone makes article marketable, infringer is liable for entire profit.**
   Defendant, in a suit for infringement of a patent for a silk skein holder, which used the infringing holder for its product only when it could not make a sale without it, *held* liable for the entire profit made on such packages.

2. **Courts ⟸352—Exceptions to account filed before master not necessary.**
   Where a party files an account before a master, under equity rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii), the other party is not required to except thereto, to entitle him to introduce contradictory evidence.

3. **Evidence ⟸78, 178(3), 179(2)—On refusal of defendant to produce records on accounting, and destruction of them by him, secondary evidence is admissible, and presumption is against defendant.**
   Where defendant, on an accounting for profits, refuses to produce its records in compliance with orders of the master and the court, and destroys records which might contain material evidence, the other party is entitled to introduce the best evidence available, and even though it is imperfect, vague, or uncertain, every intendment and presumption is to be made against defendant.

In Equity. Suit by Benjamin L. Armstrong against Belding Bros. & Co. On exceptions to master's report on accounting. Modified and confirmed.

J. Edgar Bull and C. G. Heylmun, both of New York City, for plaintiff.

Robert B. Honeyman, of New York City, for defendant.

THOMAS, District Judge. This matter is again before the court on exceptions to the master's report respecting the accounting. The

case has been in the courts since March 23, 1906, and its history is disclosed in a very lengthy record. See (C. C.) 172 Fed. 234; 174 Fed. 410, 98 C. C. A. 361; (C. C.) 178 Fed. 554; (C. C.) 181 Fed. 173. See, also, order of Judge Platt, dated April 30, 1912; order of Judge Martin, dated October 21, 1913; this court's order, dated October 1, 1915; the order of the master, dated January 5, 1914; certificate of the master, dated January 13, 1914; petition by defendant for mandamus; and the order of the Circuit Court of Appeals, dated April 14, 1915, denying the petition.

[1] The patent is for a "skein thread holder," and, to quote the specification, relates—"to devices by which thread which is usually sold and used in the form of skeins can be kept in such form while in the merchant's stock and while being used, without becoming either tangled or soiled, and without any tendency upon the part of one length of thread, when drawn from the skein, to disturb or disarrange the lengths remaining," and the invention "has been designed more especially for use with what are generally known as 'embroidery silks,' which easily become tangled, and a large percentage of which has heretofore been lost because of the lack of any convenient means for preventing the tangling and soiling."

The patent having been adjudged valid and infringed, the cause was referred to a special master, with instructions to ascertain, state, and report to the court an account of the profits, gains, and advantages which the defendant had received by reason of the infringement. A controversy having arisen between the parties as to the manner in which these profits should be ascertained, the court (Platt, District Judge) instructed the master that the defendant need not account for any profits made by it on the silk which it sold in the infringing holder, as distinguished from the profits which it made on the holder.

In compliance with these directions, the master, on January 23, 1913, filed a report stating that from the evidence he was unable to find that the defendant made any profits from the sale of infringing holders. To this report exceptions were filed by the plaintiff, and, after hearing had, the court (Martin, District Judge) ordered that the accounting be resubmitted to the master, "to ascertain the profits that the defendant received from the sale of silk through, or by the use of, the holders which are covered by complainant's patent and infringed by the defendant. In making this accounting the master will ascertain the cost of the raw silk so used, and the expense of advancing the same in manufacture to embroidery silk in bulk, as well as the expense of packing it in the infringing holders."

The defendant having refused to comply with an order of the master directing it to produce certain books showing these costs, the cause came before this court on plaintiff's motion that the defendant be adjudged in contempt. In denying that motion without prejudice, this court said:

"This ruling of Judge Martin must be taken as the law of the case. The entire value of defendant's infringing package as a marketable article is properly attributable to the invention disclosed in the Schroeder patent, No.

546,251. Westinghouse Mfg. Co. v. Wagner Mfg. Co., 225 U. S. 604, and the authorities therein cited."

The defendant still contends that the measure of plaintiff's recovery is the difference between the market price of skeins in the infringing holders and of skeins in old-fashioned packages. But it is clearly established by the testimony of two of defendant's employees, Schmidt and Crocks, that the defendant sold silk in infringing holders only when it could not have sold it at all if it had not been in such holders, so that all the profit made on the silk thus sold was directly due to the use of the patented holders. This fact brings the case at bar within the rule approved in Wales v. Waterbury Manufacturing Co., 101 Fed. 126, 41 C. C. A. 250; Carborundum Co. v. Electric Smelting & Aluminum Co., 203 Fed. 976, 982, 122 C. C. A. 276; Metallic Rubber Tire Co. v. Hartford Rubber Works Co. (C. C. A.) 275 Fed. 315; Vandenburgh v. Concrete Steel Co., 278 Fed. 607, decided by the Circuit Court of Appeals for the Second Circuit on December 14, 1921; and in many other cases. In the latter case the court said:

"The test is whether the invention of a patent gives the whole value to the infringing device. Obviously it must, in a case where the sale of the article would be impossible without availing of the disclosure of the patent."

Bush & Lane Piano Co. v. Becker Bros., 222 Fed. 902, 138 C. C. A. 382, and Vandenburgh v. Concrete Steel Co. are not to the contrary. There the court refused, in the absence of any evidence, to presume that the patented device sold the entire mechanism of which it was a minor part. Here there is no need to indulge in presumptions. The evidence shows that the entire value of defendant's infringing package as a marketable article is properly attributable to the holder. For this reason, I am still of the opinion that the defendant must account for the profit made on the contents of the infringing holder.

[2] In considering the remaining questions raised by the defendant's exceptions to the master's report, we are met at the outset by the contention that, because the plaintiff did not except to the various accounts filed by the defendant in response to the master's orders, he is concluded by the figures therein contained. With this contention I cannot agree. It is well settled that an account filed under equity rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii) merely performs the functions of a pleading, namely, to narrow the issues (In re Beckwith, 203 Fed. 45, 121 C. C. A. 381; Beckwith v. Malleable Iron Range Co. [D. C.] 207 Fed. 848), and that, while it would have been better practice for the plaintiff to file exceptions to the account, it is not required to indicate its dissatisfaction therewith in any particular form (Coffield Motor Washer Co. v. Wayne Mfg. Co. et al., 255 Fed. 558, 166 C. C. A. 626).

I think that where, as here, evidence inconsistent with the figures stated in the defendant's account is received without objection on the part of the defendant, on the ground that no exceptions to the account have been filed, the plaintiff's dissatisfaction with the account as filed is sufficiently indicated. Under the circumstances, the situation is the same as if the plaintiff had excepted to the entire account; that is, the

statements therein contained are not to be regarded as evidence, but merely as admissions on the part of the defendant. The master was entitled, therefore, to base his conclusions, not alone on the figures contained in the accounts filed by the defendant, but also on the evidence introduced by the plaintiff.

[3] The defendant, in compliance with various orders of the special master, rendered accounts purporting to show the number of skeins in infringing holders billed by its factory to its offices in New York and Chicago and to independent sales agencies in other cities, the prices at which they were billed, the prices at which skeins in old-fashioned packages were billed at the same time, in similar quantities and to the same parties, the cost of putting skeins in infringing holders, and the loss sustained by selling skeins in holders. It also furnished a partial list of the sales of skeins in infringing holders made at its New York office, showing the price at which skeins were billed to customers. Although ordered on June 17, 1910, to produce its bills or vouchers showing the prices at which its factory billed holder goods to its various agencies, and again ordered on January 4, 1914, and March 13, 1915, to produce all books, written entries, vouchers, etc., showing sales of silk in holders by the New York and Chicago offices, it neither complied with these orders nor accounted for its failure to do so.

On December 27, 1913, in compliance with an order of the special master, the defendant filed an account purporting to show the cost to it of raw silk during the period of infringement, the cost of advancing the raw silk to the point where it was ready to be inserted in the infringing holder, and the cost of putting the silk into such holder, from which it appeared that it had suffered a loss of $5,431.56 on its sales of embroidery silk in holders during the period of infringement. Thereafter, on January 5, 1914, the master ordered the defendant to produce the books showing these costs.

Upon the defendant's refusal to comply with this order, the matter was again brought before the court, and it was held that the order must be obeyed. On March 13, 1915, the master repeated his order of January 5, 1914. In response to this last order, John R. Emery, an agent of the defendant, made an affidavit to the effect that some of the records called for had never been in existence, and that those which had been in existence were destroyed in January, 1913, when the defendant moved its New York offices; that the defendant manufactured many things other than embroidery silks, that no more than 2 or 3 per cent. of the embroidery silks manufactured by the defendant were ever put into paper holders for sale, and that no separate records were kept with respect to such goods so sold in paper holders.

The destruction, during the pendency of the action, of the books and records of the defendant, which, as defendant must have known, might have a material bearing on the questions involved, if the plaintiff's contention was ultimately sustained, was a circumstance requiring explanation on the part of the defendant; but no explanation was forthcoming. Furthermore, there must have been some records in existence, at least as late as December 27, 1913, from which the defendant ob-

tained the figures contained in the account filed by it on that date. These records should have been produced, or the failure to produce them accounted for.

Because of the defendant's unexplained failure to produce, when ordered to do so, documentary evidence showing what amounts it received from the sale of skeins in holders, and the cost of manufacturing them and putting them in holders, the plaintiff was entitled to prove these facts by the best evidence available, and even though such evidence was imperfect, vague, or uncertain, every intendment and presumption is to be made against the defendant, who might have removed all doubts by producing its books. This rule of evidence is well settled (Jones on Evidence, §§ 17–18a; Hanson v. Eustace's Lessee, 2 Howard, 653), and has been applied in cases of patent accounting (P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157; Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, 92 C. C. A. 46; Byerly v. Sun Co. [D. C.] 226 Fed. 759).

The master has reported that the net profit to the defendant on the sale of silk in the infringing holders was $95,494.73, and recommended that judgment be entered in favor of the plaintiff for such amount, and the question is whether this conclusion is manifestly incorrect. Fullerton Walnut Growers Association v. Anderson-Barngrover Mfg. Co., 166 Fed. 443, 92 C. C. A. 295; Continuous Glass Press Co. v. Schmertz Wire Glass Co. et al., 219 Fed. 199, 135 C. C. A. 85. It appeared from the accounts rendered by the defendant that during the period of the infringement it billed to its offices in New York and Chicago, and to certain independent corporations and copartnerships which acted as its selling agents in Boston, Baltimore, Cincinnati, and St. Louis, in infringing holders, 4,804,752 skeins, or about 9,384¼ pounds, of embroidery silk, at prices aggregating $111,447.19, or an average price per pound of $11.88. The defendant also furnished a partial list of the sales made at its New York office, showing that on an average the prices at which the holder goods were billed to its customers were $2.64 a pound more than the prices at which they were billed to its New York office.

The evidence shows that Gager, a bookkeeper employed by the plaintiff, examined the defendant's books at its mill in Northampton, Mass., and found that during the period of infringment it bought 6,975,142 holders. He was also shown all empty holders, and by counting them found 891,500 on hand. From this evidence the master concluded that the defendant used and sold 6,083,642 infringing holders, containing 11,882½ pounds of silk, at an average price per pound of $11.88, giving the sum of $141,164.10 as the sum at which the defendant billed the goods to its sales offices. The defendant contends that there is no evidence to support this finding; but I think that the testimony of the witness Gager was sufficient to throw upon the defendant the burden of proving how the holders had been disposed of, and that in view of its failure to produce its books and records the master's finding should be sustained. Continuous Glass Press Co. v. Schmertz Wire Glass Co., supra.

The master further found, in the face of defendant's undisputed evidence that the concerns in Baltimore, Boston, Cincinnati, and St. Louis were independent concerns, that the defendant was chargeable with an additional $2.64 per pound on all silk billed to its own offices, as well as to these independent concerns, which amounted to 11,888½ pounds, or $31,369.80. The latter conclusion makes no allowance for selling expenses, and ignores the fact that the price at which goods were billed to customers by the New York office were subject to a 10 per cent. discount.

The plaintiff says that this was proper, because there was no evidence that this discount was allowed. The statement in the defendant's account of July 12, 1910, that this discount was allowed, is part of the statement used as an admission of the fact that the holder goods were billed to customers at prices higher than those at which they were billed to the New York office. It was incompetent to use only that part of the statement advantageous to the plaintiff and ignore the part qualifying it. Nor is there any evidence whatever to show that the defendant should be charged with $2.64 on each pound of silk sold by the independent sales agencies. I conclude, therefore, that the correct sum or total amount with which the defendant should be charged is $141,-164.10.

All of the evidence on which the master found that the cost to the defendant of manufacturing the embroidery silk sold by it in infringing holders and the cost of putting it into such holders was $85,392.-65. was evidence of the cost of that process to the Brainard & Armstrong Company and other manufacturers of the same grade of embroidery silk. The defendant contends that this evidence was incompetent, because the profits for which an infringer must account are not those he might reasonably have made, but those which he actually did make, by the use of the plaintiff's invention. But it appears that, in calculating the average cost to the Monotuck Silk Company, at least quantities as well as prices were taken into consideration. And in view of the defendant's unexplained failure to produce its books this evidence was sufficient to sustain the master's finding.

The master's findings that the defendant's cost of advancing raw silk to embroidery silk was $1.12 per pound, and that its cost of putting embroidery silk into the infringing holders was $1.0362 per pound, are based on Fuller's testimony, and should be sustained on the principle above stated.

It is contended that the master erred in deducting from the defendant's cost of manufacturing the skeins and putting them in holders $8,-653.48, the amount received from Procter & Gamble for the advertisement of Ivory Soap carried on the infringing holders, because these payments were made under a contract antedating the sale by the defendant of silk in holders, whereby Procter & Gamble paid for the advertisement of Ivory Soap on all embroidery silk sold by the defendant. But the amount which Procter & Gamble agreed to pay under that contract for the advertisement on the holders was measured by the cost of the holders, and reduced its costs to the defendant to the

extent of that payment. The exception to this finding, for this reason, is overruled.

My arithmetical conclusions are as follows:

The defendant should be charged with	$141,164.10
The total cost to it to be deducted is	85,392.65
Leaving	$ 55,771.45
To which should be added Procter & Gamble payment	8,653.48
Making the amount for which judgment should be rendered	$ 64,424.93

Or, figuring on another basis:

The master's report recommended judgment for	$ 95,794.73
From which should be deducted, as error, 11,882½ pounds silk, at $2.64, discussed supra	31,369.80
Leaving the amount for which judgment should be rendered	$ 64,424.93

The master's report is accordingly modified, and, as modified, is confirmed. Judgment may be entered for the plaintiff, to recover of the defendant $64,424.93 and costs, together with interest from the date of the master's report; and it is so ordered.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. RAILROAD COMMISSION OF SOUTH CAROLINA et al.

(District Court, E. D. South Carolina at Charleston. May 6, 1922.)

No. 253.

1. Telegraphs and telephones ⟸33(1)—Railroad Commission of South Carolina not authorized to enforce rate law.

The Railroad Commission of South Carolina has no power to enforce Act S. C. April 3, 1922, relating to telegraph and telephone rates; such act simply authorizing the commission to furnish information, the Legislature itself having fixed the rates in the act.

2. Courts ⟸101—Bill to restrain Railroad Commission of South Carolina from publishing rates not a bill to restrain enforcement of statute, requiring three federal judges on application for injunction.

A bill to restrain the Railroad Commission of South Carolina from publishing the established rates under Act S. C. April 3, 1922, is not a bill to restrain the enforcement of a statute by an officer, under Judicial Code, § 266 (Comp. St. § 1243), requiring that a motion for a temporary injunction be heard before a court of three judges; the commission having no power to enforce the statute, notwithstanding Civ. Code S. C. 1912, § 3161, giving the commission powers of enforcement over telegraph and telephone lines.

3. Courts ⟸101—Statute relating to number of federal judges on motion for temporary injunction held inapplicable on motion to dismiss complaint.

Judicial Code, § 266 (Comp. St. § 1243), requiring that motion for temporary injunction to restrain the enforcement of a statute by an officer be heard by three judges is inapplicable on motion to dismiss the complaint, which, under rule 29 (33 Sup. Ct. xxvi), is equivalent to a demurrer to the whole bill, since, if the motion be refused, and no answer be interposed, the decree would be final, and a final injunction would issue.

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1. **Equity ⊜239—Matters of fact in bill of complaint taken as admitted on demurrer.**
   On bill and demurrer, or bill and motion to dismiss, all matters of fact in the bill of complaint well pleaded must be taken as admitted.
5. **Telegraphs and telephones ⊜7½—Allegation as to status of foreign corporation in state held insufficient to show right to do business therein.**
   Allegations in complaint that complainant is duly and legally qualified to do a telephone business throughout the state of South Carolina, and is a foreign corporation doing business in such state, and a nonresident, are insufficient to show that such corporation is entitled to do business in the state in view of Civ. Code 1912, S. C., §§ 2664–2667, requiring foreign corporations to perform certain stipulated acts, especially in view of section 2688.
6. **Corporations ⊜391—Public service corporation entitled to a fair and reasonable remuneration, and state may not compel it to render services free and exhaust capital for public.**
   In the absence of a contract compelling a corporation, though a public service corporation, to perform its services at stipulated and covenanted rates, it is entitled to charge such rates as will lead to a fair and reasonable remuneration, and a state has no right to compel it to render its services free and to exhaust its capital in performing work for the benefit of the public.
7. **Corporations ⊜382½, New, vol. 16 Key-No. Series—Public service corporation has right to cease operating.**
   A public service corporation has the right, if it finds its business unremunerative, unless bound to the contrary by a contract, to cease operating and stop its work.
8. **Corporations ⊜636—State may prescribe terms on which foreign corporation will be allowed to do business and to arbitrarily exclude corporation not engaged in interstate commerce.**
   A state has the right to prescribe the terms on which a foreign corporation will be allowed to carry on business within its jurisdiction, or, if it see fit, arbitrarily and capriciously exclude any corporation from entry within its border, if not engaged in interstate commerce.
9. **Corporations ⊜636—State and foreign service corporation must be given reasonable time to exclude from state or cease doing business.**
   If a state should exercise the power of exclusion of a public service corporation doing a business within it, under the guise of regulation, it can do so by giving it a reasonable time to realize on its property and securities and retire from the state, and, conversely, a public service corporation, exercising its right to cease carrying on its business because of inability to earn a reasonable return, may be restrained from doing so for such a reasonable time as would permit the state to meet the situation and endeavor to provide for the public service.
10. **Corporations ⊜636—Statute prescribing confiscatory rates for foreign public service corporation invalid, unless time given to cease business.**
    A state statute fixing rates to be charged by foreign public service corporation doing business in the state, which are nonremunerative and confiscatory, though not invalid on its face, is unconstitutional unless the foreign corporation is given time and opportunity to cease business and realize on its investment.

In Equity. Suit by the Southern Bell Telephone & Telegraph Company, a corporation created and existing under the laws of the state of New York, against the Railroad Commission of South Carolina and others. On motions for temporary injunction and to dismiss a complaint. Motion for temporary injunction granted, and that for dismissal of bill dismissed.

Grier & Park, of Greenwood, S. C., W. S. Nelson, of Columbia, S. C., Hagood, Rivers & Young, of Charleston, S. C., and Henry E. Davis and Willcox & Willcox, all of Florence, S. C., for plaintiff.

Samuel M. Wolfe, Atty. Gen., John M. Daniel, Asst. Atty. Gen., Stephen Nettles, of Greenville, S. C., F. A. Miller, of Hartsville, S. C., and D. W. Robinson, of Columbia, S. C., for defendants.

SMITH, District Judge. This cause came on to be heard on the 24th day of April, 1922. It came on to be heard first on the motion made in the cause for a temporary injunction, following an ex parte temporary restraining order already granted. At the same time and place there was heard a motion filed by the defendants to dismiss the complaint for want of equity, and in that the bill of complaint upon its face shows no ground for relief in favor of the complainant against the defendants. Due service has been made upon all parties defendant, and all have appeared by counsel, and counsel have been heard for all parties interested, both upon the motion for an interlocutory injunction and on the motion to dismiss the bill of complaint.

The first matter for consideration is the motion made on behalf of the complainant that the motion for a temporary injunction is one which, under section 266 of the Judicial Code of the United States (Comp. St. § 1243), must be heard before a court of three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the motion is made to defer the hearing on this motion until the judge of this court shall have time to call to his assistance two other judges and name a date for the hearing.

Section 266 prescribes that any interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of the state, by restraining the action of any officer of such state in the enforcement or execution of that statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of the state, shall not be issued or granted, except after a hearing before three judges provided for in the statute. The bill of complaint in this case is brought to enjoin the Railroad Commission of this state from the enforcement of the act of the state of South Carolina approved April 3, 1922, entitled:

"An act to regulate the maximum price which may be charged by telephone and telegraph companies doing business in this state."

That act provides in express terms that, from and after the approval of the act by the Governor, no corporation, company, firm, person, or persons owning, operating, or controlling a line or lines of telephone or telegraph in this state shall charge or collect or suffer to be charged or collected for their services a greater price or sum of money or a greater rate than was of legal force and effect on January 1, 1921. The act further provides that any person so forbidden to charge higher rates, violating the provisions of the section, shall be liable to a penalty of $50 for each violation or attempted violation, to be recovered in any court of competent jurisdiction in this state, at the instance and on behalf of the aggrieved party or parties.

There has been no order made by any administrative board or commission, acting under and pursuant to this statute or any other statute of the state, and therefore the bill is not brought to enjoin the enforcement or execution of any such. It must stand upon that part of section 266 which requires any application for an interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of the state by restraining the action of any officer of the state in the enforcement or execution of such statute.

[1] An examination of this act approved April 3, 1922, does not show that any officer of the state is authorized to enforce or execute the statute. The enforcement of the statute, so far as this particular statute is concerned, is secured by making the offending party liable to a penalty of $50 for each violation or attempted violation, to be recovered in any court of competent jurisdiction in this state at the instance and on behalf of the aggrieved party or parties. So far as this statute is concerned, the Railroad Commission is not authorized in any wise to enforce it. The enforcement is left to the method provided by a liability to the party or parties aggrieved. The only thing that by this statute the Railroad Commission is required to do is to promulgate, and on request furnish, the schedule of rates existing and effective January 1, 1921. It is evident that this is not meant for an enforcement of the act, but simply for the purpose of giving information to the public as to what were the rates directed by the Legislature. The Legislature, by the statute itself, at once prescribes the schedule of rates. In order that the public making use of the telephone and telegraph service shall be informed as to what are the legal rates, the Railroad Commission, is for the purposes of giving that information, required to have promulgated and on request furnish the information. The commission is not to enforce the act. It is to do nothing but give information of the schedule already existing, and which any member of the public could obtain by application to the office in which that schedule is on file. That is all.

[2] This statute itself does not authorize or empower any officer of the state in any wise to enforce it, and therefore no bill of complaint could lie to restrain the action of any officer of the state from enforcing that which he is not authorized to enforce. A bill to restrain the Railroad Commission from publishing the established rates is not a bill to restrain the enforcement of a statute by an officer under the terms of section 266. A bill might lie to restrain parties aggrieved from enforcing it, so as to put an end to a multiplicity of actions; but that bill would be against those parties, and not against the officers of the state, and would be an application to the court in its general equity jurisdiction for an injunction to put an end to a multiplicity of actions, and would not come under the terms of section 266 of the Judicial Code of the United States.

Counsel for the defense attempt to meet this upon the ground that the Railroad Commission has, by section 3161 of the Code of Laws of South Carolina of 1912, the same powers of enforcement over telephone and telegraph lines that it has over railroads; but that is not the provision of this special statute, which provides its own peculiar

remedies for its enforcement, and furthermore, under section 3163 of the Code of Laws of 1912, the Railroad Commission is not given any authority to enforce the provisions of the statute, but it is provided that in the case of the violation of the provisions of law by telephone lines, or the failure or refusal to obey any orders of the commission, such parties shall forfeit and pay as a penalty therefor the sum of $25 per day for each day in default, to be recovered by suit in the name of the state on the relation of any person, firm, or corporation aggrieved, in any county in which such violation or default shall be committed or occur, and the sum so recovered shall, after paying all expenses of such suit, be paid into the treasury of the state, and that it shall be the duty of the Attorney General and of the solicitors of the state, not of the Railroad Commission, to prosecute such suits.

An inspection of the Act of April 3, 1922, shows that the rate or schedule of charges is there fixed directly by the state itself. No action of the Railroad Commission is required, and this bill is brought, not really to restrain any action of the Railroad Commission, but to restrain the enforcement of the tariff or schedule of rates prescribed by the state itself, and for that purpose to restrain a multiplicity of parties from suing for the violations and recovering the penalties prescribed by the statute. It does not appear, therefore, to the court, that the application is for an interlocutory injunction, which under the terms of section 266 of the Judicial Code of the United States requires it to be heard by a court of three.

The court is not unmindful of the directions of the decision of the Supreme Court of the United States in the case of Ex parte Metropolitan Water Co. of West Virginia, 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; but in that case there was no doubt that the action was to restrain the enforcement of a statute of the state, by restraining the action of an officer of the state, and the only point on appeal was that the court below held the act to be constitutional, and not unconstitutional, and refused the temporary injunction, and, so holding, considered that that dispensed with the necessity of calling two judges to the assistance of the presiding judge, which occasion only arose when the court should issue a temporary injunction on the ground that this statute was unconstitutional. It is therefore held that section 266 of the Judicial Code is not applicable to the present application.

[3] For the purpose of this hearing however, the result does not depend upon the application for a temporary injunction. The defense has interposed a motion to dismiss, and such motion, under rule 29 (33 Sup. Ct. xxvi), is equivalent to a demurrer to the whole bill, and the hearing is upon the merits upon the bill and motion to dismiss. If the motion be refused, and no answer be interposed, the decree would be final, and a final injunction would issue. The provisions of section 266 apply only to temporary, and not to final, injunctions. Inasmuch as, if the court is of the opinion that the bill should be dismissed, and so order, that would be a permanent and final decree disposing of the matter, and there would be nothing left before the court upon which any application for a temporary injunction could be heard.

[4] For the purposes of the argument upon bill and demurrer, or

bill and motion to dismiss, all matters of fact in the bill of complaint well pleaded must be taken as admitted.

[5] It is set out in the complaint that the complainant is duly and legally qualified to do a telephone business throughout the state of South Carolina. It is also set out in the bill of complaint that the complainant is a foreign corporation doing business in the state of South Carolina and a nonresident of the state of South Carolina. This allegation is insufficient. The state of South Carolina requires that, in order to permit foreign corporations to do business within its limits, they should perform certain stipulated acts, as prescribed in sections 2664, 2665, 2666, and 2667 of the Code of Laws of 1922. Proper pleading would require that it should be alleged that all those preliminary and additional acts had been performed, and not make simply the general allegation that the complainant is legally qualified to do a telephone business, especially in view of the positive provisions of section 2688 of the Code of Laws of 1922, which declares that it shall be unlawful for any foreign corporation to do business or attempt to do business in the state without having first complied with the requirements of the law. Inasmuch, however, as no exception is taken to this, although the facts are not well pleaded, it may be assumed for the purposes of the argument that compliance has been had by the complainant with all these requirements, and that it is authorized as a foreign corporation to do business in the state of South Carolina.

That being the case, the bill alleges that, so carrying on business in the state of South Carolina as a telephone company, charging and receiving the rates of toll theretofore permitted by the legal authorities of the state of South Carolina, suddenly on April 3, 1922, the state of South Carolina by legislative act decreased these rates to a point at which they were nonremunerative and confiscatory. The express charge in the bill of complaint is: The rates and charges which are imposed on it, the complainant, by the act, are so low, unreasonable, and inadequate that they do not and cannot be made to yield to the complainant a fair and reasonable return upon the value of its property, and are in effect confiscatory.

[6, 7] In the absence of a contract compelling a corporation, although a public service corporation, to perform its services at stipulated and covenanted rates, it is entitled to charge such rates as will lead to a fair and reasonable remuneration. The state, acting for the public, has no right to compel a corporation to render its services free, nor to exhaust its capital in performing work for the benefit of the public. A corporation has the right, if it finds it unremunerative, unless bound to the contrary by a contract, to cease operating and stop its work.

[8] There are two conflicting principles under the decisions involved: One is the right of the corporation, either to receive reasonable remuneration for the use of its capital and its labor, or to cease operation; and, on the other hand, the right of the state to regulate the rates which a corporation can charge. In doing this, it is bound to allow it to charge such rates as will lead to a reasonable remuneration. Again, there is no doubt of the right of the state to prescribe the terms upon which a foreign corporation will be allowed to carry on business with-

in its jurisdiction, or even, if it see fit, arbitrarily and capriciously to exclude any corporation (if one not engaged in interstate commerce) from entry within its borders.

The position of the complainant is, and is so avowed in argument, that where a foreign corporation once comes into a state with its permission, and makes investments, it acquires a perpetual right to remain there and carry on business at remunerative rates, no matter what may be the casualties that affect other business, and the contention is that a corporation, having once established itself, being of right entitled to a reasonable remuneration, is entitled in perpetuity as a vested and continuing right to continue to carry on business, and to require payment therefor of such rates as would give it a reasonable remuneration, although the times be such that every other industry in the state is unable to earn such remuneration.

Carried to its logical and full extent, this would mean that the state, having allowed foreign corporations to come within the jurisdiction and make investments for the purpose of carrying on their business, would find itself completely tied hand and foot in perpetuity to allow them to remain and operate and carry on business at a reasonable rate, no matter what may be the wishes of the state or of its citizens in regard thereto. What an opportunity for investors it would be if they could thus acquire the right by a forced levy in the shape of rates to insure themselves in perpetuity a profitable return on their investments!

It would be equally hard, however, if after a corporation has entered into a state with its permission, and made its investments and carried on business, that the state should have any arbitrary and immediate right of exclusion, which would lead to the destruction and loss of those investments already made. By an arbitrary enactment decreasing the rates of compensation to a point which in the result would be destructive of the property of the corporation, the state could in effect declare there must be a departure from its limits, and an exclusion from doing business therein of any corporation, although it reached that result under the guise of a regulation of its schedule of charges.

[9] The question comes into this argument only incidentally, in view of the points of law raised by the motion to dismiss as based upon the power of the state. While it may be conceded that no such right in perpetuity exists on the part of any foreign corporation to carry on business and remain within the state, yet equally it must be denied that the state has the right by a sudden and arbitrary exclusion practically to sacrifice and confiscate the property of any such corporation. If it should exercise that power of exclusion, under the guise of regulation, it can do so by giving to the corporation, which has been allowed to establish itself legally within the limits of the state, such a reasonable time for realization upon its property and securities and retirement from the state as would as a judicial question equitably meet the situation. So, conversely, a public service corporation, exercising its right to cease carrying on its business because of its inability to earn a reasonable return from its operation, might be restrained from doing so for such a reasonable time as would permit the state to meet the situation and endeavor to provide for the service of the public.

The ground, under this head, on which the statute is claimed by the defendant to be invalid and unconstitutional, is not that the act, on its face is unconstitutional, but is so in the results effected. Upon its face, the act is a constitutional exercise of the state's right to regulate the rates charged by a public service corporation. But it is claimed that as a matter of fact, dehors the wording of the act, the rates prescribed are unremunerative and unconstitutional, and the act is invalid, not because an act prescribing rates is unconstitutional, but because the particular rates prescribed are beyond the power of the state to prescribe. The whole controversy turns upon a question of fact, to be decided by the court upon the testimony to be adduced. It is not the statute which per se is unconstitutional, but that the rates prescribed are unconstitutional.

[10] It being conceded by the defendant on the motion to dismiss that as a matter of fact the rates so enacted by the state are nonremunerative and confiscatory, it follows that the state at this time, under its power to exclude, cannot summarily confiscate, and the action of the state in at once prescribing and attempting to enforce such nonremunerative and confiscatory rates is unconstitutional and invalid.

The next question is, however, whether the state has so acted, without giving the party an opportunity for relief, by following the terms of the act. The act, while declaring at once what shall be the rates at a certain date, and what shall be the penalties for violation, contains other provisions. The act is a little ambiguous, because by the third proviso it is provided:

"Decisions of said commission may be reviewed by the court of common pleas upon questions both of law and fact."

Whereas, no commission has been, previous to that proviso, referred to in the act, and that clause is evidently out of place, and should follow the succeeding clause, which provides for the commission's action. The act further provides that the Railroad Commission may, on application, after investigation in the manner now provided by law, alter, modify, raise, or reduce rates in effect January 1, 1921, and that upon its action, and within 30 days thereafter, any person aggrieved may commence an action in any court of competent jurisdiction to vacate the action of the commission, and that no order or determination of the commission reducing any rate, fare, charge, or toll shall be enforced during the pendency of such action, if the telephone company affected shall execute and file a sufficient bond to secure the amounts collected in excess; that any party to such action shall have the right to appeal to the Supreme Court.

This proceeding does give to every party affected the opportunity to be heard, to raise all questions and appeal, if the decision be against him; but the difficulty is that this applies under the terms of this act only to future actions of the Railroad Commission. If the statute had not enacted at once a prescribed and fixed rate of charges, taking effect immediately, these provisions would be ample to secure to the parties aggrieved, whether they be telephone companies or customers, all rights to which they would be constitutionally entitled. The difficulty is that the statute at once prescribes a schedule or tariff of charges,

which takes effect and remains in effect until the Railroad Commission can receive applications and act, so as to raise or reduce them, and for that period unreasonable and confiscatory rates would be in force.

To allow the complainant to be sued in repeated actions to recover the penalties provided by the statute in favor of parties aggrieved would not only lead to a great and wholly unnecessary multiplicity of actions, but would place the complainant under a most inequitable burden in the ascertainment of its legal rights. The complainant has the right to have its day in court and its rights adjudicated, free from the risk of having to pay great penalties as accrued whilst it is bona fide attempting to settle the questions, and pending a final determination to that effect.

The court having come to the conclusion that under these circumstances there is an equity in the bill which entitled the complainant to file it, the other grounds raised against the invalidity of the act need not be considered.

It is therefore ordered, adjudged, and decreed that the motion to dismiss the bill be overruled, and that it appears upon the face of the bill of complaint that the rates imposed by the act of the state of South Carolina approved April 3, 1922, are unreasonable and confiscatory, and should not be enforced, and that the complainant is entitled upon the face of the bill to a permanent injunction against the parties to this bill, enjoining and restraining the institution of any actions to recover any penalties prescribed in the statute.

It is further ordered, adjudged, and decreed that the defendants may, within 30 days from the date of this decree, answer to the bill of complaint herein, as they may be advised, and that upon the bill of complaint and such answers, if filed, the cause shall stand for hearing upon the same, with any testimony that shall be taken upon any issues of fact raised by any such answer, and, if no answer be filed, the complainant may move for a decree pro confesso under equity rule 29 (33 Sup. Ct. xxvi).

It is further ordered, adjudged, and decreed that, if answers be filed in the time allowed, the injunction as herein decreed shall continue until the further order of the court; and, inasmuch as an appeal may lie from this decree, it is further ordered, adjudged, and decreed that, in case such appeal be taken within 30 days from the entry of this decree, then and in that case the complainant or any party hereto may move before this court for an order continuing such injunction during the pendency of such appeal and until the further order of this court.

SWIFT & CO. v. GLASGOW STEAM SHIPPING CO., Limited, et al.

(District Court, S. D. New York. May 5, 1921.)

1. **Shipping ⟸106—Assignee of bill of lading held entitled to all rights of shipper under contract of affreightment made before issuance of the bill.**
   Where goods were shipped under and against a contract of affreightment previously made between shipowner and shipper, the fact that bills of lading were made out by other company operating the ship under a charter from the shipowner to a bank, and assigned by the bank to a company of which the shipper was a subsidiary, did not debar the subsidiary from claiming all the rights that the shipper would have had, had the documents been made out in its name.

2. **Shipping ⟸106—Bill of lading not construed to modify previously made inconsistent contract of affreightment.**
   Where goods were shipped under and against a contract of affreightment, so that the rights of the parties were not necessarily based on the bill of lading subsequently issued, and the bill of lading differed from the contract of affreightment, prima facie, and in the absence of any intention to the contrary as between the parties, the bill of lading is not to be construed to modify the contract of affreightment.

3. **Shipping ⟸197—Contract of affreightment held not to debar shipper from sharing in general average.**
   Contract of affreightment, providing that the meat "is received and carried, as regards perils of any kind whatsoever, at the" shipper's "own risk absolutely," *held* not to deprive shipper of the right to share in the general average for the jettison of unsound meat; such provision relating solely to the liability of the shipowner as such to the shipper for the carriage of the cargo, and not to his obligation to share with others in the general average loss.

In Admiralty. Libel by Swift & Co. against the Glasgow Steam Shipping Company, Limited, and others, to obtain a readjustment in general average. Judgment for libelant.

Lord, Day & Lord, of New York City (Howard Mansfield and Allen B. A. Bradley, both of New York City, of counsel), for libelant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, of counsel), for respondents.

MACK, Circuit Judge. Libelant was the owner of certain meat cargo, which, together with certain other cargo, was jettisoned when the steamship Kelvindale was stranded on Horseshoe Reef, off Virgin Islands, on a voyage from La Plata to New York. Libelant was wholly excluded from sharing in the benefit of the general average in respect to the sound as well as the unsound meat jettisoned, although it was compelled, along with other cargo owners, to contribute its share in general average.

The libel is brought against the Glasgow Steam Shipping Company Limited, the owner of the steamship Kelvindale, and against J. F. Whitney & Co. and Willcox, Peck & Hughes, the trustees for all concerned under the general average bonds. The case turns upon the interpretation and effect to be given to the charter party or freight agreement and bills of lading under which the cargo was shipped.

The charter party was made between the Glasgow Steam Shipping Company, Limited, as owner of the vessel, and Swift Beef Company, Limited, a British company, subsidiary of libelant, under date of December 31, 1913. It provided for the shipment of chilled beef and/or frozen meat and/or other cargo from La Plata and/or Montevideo to New York or Boston, or a direct port in the United Kingdom, at shippers' option, in eight consecutive voyages of the steamships Kelvinbank and Kelvindale, commencing about April, 1914. Clauses 12, 15, 21 and 22, which bear on the points in issue, read as follows:

"12. The shipowners undertake that the steamers named shall be (or are) classed 100 A 1 at Lloyd's with Lloyd's R. M. C. certificate, and that before loading meat in any insulated space or spaces they will obtain (or have obtained) the certificate of Lloyd's surveyor, or other person, in accordance with Lloyd's rules, that such insulated space or spaces and the refrigerating machinery have been surveyed and found in good condition and fit for the conveyance of refrigerated cargoes. The existence of such class, and the production of such certificate, shall be deemed to be conclusive evidence, against the shippers and consignees or indorsees of bill of lading, that the vessel, her engines, machinery, refrigerating machinery, spare gear and equipment and insulation, were at the loading, and at the commencement and during every stage of the voyage, in every respect sufficient and in a seaworthy and fit condition; and the existence of such class and certificate shall be deemed to satisfy and discharge every obligation or warranty, express or implied, under this contract or bill of lading, to provide a seaworthy and fit vessel for the voyage or any stage thereof; and, further, it shall absolutely exclude any claim for damage or loss or delay, on any ground whatsoever, the intention being that the meat is received and carried, as regards perils of every kind whatsoever, at the *merchants' own risk absolutely*, the shipowners not being responsible for unseaworthiness or negligence or default of themselves, their agents or servants, or any other person whomsoever, nor for any other peril of any kind or nature whatsoever, nor for any loss or damage of any kind arising from any cause or peril whatsoever.

"The above exceptions are to be read as absolutely unqualified by any other words, whether written or printed, appearing in this contract or implied therefrom, and full and complete effect shall be given to the aforesaid exceptions, anything to the contrary appearing herein notwithstanding: Provided, always, that nothing in this clause shall relieve the shipowners from their liability to provide steamers under clause 1 hereof."

* * * * * * * * * *

"15. Shippers' cargo to be shipped under the customary form of bill of lading, subject always to the conditions named in this agreement, and so far as the conditions in the bill of lading differ from, or add to, or subtract from the conditions hereof they shall be of no effect."

* * * * * * * * * *

"21. Should the cargo become putrid during the voyage it may be jettisoned at the captain's discretion; if it be landed in that condition or condemned by the port sanitary authorities, the consignees are to arrange for its removal from the ship's side and disposal at their expense.

"22. Notwithstanding any obligation herein imposed on the shipowners, or any other matter or thing in this contract contained, the shipowners are not to be liable for any loss or damage, however caused or brought about, which may be sustained by the shippers or consignees of the cargo, in consequence of the meat or any portion thereof becoming at any time after shipment unsound or damaged, or arriving, or being landed or delivered, in a damaged or unsound condition, or being jettisoned as having become unsound."

Libelant's cargo was shipped on the Kelvindale (which was then operated by Barber & Co. under charter from the Glasgow Steam Shipping Company, Limited) about November 24, 1914, from Puerto La

Plata, Argentina, by La Plata Cold Storage Sociedad Anonima, affiliated with libelant, and was consigned to the National City Bank, or assigns, the representative of libelant, under bills of lading which contained the following provision:

"Freight on live stock is payable on the number shipped without regard to and irrespective of the number and condition of those landed, and the master, owners, or agents of the vessel, or its connections shall not be responsible for the death of or injury to the stock however occasioned, and it is understood that no damage, injury or loss arising to live stock or dead meat, whether arising from jettison or otherwise, shall be recoverable under general average, but shall form a charge on such stock or meat."

The average adjusters apparently assumed that the rights of the parties were to be adjusted solely by reference to the bills of lading, for their statement contains the following explanation:

"Swift & Co., Puerto La Plata B/L—Meats.

"Statements have been presented to the adjusters, claiming in general average loss on meats by short delivery, amounting to some $22,813.13, which includes loss by jettison in salvage operations and by discharging at St. Thomas and dumping at sea the damaged meat considered worthless. (In respect of the above the adjusters find that all cargo, except that shipped at Buenos Ayres under bills of lading No. 1, for 300 bags alfalfa seed, and No. 2 for 150 bags alfalfa seed), was shipped under bills of lading with stipulation that no damage, injury, or loss to dead meat, whether arising from jettison or otherwise, shall be recoverable in general average, but shall form a charge on such meat. In accordance with such stipulation no allowance in general average is made herein for loss on meat jettisoned or damaged. * * *"

[1] In the circumstances of the present case, where the goods were shipped under and against a contract of affreightment previously made, the fact that the bills of lading were made out to the bank and assigned to Swift & Co. does not debar the latter from claiming all the rights that its subsidiary, the Swift Beef Company, Limited, would have had, had the documents been made out in its name. Barber & Co., as charterer from the Glasgow Steam Shipping Company, merely took over the Shipping Company's contract of affreightment. This is not a case involving the rights of bona fide holders for value of bills of lading in any sense.

[2] Where, therefore, the rights of the parties are not of necessity based upon the bill of lading, and the bill of lading differs from the contract of affreightment, prima facie and in the absence of any intention to the contrary, as between the parties, the bill of lading is not construed to modify the contract of affreightment. Kruger & Co., Ltd., v. Moel Tryvan Ship Co. Ltd., [1907] A. C. 272; Rodocanachi Sons & Co. v. Milburn, 18 Q. B. D. 67; Carver, Carriage of Goods by Sea, § 151, p. 213; Scrutton, Charter Parties and Bills of Lading, art. 18. In view of the provision in the freight contract in the instant case, that so far as the conditions in the bill of lading differ from, or add to, or subtract from the conditions thereof, they should be of no effect, it cannot be assumed that the parties intended, by reason of any provision in the bill of lading, to modify the terms of the original contract. As, then, the contract of affreightment is controlling as between shipowner and shipper, the average adjusters should not have been guided in the present case solely by the terms of the bill of lading.

[3] Turning to the contract of affreightment, I am unable to accept the contention of counsel for the respondents that under its terms the shipper is debarred from claiming in general average for the jettison of sound meat. It is true that clause 12 of the agreement contains strong language to the effect that the meat is received and carried, as regards perils of every kind whatsoever, at the merchants' own risk absolutely. But, in my judgment, the words relate solely to the liability of the shipowner as such to the cargo owner for the carriage of the cargo, not to his obligation to share with others in a general average loss. The law of general average is an old law of the sea, and is not based on specific contract. While the language used here is somewhat stronger than that employed in Burton v. English, 12 Q. B. D., 218 (see also, Greenshields, Cowie & Co. v. Stephens & Sons, Ltd. [1908] K. B. 51, affirmed in [1908] A. C. 431), I cannot find in it an intent to deprive the cargo owner of his right to contribution in the event of a general average loss. The evidence adduced is not convincing that the customary form of bill of lading referred to in clause 15 of the contract of affreightment would include a provision depriving the cargo owner of this right.

It consequently becomes unnecessary to interpret the bills of lading as such, and the effect of the provisions contained therein, incorporating all the terms, conditions, stipulations, and exceptions contained in the charter party or freight contract, in the bill of lading, in addition to the exceptions and stipulations specifically set out, because the provisions taking from the libelant the right to share in a general average adjustment are inconsistent with the contract of affreightment, the terms of which remain effective, in the absence of evidence that the parties intended them to be modified or altered by the bills of lading.

There must, therefore, be a readjustment in general average, in which the libelant will be entitled to secure contribution from the general interests concerned by reason of the jettison of its sound meat.

UNITED STATES v. REECE (five cases).

(District Court, D. Idaho, E. D. May 4, 1922.)

Nos. 704–708.

1. **Indictment and information ⟸150—Presenting demurrer merely with naked list of authorities improper.**

Where demurrers to indictments were interposed, but were presented with merely a naked list of authorities, and with no argument or statement of particular points or propositions, the method of presentation was improper.

2. **Banks and banking ⟸257(1)—Indictment charging president of national bank with misapplication of funds sufficient, if appropriation and conversion by either president or recipient of funds is shown.**

An indictment charging the president of a national bank with willful misapplication of funds, in violation of Rev. St. § 5209 (Comp. St. § 9772), need not show conversion of funds by both the president and the recipient of the proceeds; facts showing an appropriation and conversion by one or the other being sufficient.

3. **Banks and banking ⟸256(3)—President of national bank may be guilty of willful misapplication of funds, though not in actual possession.**
The president of a national bank may be guilty of willful misapplication of the funds of such bank, in violation of Rev. St. § 5209 (Comp. St. § 9772), though he has not the actual possession, if he has such control and power of management as to direct an application of the funds in such manner, and under such circumstances as to constitute a violation of the statute.

4. **Indictment and information ⟸71—Test as to certainty of indictment stated.**
The test as to the sufficiency of an indictment on demurrer for uncertainty is not whether it might have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet.

5. **Banks and banking ⟸256(1)—Bank president, who causes false entries to be made in reports to Comptroller of Currency, guilty of making false entries in returns to Comptroller.**
President of national bank, who causes false entries to be made in reports to Comptroller of Currency with knowledge of their falsity and with intent to deceive, is guilty of making false entries in returns to Comptroller, in violation of Rev. St. § 5209 (Comp. St. § 9772), though he does not himself make the reports.

6. **Criminal law ⟸134(3)—In absence of counter showing on motion for change of place of trial, presumed that no such showing was available.**
On motion for change of place of trial to other division of district, supported by affidavits showing hostility and prejudice against defendant in the division in which the prosecution had been commenced, it will be presumed, in the absence of a counter showing, that no such showing was available.

7. **Criminal law ⟸134(3)—Denial of motion for change of place of trial for prejudice, in prosecution of president of insolvent national bank for misapplication of funds, held error.**
In prosecution of president of insolvent national bank for misapplication of funds and for making false entries in returns to Comptroller of the Currency, denial of motion for change of place of trial to other division of district, supported by affidavits showing hostility and prejudice to the defendant in the district in which the prosecution had been commenced, *held* error, in the absence of a counter showing, notwithstanding suggestions of prosecuting attorney that care be taken to exclude as jurors persons from county in which bank was situated, or who had become hostile to defendant because of the bank's failure.

S. L. Reece was indicted for misapplication of bank funds and for making false entries in returns to the Comptroller of the Currency. On demurrers to indictments, and on motion for change of place of trial to other division of district, should demurrers be overruled. Demurrers overruled, and motion to change place of trial granted.

E. G. Davis, U. S. Atty., of Boise, Idaho.

C. M. Booth, of Pocatello, Idaho, and Frank J. Gustin, of Salt Lake City, Utah, for defendant.

VAN FLEET, District Judge. In five indictments (numbered in the margin) returned against him in the Eastern Division of the United States District Court for the District of Idaho, the defendant Reece is charged, as president of the Bannock National Bank, at Pocatello, Idaho, with certain violations of section 5209, R. S. (Comp. St. §

9772); the first three, in each of their numerous counts, charging defendant with a separate and distinct misapplication of the funds of the bank, and the last two with the making by him of false entries in returns made by the bank to the Comptroller of the Currency, both of such acts being made offenses under the statute. In the first four of these indictments Reece is the sole defendant; in the last, No. 708, others are charged jointly with him. To each of the indictments Reece has interposed a demurrer, and also a motion for change of place of trial to some other division of the district (should his demurrer be overruled), on the ground of local prejudice claimed to exist against him in the district where the indictments were returned. The demurrers and motions have for convenience been submitted together, and may be disposed of in one opinion.

[1] Disposing of the demurrers first, it may be remarked that they have not been urged in a manner to convey the impression that the grounds stated in them are very seriously relied on by the defendant. No argument or written points have been made or filed by his counsel to direct the court's attention to any specific vice thought to be disclosed on any of the indictments; the defendant contenting himself with presenting merely a naked list of authorities, with no statement of the particular points or propositions to which any citation is supposed to be applicable. This method is not to be commended, as it casts upon the court, seeking to protect defendant's rights, labor that properly belongs to counsel.

[2] After a careful examination of the authorities submitted, however, I am satisfied that they do not sustain either of the grounds specified in the demurrers to 704, 705, and 708, while, to the contrary, one of the cases cited by defendant—that of United States v. Heinze, 218 U. S. 532, 31 Sup. Ct. 98, 54 L. Ed. 1139, 21 Ann. Cas. 884—directly rules against the objection that these three indictments do not state facts constituting a public offense. These indictments in all substantive averments are practically a replica of the indictment in the Heinze Case, which charged the defendant with the same offense, that of misapplication of the funds of a national bank by an official thereof, and the reasoning of the court in sustaining the sufficiency of the indictments fully covers all the grounds urged against the present indictments under that head. It is there held that, where an indictment charges an officer of a national bank with willful misapplication of its funds, induced by and resulting in his advantage, with the intent to injure and defraud the bank by discounting the unsecured promissory note of another party, knowing it to be valueless, whereby the funds so applied are wholly lost to the bank, it sufficiently charges a violation of the provisions of the section under which these indictments are filed; that, while it is of the essence of the criminality of the misapplication there there should be a conversion of the funds to the use of the defendant, or of some one other than the bank with intent to injure and defraud the latter, it is not necessary to allege conversion by both the officer of the bank and the recipient of the proceeds of the discount; that facts showing that there was an appropriation and conversion by one or the other are sufficient.

[3] That case also meets the objection urged under this head that the indictment is bad because as matter of law the president of a national bank is not by virtue of his official relation thereto "an agent in control of nor has he as such officer direction over moneys, funds, or credits of such bank." It is there said:

"There may be a willful misapplication of the funds, * * * even though the officer has not the actual possession of them. He may have such control and power of management 'as to direct an application of the funds in such manner and under such circumstances as to constitute an offense.' "

[4] As to the grounds of uncertainty specified and duplicity, they have not been urged, and it is only necessary to say that, after a careful examination of those questions, neither of them appear to be well taken. As said in Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704:

"Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Evans v. United States, 153 U. S. 584, 587, 588; Batchelor v. United States, 156 U. S. 426."

These indictments are quite sufficient, I think, to meet that requirement.

[5] As to indictments 707 and 708, the objections raised by the demurrer are equally untenable. The defendant is not charged with himself having made false reports to the Comptroller of the Currency, but that he did, to deceive that official, make and cause to be made false entries in such reports with intent to deceive, and knowing the same to be false. These facts are sufficient to constitute the offense charged. It was not necessary that the defendant should himself have made the reports.

[6, 7] Coming to the motions to change the place of trial. The affidavits of the defendant, his counsel, and a number of other individuals set forth with considerable detail reasons tending to show that a spirit of hostility and prejudice has been excited against the defendant, growing out of the failure of the bank of which he was president, and tending to show that that prejudice has ramifications to a very considerable extent throughout the whole of the division in which the indictments were returned, and it may be said, without more, that, accepting these affidavits for all they tend to show, they are sufficient prima facie to make out a case where the rights of the defendant would be unduly jeopardized by compelling him to go to trial in that district. These affidavits have not been met by the Government by any countershowing by affidavits on the part of the United States attorney and presumptively because no such showing was available. He suggests that a fair and impartial trial may be obtained if care is taken to exclude from the jury such persons as have become affected with hostility against the defendant caused directly or indirectly by the failure of the bank; that

the bank would naturally have few depositors outside of the county of Bannock, and by excluding that county from the territory from which the jury is to be drawn it would be "practically certain that the panel as a whole would be entirely free from any suggestion of bias or prejudice growing out of the failure of this bank;" and he further suggests that the jury, once selected, may be protected from improper influence by keeping its members together during the trial. For these reasons he urges that the motion for transfer be denied.

I am constrained to the view that the suggestions of the United States attorney do not meet the necessities of the case. Nothing is perhaps more calculated to excite in the mind of a community a sentiment of bias and prejudice against an individual than acts affecting their pecuniary interests or those of their relatives and friends, especially under circumstances where they regard the course of conduct of the individual concerned as dishonest or fraudulent, and that such a sentiment may pervade a district far broader than that immediately surrounding the bank affected readily falls in with our observation. In fact, it is difficult to always measure its ramifications, and I am not prepared to accept the suggestion that merely excluding the county in which the bank was located from the territory from which the jury is to be drawn would insure the safety of the defendant against the danger of which he complains. And so far as the suggestion of keeping the jury together is concerned, that will not accomplish the protection of the defendant against such prejudice, if perchance members of the jury have become unconsciously tainted with that vice prior to being sworn. I am therefore of the opinion that upon the showing made the defendant is entitled to have the place of trial removed to another division of the district.

It is suggested by the United States attorney that, if the court concludes that the case should be removed, the removal be had to the Southern division, for trial at Boise. As the defendant has not antagonized this suggestion, that will be the order.

The defendant's demurrers are accordingly overruled in all respects. His motions to change place of trial will be granted, and upon the filing of this opinion the clerk may enter proper orders accordingly.

SILBERSCHEIN v. UNITED STATES.

(District Court, E. D. Michigan, S. D. April 25, 1922.)

No. 6742.

Army and navy ⟸51½, New, vol. 12A Key-No. Series—Findings of fact by Director of Veterans' Bureau not reviewable by courts.

Act Aug. 9, 1921, creating the United States Veterans' Bureau, which transfers to its Director the powers and duties of the Director of the Bureau of War Risk Insurance, and provides in section 2 that the Director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of the act, "and shall decide all questions arising under this act except as otherwise provided herein," con-

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

fers on such officer exclusive authority to decide all questions arising under the act, in so far as they involve the exercise of executive duties and require the determination of disputed questions of fact, and an action cannot be maintained in the courts to review his findings of fact, if supported by any evidence.

At Law. Action by Sam Silberschein against the United States. On motion to dismiss petition. Motion granted.

Fixel & Fixel, Rowland W. Fixel, and Charles A. Retzlaff, all of Detroit, Mich., for petitioner.

Earl J. Davis, U. S. Atty., of Saginaw, Mich., and F. L. Eaton, Asst. U. S. Atty., of Detroit, Mich. (E. H. Horton, of Washington, D. C., of counsel), for the United States.

TUTTLE, District Judge. This cause is before the court on motion to dismiss a petition seeking to enforce against the United States, in this court sitting as a court of claims under subdivision 20 of section 24 of the Judicial Code (Comp. St. § 991), a claim for compensation based upon the provisions of the War Risk Insurance Act, as amended by the act creating the United States Veterans' Bureau (42 Stat. 147).

The material allegations of the petition, which must be accepted as true for the purposes of the motion to dismiss, are that petitioner enlisted in the United States Army December 9, 1917, and was discharged therefrom February 8, 1918, on account of physical disability and by reason of varicose veins in his legs and thighs; that such discharge recited that disease existed prior to his enlistment, and was not contracted in the line of duty, and that the degree of such disability was one-fourth; that the statements in said discharge to the effect that petitioner had a disease prior to enlistment, and that his disability was not contracted in the line of duty, were untrue; that petitioner before such enlistment, was not suffering from varicose veins or any other disease, but was a strong, healthy, and able-bodied man; that, if he was suffering from a disability before enlistment, such disability was aggravated by his duty in active military service; that on his discharge he was suffering from varicose veins, chronic orchitis, fallen arches, and other ailments, all of which resulted from injury incurred in the line of duty while he was employed in the active military service of the United States; that said disability has prevented him from performing work since his discharge; that on August 26, 1918, he was awarded compensation under the War Risk Insurance Act at the rate of $30 per month from February 9, 1918, to July 15, 1918, on account of his said disability; that thereafter he applied for a reopening of his case, and on February 28, 1921, was advised by the Assistant Director in Charge of the Compensation and Insurance Claims Division of the War Risk Insurance Bureau that an award of compensation was on February 19, 1921, approved in favor of petitioner on a total disability rating operative from July 16, 1918; that on May 14, 1921, petitioner was advised that the aforesaid rating was erroneous and on June 17, 1921, he was rated temporary partial disability of 20 per cent., effective from July 16, 1918, to March 18, 1921, after which date his

service disability was held to be noncompensable; that he received compensation in the amount of $641.93 in full of the sum due under the Bureau's ruling; that he has been hospitalized by the United States government practically all of the time since his aforesaid discharge, and is still being so hospitalized at the United States Marine Hospital; that "the contention of the Veterans' Bureau (the legal successor of the War Risk Insurance Bureau) is that the original award of temporary total disability was erroneous, same having been based on the assumption that the disability for which petitioner was being hospitalized was of service origin, and that said disability is not of service connection and therefore is not compensable," while petitioner avers that "said disability is of service origin and therefore is compensable"; that the aforesaid award was "erroneous," and that petitioner is entitled, under the War Risk Insurance Act, to an award of $80 a month from July 16, 1918, to such time as his disability ceases to be total disability; that the ruling of said Veterans' Bureau, allowing petitioner only 20 per cent. disability, as aforesaid, "constituted a violation of petitioner's rights under said law and deprived petitioner of a right and privilege under said law"; that the United States "has neglected and refused to make any payment or settlement with petitioner other than as stated" in his petition, and has "failed to comply with the provisions of the War Risk Insurance Act, although it has had knowledge of petitioner's rights through the officers and agents in said Veterans' Bureau." Wherefore petitioner demands judgment against the United States in the sum of $10,000.

The motion to dismiss the petition is based, in substance and effect, upon the grounds that the United States has not consented to be sued in this court on such a claim as that involved herein, and that, under section 13 of the War Risk Insurance Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514kk), originally the director of the War Risk Insurance Bureau, and now his legal successor, the director of the United States Veterans' Bureau, is vested with power and authority to decide all questions arising under said act, including the question whether petitioner here is entitled to the compensation claimed by him.

Section 300 of the War Risk Insurance Act, the Act of September 2, 1914, chapter 293, 38 Stat. at Large, 711, as amended by section 10 of the Act of June 25, 1918, 40 Stat. at Large, 609, amended again by section 10a of the Act of December 24, 1919, 41 Stat. at Large, 371, and amended further by section 18 of the Act of August 9, 1921, 42 Stat. at Large, 147, abolishing the Bureau of War Risk Insurance and creating in its stead the Veterans' Bureau, provides as follows:

"For death or disability resulting from personal injury suffered or disease contracted in the line of duty on or after April 6, 1917, or for an aggravation of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered and contracted in the line of duty on or after April 6, 1917, by any * * * enlisted man, * * * the United States shall pay to such * * * enlisted man * * * compensation as hereinafter provided; but no compensation shall be paid if the injury, disease, or aggravation has been caused by his own willful misconduct. That for the purposes of this section every such * * * enlisted man * * * shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities,

made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record."

Section 302 of the War Risk Insurance Act as amended by section 11 of the Act of December 24, 1919, just cited, provides a classified schedule of awards payable to an enlisted man for the disability mentioned; the amounts depending upon the nature and extent of his disability and upon the kinship and number of his relatives.

Section 305 of the act, as amended by section 19 of the Act of August 9, 1921, cited, is as follows:

"Upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation is increased, or, if compensation has been refused, reduced or discontinued, may award compensation in proportion to the degree of disability sustained as of the date such degree of disability began, but not earlier than the date of discharge or resignation."

Section 13 of the act, as originally enacted (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514kk), contained the following provisions:

"That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the act. * * * The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, * * * and the manner and form of adjudications and awards."

Section 1 of the Act of August 9, 1921, already cited, amending the War Risk Insurance Act in several respects, provided for the establishment of an independent bureau under the President, to be known as the Veterans' Bureau, the director of which should be appointed by the President, by and with the advice and consent of the Senate. It was therein further provided that the powers and duties of the Director of the Bureau of War Risk Insurance were thereby transferred to the Director of the Veterans' Bureau, subject to the general direction of the President, and the office of the Director of the Bureau of War Risk Insurance was thereby abolished.

Section 2 of the act last mentioned is as follows:

"The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this act, which are necessary or appropriate to carry out its purposes and shall decide all questions arising under this act except as otherwise provided herein."

Section 3 of said act contains the following provision:

"The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau."

It is conceded by petitioner, and it is clear, that there is no language in the original War Risk Insurance Act or in any of the acts amendatory thereto granting, in terms, to the petitioner the right to bring the present action in this or in any other court, or expressly conferring jurisdiction upon this or any other court over such an action. Nor is there any section or provision in the act, as so amended, which, for the purposes of this case, at least, modifies or limits the authority vested in the director, by section 2 of the act last cited, to "decide all questions arising under this act except as otherwise provided herein." There is no such exception, so far as the action at bar is concerned.

It is, of course, elementary law that the United States government cannot be sued without its consent. As pointed out in Schillinger v. United States, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108:

"The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

In the language of the Supreme Court in Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960:

"It is a fundamental principle of public law, affirmed by a long series of decisions of this court, * * * that no suit can be maintained against the United States, or against their property, in any court, without express authority of Congress. * * * Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers."

It is urged by petitioner that this court has jurisdiction to entertain and enforce his claim under the provisions of the Tucker Act (24 Stat. 505), as modified by subdivision 20 of section 24 of the Judicial Code, hereinbefore referred to (Act of March 3, 1911, chapter 231, 36 Stat. at Large, 1093 [Comp. St. § 991]), providing as follows:

"The District Courts shall have original jurisdiction as follows: * * * Twentieth, Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: * * * Provided, however, that nothing in this paragraph shall be construed as giving to either the District Courts or the Court of Claims jurisdiction to hear and determine claims * * * for pensions."

It is, however, insisted by the government that by the express language of the War Risk Insurance Act already quoted the Director of the Veterans' Bureau is clothed with the authority to consider and decide the question whether petitioner is entitled to the compensation sought by him; that under such authority said director has discretion-

ary power; and that the decision of such official is final and binding upon the petitioner and leaves the latter no right to institute or maintain the present action in this court.

It is plain that Congress intended to confer upon the administrative officer mentioned full and exclusive authority to decide all questions arising under the act in so far as they involved the exercise of executive duties and required the determination of disputed questions of fact, and to the extent indicated, to make such decisions final and not reviewable by the courts. United States v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610; Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. Ed. 1135; United States v. Laughlin, 249 U. S. 440, 39 Sup. Ct. 340, 63 L. Ed. 696; United States v. Babcock, 250 U. S. 328, 39 Sup. Ct. 464, 63 L. Ed. 1011.

It is equally plain that Congress did not intend to permit this executive official to make decisions without any proofs to support the findings of facts necessary to such a decision. From such a finding or decision an aggrieved party has the right to obtain appropriate relief, in a proper proceeding, in court. Medbury v. United States, 173 U. S. 492, 19 Sup. Ct. 503, 43 L. Ed. 779; Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; United States v. Laughlin, supra; United States v. Babcock, supra.

Tested by the foregoing principles this petition is fatally defective. It must affirmatively and sufficiently show the existence of those facts necessary for jurisdiction and the right to the relief prayed. There is a total absence of any allegation, as well as of any showing of facts from which an allegation could be inferred, that the decision complained of was unsupported by any facts. Petitioner does not aver that the decision of the bureau is contrary to the undisputed facts or against the weight of the evidence, nor does he allege that the facts involved are undisputed. He does not claim that such decision was based upon or involved a construction of any statutory provision or other question of law. Nor does he allege that the bureau or any other officer of the United States has acted arbitrarily or unfairly or in abuse of any discretion conferred by law.

The extent to which petitioner in his petition has gone in the direction referred to, beyond the bare statement that "the award to your petitioner was erroneous * * * and deprived petitioner of a right and privilege under said law, * * * and that said United States of America, through the Veterans' Bureau, has failed to comply with the provisions of the War Risk Insurance Act" (statements of legal conclusion alone), is merely the allegation that the bureau contends "that the original award of temporary total disability was erroneous, the same having been based on the assumption that the disability for which petitioner was being hospitalized was of service origin, and that said disability is not of service connection and therefore not compensable," while petitioner "avers that said disability is of service origin and therefore is compensable." This falls far short of being an allegation of facts sufficient to constitute a claim that the executive official vested by the statute with power to "decide all questions arising under this

act" has exceeded such power. It will be noted that petitioner does not aver that the bureau or its director contends that his disability was caused or aggravated by injury suffered or disease contracted prior to his examination, acceptance, and enrollment for service. Therefore petitioner is not in position to invoke, or claim any benefit from, the provision of section 300 of the War Risk Insurance Act, as amended, to the effect that—

"Every such * * * enlisted man * * * shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities, made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record."

So far as the language of this petition is concerned, the alleged contention of the bureau, or of its director, that the disability of petitioner was not of "service origin" or "service connection," and "therefore not compensable," may have related, or did in fact relate, merely to the character of the cause of such disability (as being in, or outside of, his line of duty), and not to the period of time during which such disability was caused. Furthermore, petitioner does not deny that a military record was made by proper military authorities at the time of, or prior to, his acceptance into military service, showing that he then suffered from such disabilities, and that there was proof before the Director of the United States Veterans' Bureau tending to show that his present disability arose from "defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service." It may be that it was the contention of the director or the bureau that such disability resulted from some such defect, disorder, or infirmity so made of record, and it may be, therefore, that the asserted contention of said bureau that said disability was not "of service origin" had reference to the time of the injury or contraction of the disease, and that for the reason just mentioned such contention was correct.

In the absence of any allegation denying that the disability of petitioner resulted from a defect, disorder, or infirmity so recorded, this court is not at liberty nor willing to indulge in any assumption or presumption to that effect. Indeed, if presumption be proper under the circumstances, it should be the usual one that the United States officials properly performed, rather than entirely neglected, their duty. So far as appears in this petition, the Director of the Veterans' Bureau may have had before him a proper military record made by proper United States authorities at the time of, or prior to, the petitioner's acceptance into military service, showing that he then suffered from all the ailments for which he now claims compensation. If so, the case involved merely a question of fact, the power to decide which was properly conferred by Congress upon the Director of United States Veterans' Bureau; and the determination thereof by such director is not, at least on the present petition, reviewable by this court in this cause.

For the reason stated, it becomes unnecessary to consider or discuss other interesting and important questions, some of which have

been argued by counsel, others have suggested themselves, and all of which have received careful attention and study. An order must be entered dismissing the petition.

UNITED STATES v. ALEXANDER & REID CO. et al.[1]

(District Court, S. D. New York. April 12, 1922.)

1. **Criminal law ⟸304(2)—Judicial notice taken of historical facts.**
   Court will take judicial notice of historical facts.

2. **Criminal law ⟸980(1)—Sentences should be less severe, where accused pleads guilty.**
   Defendants, aware of their guilt, but who nevertheless contumaciously stand out on a plea of not guilty, are entitled to much less consideration in fixing their sentences than those who candidly acknowledge guilt and throw themselves on the mercy of the court.

Prosecution by the United States against Alexander & Reid Company and others under the Sherman Act. Defendants plead guilty.

William Hayward, U. S. Atty., of New York City, and David L. Podell, Leland B. Duer, Benjamin S. Kirsh, Nathan Probst, Jr., Susan Brandeis, and Raymond L. Wise, Sp. Asst. U. S. Attys., all of New York City.

Winthrop & Stimson (by Henry L. Stimson), Phillips & Avery (by Frank M. Avery), Carl F. Whitney, Arnstein & Levy (by Samuel Levy), Pitkin, Rosensohn & Henderson (by Saumel J. Rosensohn), and Eidlitz & Hulse (by Cornelius J. Sullivan, Jr.), all of New York City, for defendants.

VAN FLEET, District Judge. This is a prosecution based upon an alleged violation of section 1 of "An act to protect trade and commerce against unlawful restraints and monopolies," passed by Congress July 2, 1890, commonly referred to as the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830). The first section (section 8820) reads:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

[1] It will be observed that in its legal aspect the criminal offenses denounced under that section are but misdemeanors, but nevertheless the act was intended as a protection to the public against unlawful practices in interstate commerce, and has throughout its history subserved a very important function. Perhaps, however, there has not previously been a prosecution brought under its criminal features of

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

[1] Published by request of the United States District Attorney.

greater importance than the present. A brief historical statement of the conditions out of which the prosecution arose will, I think, emphasize this fact. These facts are gathered, not only from statements of counsel at the argument, but from sources of such common knowledge that the court is at liberty to take judicial cognizance of them.

The state Legislature of this state, as far back as April, 1920, declared that an emergency existed in the large cities of this state, due to the acute shortage of housing facilities. That finding has since been emphasized and confirmed by the courts, both state and federal, including the Supreme Court of the United States; all of them declaring that the finding of the Legislature that such an emergency existed was well founded. And there can be no question that such condition has vitally affected the shelter, the comfort, and well-being, and indeed the health, of this great community.

While the primary cause of these conditions was perhaps largely the outgrowth of the World War, and while in a large measure doubtless the rent profiteer contributed to the hardship, there can be no question but that this situation was aggravated in grave measure by certain unlawful combinations among groups of men engaged in the business of supplying building materials of the character with which we are here dealing. Authoritative records, including the report of the United States Senate Reconstruction Committee, as well as of the Department of Labor, show that during the war building materials were the highest priced of all general commodities, as compared with pre-war prices, and that since the war, of all such commodities, building materials have been the slowest to recede, and that to-day they are unquestionably the highest priced of all general commodities as compared with pre-war prices, and we are now more than three years beyond the war period or the actual cessation of hostilities.

Nor is this situation confined to the great city of New York or its immediate environment, but it affects similarly every large city throughout the country from coast to coast. Ample facts have been adduced showing that these abnormal prices of building materials, as well as the lack of new building construction and the resultant lack of proper housing for the multitudes of human beings in the large cities throughout the country, are traceable directly to an interlocking series of criminal conspiracies and combinations in the building trades, of which this case is typical. The particular commodity here involved, tile, is one which, as is well known, is used in every modern apartment house and other structure for human habitation, principally for purposes of sanitation, and it thereby contributes directly toward cleanliness and the preservation of the health of the community.

It was out of a very thorough and far-reaching investigation, disclosing the conditions I have indicated, that the indictment in this case sprang. The plea of guilty of these defendants admits the allegations of the fourth count of the indictment, which charges a series of vicious practices on the part of this trade association or combination among these defendants, the only effect of which was a clear restraint upon the trade and commerce of the community in the particular commodity with which they were dealing.

The first of these practices provided for in their Articles is the "stop notice." In brief, the stop notice meant this: Upon the request of any one member, the secretary of the association would send out a so-called stop notice to all of the other members of the association. The effect of that notice was an immediate boycott of all members of the association against the individual or particular contractor engaged in erecting an apartment house, which would completely tie his hands and paralyze his work until he came to terms with the member causing the issuance of the notice, regardless of which was in the right in the matter in difference between them. The employment of this method of boycott has been justly and severely condemned by the courts, particularly in the Duplex Case, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196.

The second of these practices was the so-called "protection card." This practice was originated and utilized by a group of several among the defendants, who were more or less the leaders in the business. Upon the request of any one member, the secretary would circulate among other members a notice or card, giving the location of a job and the name of a contractor, who either had awarded a contract or was about to award a contract for tile work. This card was in sum and substance a notice to the other members to ignore that contractor, and not to bid upon any work he required to be done, leaving the field clear for the member who had requested the protection card, so that he might secure, not only the contract for the original work, but for any extra or additional work necessary to complete it, and this upon his own terms. It left the builder completely at the mercy of the individual defendant as to price, and all other terms and conditions of the contract.

The next provision was the "keep off" notice, which some of the leading members utilized through the medium of the secretary, when they desired other members to refrain from bidding upon a prospective job.

Finally, there was the blacklisting or collection system, known in the association as forms numbered 1, 2, and 3. Under this practice of collecting alleged debts, the defendants were not content with the usual processes of the law. If any member of the combination made a claim against a contractor for moneys claimed to be due, whether it was just or unjust, the contractor was served with notice to appear before a committee of the organization to act as his judges, and on his failure to make appearance he was promptly blacklisted. Thereupon he became a marked man among the members of this combination. Any bids he thereafter requested were without his knowledge arbitrarily increased by the secretary of this association, and the moneys claimed to be due any member of the combination were in that way collected through this method of fraudulent bidding, and in some instances, the amount claimed to be due was collected more than once and from persons who never could have incurred the indebtedness, because they had had no part or parcel in the original transaction out of which the alleged claim arose.

Finally, the plea of the defendants admits, as alleged in this fourth count, that they indulged in the wholly vicious and unjustifiable practice of what is known as "accommodation bidding"; that is, they would previously determine who of their number was to receive a particular contract, and then collusively arrange their bids so that the transaction, while it appeared to the contractor receiving the bids as being competitive, would not be so in fact.

With these practices prevailing in this particular association, and with like combinations holding a grip throughout the country upon the various building trades, it is not a matter for surprise that the building industry throughout the great cities of the country has been for several years virtually at a standstill. This is but a brief and inadequate statement of the nature of this nefarious and absolutely indefensible method of dealing with the public, which the evidence placed before the court has tended to portray.

[2] As a result of an inquiry into the facts as to the participation of the various defendants, the court is satisfied that the mere imposition of a fine as to certain of the more flagrant instances will afford no cure, nor act as a deterrent, which is the main object of punishment; that, while it may be true, as urged at the argument, that in the past the provisions of the Sherman Law authorizing jail sentences have rarely been enforced, the situation presented here is of such character that the time has come to put a stop to these criminal practices; and in my judgment the only effective way of doing it is to invoke and bring to life those features of this great act which provide for imprisonment in all instances where the facts warrant it. Of course, this does not apply to all the defendants, nor indeed to many of them; and, moreover, the court is bound to take strongly into consideration in dealing with all the defendants the fact that they have appeared here and pleaded guilty, thus saving the government a long and expensive trial; and while I feel constrained to impose imprisonment on some, my judgment even in those instances will be much less severe than upon a conviction after trial. Defendants aware of their guilt, but who nevertheless contumaciously stand out on a plea of not guilty, are entitled to much less consideration than those who candidly acknowledge guilt and throw themselves upon the mercy of the court.

With these preliminary suggestions, I shall proceed to pronounce judgment.

THE OCONEE.

(District Court, E. D. Virginia.)

1. Admiralty ⇐1, 15—Congress may enlarge jurisdiction; Ship Mortgage Act held constitutional.

Congress has power to enlarge the jurisdiction of the courts of admiralty by altering and amending the maritime law to embrace new causes of action, or causes not previously considered maritime, and Ship Mortgage Act June 5, 1920, § 30, providing for preferred mortgages, and conferring on courts of admiralty jurisdiction in rem to enforce the same, is within such power, and valid.

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

2. Maritime liens ⟸2—Liens on American ships asserted in American courts governed by law of forum.

A claimant, asserting a lien in an admiralty court of the United States for supplies furnished to an American ship in a foreign port, is bound by the law of the forum.

3. Maritime liens ⟸38—Default of mortgagor held not to affect status of preferred mortgage.

A mortgage on an American ship, which is made to conform to all the requirements of Ship Mortgage Act 1920, § 30, subsec. d (a), to give it the status of a preferred mortgage, does not lose that status by the failure of the mortgagor to keep a certified copy of the mortgage on board the ship, or of the master to exhibit it to the claimant of a subsequent lien, as required by subsection E.

In Admiralty. Suit by William H. Muller & Co., Limited, against the Steamship Oconee. On exceptions to petition of the United States, as holder of a preferred mortgage. Exceptions overruled, and decree in favor of petitioner.

Hunt, Hill & Betts, George Whitefield Betts, Jr., Morris Douw Ferris, and Joseph A. Barrett, all of New York City, Hughes, Vandeventer & Eggleston and Braden Vandeventer, all of Norfolk, Va., for Wm. H. Muller & Co., Limited.

Kirlin, Woolsey, Campbell, Hickox & Keating, James H. Herbert, and John M. Woolsey, all of New York City, and Baird, White & Lanning, of Norfolk, Va. (Edward R. Baird, Jr., and George M. Lanning, both of Norfolk, Va., of counsel), for Dartmouth Coaling Co., Limited.

Burlingham, Veeder, Masten & Fearey, of New York City, and Hughes, Vandeventer & Eggleston, of Norfolk, Va., for Henry Kaelin & Son, Inc.

Silas B. Axtell, of New York City, and Roper, Bowden, Cochran & Sands, of Norfolk, Va., for B. A. Barack.

Baird, White & Lanning, of Norfolk, Va., for Swift & Co., Limited, and Anderson Clayton & Co.

Paul W. Kear, U. S. Atty., and H. H. Rumble, Sp. Asst. in Admiralty to U. S. Atty., both of Norfolk, Va., for the United States.

GRONER, District Judge. Libelant, on May 3, 1921, filed its libel in this court against the steamship Oconee for necessaries furnished the ship at Bremen, Germany, in February, 1921. The vessel was attached by the marshal, and, by decree subsequently entered, sold at public auction for $25,500. Numerous petitions have been filed in the cause, among them the petition of the United States, claiming, as the holder of a preferred mortgage, priority of payment out of the fund in the registry of the court. The debt thus claimed to be secured is largely in excess of the amount of the fund, and, if allowed, will leave nothing for distribution to the libelant or the other interveners.

The Oconee was originally owned by the United States. On April 26, 1920, she was sold to E. H. Green & Co. who, on July 21, 1920, with the consent of the Shipping Board, sold her to the Oconee Steamship Company. The last-named, to secure the unpaid purchase price,

executed 15 negotiable promissory notes, for $21,814.80 each, payable every 6 months, beginning October 26, 1920, and as security for these notes executed and delivered to the Shipping Board, for the account of the United States, a preferred mortgage on the whole of the vessel, which was duly recorded. Default was made in the payment of the second note, and the United States has intervened, by libel and petition in this cause, to the end that its preferred mortgage may be foreclosed, and that the indebtedness to it, evidenced by the promissory notes above mentioned, may be ascertained and paid. Exceptions, on behalf of other claimants, have been filed, in which two major questions are presented for decision:

First. "Was the enactment of the statute known as the Ship Mortgage Act of 1920, in so far as it purports to give a ship mortgage a preferred status, a valid exercise of congressional power?"

Second. "If the statute is constitutional, does the compliance therewith, which gives to a mortgage a preferred status, amount to constructive notice of the existence of the lien?"

The Ship Mortgage Act is a part of the Merchant Marine Act of June 5, 1920, 41 Stat. 1000. In order to provide an American merchant marine "sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in the time of war," and in order to encourage investment in ships and the financing of maritime ventures, Congress, in subsection C (a) of the act mentioned, provided a method whereby a mortgage on a vessel of the United States should have a preferred status. Certain prerequisites are provided in the act to be done by the mortgagor or the mortgagee, or both, in order that the benefits of the provision may accrue—for instance: The vessel must be a vessel of the United States of 200 gross tons or upward; the mortgage must include the whole of the vessel; the mortgage must be indorsed upon the vessel's documents; it must be recorded as required, together with the time and date when the mortgage is so indorsed; an affidavit of good faith must be filed with the record; there must be no waiver therein of the preferred status, and the mortgagee must not be an alien. In the case now under consideration it is conceded that all of the requirements just named were duly complied with.

In addition to the above, certain duties are imposed by the act upon the mortgagor and master, and penalties are provided for their neglect. Thus, in section E, the mortgagor is required to retain a certified copy of the mortgage on board, "to be exhibited by the master to any person having business with the vessel which may give rise to a maritime lien," etc., and the master of the vessel is required, "upon the request of any such person," to exhibit, with the documents of the vessel, a copy of the mortgage to such person.

On behalf of the exceptants, it is now insisted that, even if the constitutionality of the act be decided affirmatively, the burden is on the United States, as claimant under the preferred mortgage, to show that the master complied with the provisions of subsection E just quoted. This proposition will be dealt with in the concluding part of the opinion.

[1] From all of the foregoing it will be seen that the question first presented for decision here is: Did Congress exceed the powers vest-

ed in it by the Constitution in passing the so-called Ship Mortgage Act (Act June 5, 1920, subsec. C; 41 Stat. p. 1000). Article 3 (section 2) of the Constitution of the United States reads as follows:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and Maritime Jurisdiction," etc.

And section 8, clause 18, of article 1, empowers Congress to make all laws necessary and proper for carrying into execution the powers vested in the government of the United States, or in any department or officer thereof. The original Judiciary Act (Act Sept. 24, 1789, § 9, 1 Stat. 76) conferred upon the federal District Courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of the impost, navigation—or trade of the United States—saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Admittedly, Congress has no other power to legislate on the subject-matter than is thus conferred, and where the power is questioned the duty of the court is to see whether the grant is broad enough to embrace the specific act. Very early in the history of the country the jurisdiction of the District Court, in admiralty, to enforce payment of a mortgage upon a boat, was challenged, and by frequent adjudications by the Supreme Court that question was settled in the negative. In The John Jay, 17 How. 399, 15 L. Ed. 95, Judge Wayne, on behalf of the court, said:

"It has been repeatedly decided in the admiralty and common-law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States."

And further on in the same opinion he says:

It (a mortgage) "is a contract without any of the characteristics or attendants of a maritime loan," and, "has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction."

Likewise, in the case of The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345, which was a contest between persons furnishing repairs and supplies in the home port of the vessel, on the one hand, and the holders of a mortgage, on the other, the decision gave precedence to the supply claims by virtue of a statute of the state wherein the supplies were furnished, and in the course of the opinion Mr. Justice Gray, speaking for the court, said:

"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it."

See, also, in the same connection, The Eclipse, 135 U. S. 599, 608, 10 Sup. Ct. 873, 34 L. Ed. 269; People's Ferry Co. v. Beers, 20 How. (61 U. S.) 396, 400, 15 L. Ed. 961; The Rupert City (D. C.) 213 Fed. 263, 273.

In the light of the decisions in these cases it cannot be doubted that, unless there exists in Congress power to change the recognized and established law on the subject, the act of 1920 must be declared unconstitutional.

On behalf of the exceptants, it is insisted that Congress possesses no such power; that, when the grant of admiralty and maritime jurisdiction was surrendered by the states to the federal Government, neither more nor less was then surrendered than was understood at the time to be embraced within those terms, or, as was said by Mr. Justice Bradley, speaking for the court, in The Lottawanna, 21 Wall. 558, 574, 22 L. Ed. 654:

"The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

Or, as was said by Mr. Justice Catron, speaking for the court in People's Ferry Co. v. Beers, supra:

"Its terms [admiralty jurisdiction] are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now."

It is, therefore, argued that since the federal government may not exercise powers not granted, and since the courts have declared, quoad the grant in question, that only what was then embraced within the term "maritime" was granted, and have, likewise, decided that the thing which the statute now declares to be maritime was not then so regarded, it follows that the act should be pronounced beyond the power of Congress, just as much so as if it had declared a mortgage on a house to be maritime and enforceable in admiralty. The St. Lawrence, 1 Black, 522–527, 17 L. Ed. 180. But this position, it seems to me, finds no support either in reason or the decisions of the courts. If it be correct, this important branch of our national judicial system alone, of the entire structure, is immutable, fixed, and unalterable, responsive neither to changing conditions nor to the necessities of modern commerce, and subject to no expansion, either at the instance of state or nation. That Congress, under the grant of admiralty jurisdiction, has power and authority to alter and amend the maritime law and make substantive innovations therein cannot be doubted; for, if it were otherwise, this nation, whose coast line is more extensive and whose ocean-borne commerce is the greatest in the world, would be placed alone, of the nations of the world, in a position where legislation for the improvement, enlargement and protection of these great interests would be impossible. As was pointed out by Mr. Justice Bradley in The Lottawanna, supra, 21 Wall. 577, 22 L. Ed. 654:

"It cannot be supposed that the framers of the Constitution contemplated that the law [maritime] should forever remain unalterable."

The earlier view of the limited character of the grant has gradually, but steadily, given way to an interpretation more in harmony with modern necessities and world conditions, and the legislation in question

goes no further than to establish in this country a statute of universal application in the maritime nations of Europe. Congress, recognizing that the investment of capital in shipping was necessary if the merchant flag of the nation was to be kept afloat, and recognizing, likewise, that to obtain capital provision should be made for its protection, enacted the law giving to a ship mortgage a preferred status. In doing this it doubtless ingrafted on the American maritime law a feature it did not formerly possess. Equally beyond question, it extended its terms beyond the conception of its meaning by the statesmen and lawyers of the country when the Constitution was adopted.

But in neither respect was there anything more than a reasonable recognition of the characteristics and attendants of a maritime subject. It was not experimental, because, as has been already stated, the maritime nations of the world long ago provided by statute for a similar condition. Neither can it be said to be an unlawful assumption of power by Congress, for its right to make substantive changes in the law has been recognized since the foundation of the government, and upheld by the courts. Instances in point are: The provisions in the Judiciary Act (1789), conferring jurisdiction on the District Courts in Admiralty to seizures under the impost, navigation, and trade laws; the passage of the Limited Liability Act of 1851 (Comp. St. §§ 8020–8027); the act extending the jurisdiction in admiralty to the waters of the Great Lakes (Act Feb. 26, 1845, 5 Stat. 726, c. 20); and the act of June 23, 1910 (Comp. St. §§ 7783–7787), giving a lien against a vessel for repairs furnished in her home port. Nor is judicial recognition of this power in Congress difficult to find. Thus, in The Lottawanna, supra, Mr. Justice Bradley said:

"Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

And in Providence S. S. Co. v. Hill Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038, the same learned justice says:

"Whilst the general maritime law with slight modifications is accepted as law in this country it is subject to such amendments as Congress may see fit to adopt."

And in the case of The Scotland, 105 U. S. 24, 26 L. Ed. 1001, the court, in passing on the limited liability statute, used this significant language (105 U. S. 29, 26 L. Ed. 1001):

"* * * This particular rule of the maritime law had never been adopted in this country until it was enacted by statute."

And in the very recent case of Southern Pacific Co. v. Jensen, 244 U. S. 214, 37 Sup. Ct. 528, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, Mr. Justice McReynolds, speaking of the power derived by Congress under the Constitution to deal with the subject, says:

"Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Even in the case of The John Jay, which is relied upon to sustain the position of the exceptants that Congress has no such power, the

court seemed to recognize the power of Congress to make a ship mortgage maritime, for, after noticing the fact that it is so in England by virtue of St. 3 and 4 Vict. 65, says (17 How. 402, 15 L. Ed. 95):

"Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States as it has been."

Congress having now acted, the omission existing in the law as it formerly stood is supplied, and the act must be held within the power of Congress, and therefore constitutional.

[2] It is, however, further urged on behalf of the foreign supply lienors that a mortgage cannot take precedence over a lien for supplies impressed by the laws of another country, since the act cannot have extraterritorial effect. In the case at bar the vessel in question was an American vessel, and "Congress, having created * * * this species of property, and conferred upon it its chief value," may also regulate and determine "the rights * * * of all persons dealing therein." White's Bank v. Smith, 7 Wall. 656, 19 L. Ed. 211. Under the English maritime law neither of the foreign petitioners would have been entitled to a lien, and while under the maritime laws of the United States they would have been so entitled, Congress has, by the act in question, made such lien subordinate to that of the preferred mortgage, and petitioners seeking relief in an American court are bound by the law of the forum. The Scotland, 105 U. S. at pages 31, 32, 26 L. Ed. 1001.

[3] It is also insisted that in the instant case the petition of the United States is insufficient, in that it does not allege compliance with the Ship Mortgage Act; the point being that it is not shown by the petition that the master of the Oconee exhibited to the libelant a copy of the preferred mortgage or otherwise called attention to the existence of the same; that the language of subsection E, "cause such copy, and the documents of the vessel, to be exhibited by the master to any person having business with the vessel," etc., when given proper effect, imposes upon the mortgagee the duty and obligation of seeing that the master notifies every person furnishing supplies to a vessel, in a foreign port, of the existence of the mortgage, in order that such persons may act with open eyes.

An examination of the petition of the United States shows that it is there alleged that compliance in detail with the requirements of the statute was duly had. It is true it is not alleged that libelant, or the other intervening supply petitioners, had actual notice of the mortgage, nor is it specifically alleged that the master of the vessel exhibited a copy of the same to such persons; but, conceding the master failed in this respect, and that petitioners were without actual notice, the question is: To what extent, if any, does this affect the claim of the mortgagee? The duty of having aboard the vessel a copy of the mortgage is, by the statute, specifically imposed upon the mortgagor, and the duty to exhibit it, upon the request of any person having business with the vessel, is imposed upon the master, and a penalty is provided for the failure of either to comply with the law; but it seems to be manifest

that these are not conditions precedent to the acquisition by the mortgage of a preferred status.

By the terms of the act a preferred status attaches as of the date of compliance with subdivision (a) of subsection D. The compliance with these provisions, as has been heretofore stated, is admitted, and the statute itself nowhere seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act to be performed by the mortgagor and the master. The mortgagor (the owner) is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same when called upon. The mortgagee, in the nature of things, has no control over either, and the act clearly does not contemplate the invalidity of the mortgage by reason of such failure on their part. It might have been more completely in the interest of fair dealing if provision had been made for the posting of copies of the mortgage in prominent parts of the vessel; but to a person dealing on the credit of the vessel, with knowledge of the statute, the provisions as they are afford ample protection, because by a simple inquiry of the master such person may ascertain and verify the title condition.

What would be the effect of a willful misrepresentation on the part of the master under such circumstances is not involved in this case, and need not be answered. But that Congress had the power to provide, as it has, for the creation of the lien, and make compliance with the conditions prescribed, constructive notice, seems to me to be beyond question. Indeed, it was so held by the Supreme Court in the case of an act (Act July 29, 1850 [Comp. St. § 7778]) giving a mortgagee precedence over a subsequent mortgagee or purchaser. White's Bank v. Smith, supra. And it would therefore seem to be clear that all persons, whose dealings with a vessel may give rise to claims which are by statute made subordinate to the mortgage, are, when the provisions precedent of the mortgage are complied with, affected with constructive notice and bound by its terms.

A decree will be entered, on presentation, overruling the exceptions to the libel and petition of the United States, and the claims of the United States will be held superior to all claims against the vessel other than preferred maritime liens, as defined by the statute under consideration, if any such shall be established.

ATLANTIC REFINING CO. v. PORT LOBOS PETROLEUM CORPORATION et al.

(District Court, D. Delaware. March 30, 1922.)

No. 433.

1. **Courts ⇐343—Petition in intervention may be filed only with leave of the court.**

In view of equity rule 37 (198 Fed. xxvii, 115 C. C. A. xxvii), a petition of intervention may be filed only by leave of the court, and whether permission to file should be granted is to be determined from the allegations

of the petition itself, considered in the light of the other pleadings and proceedings in the cause.

2. **Courts ⟸343—Filing petition to intervene does not make intervener a party.**
Under equity rule 37 (198 Fed. xxvii, 115 C. C. A. xxvii), the filing by leave of the court of a petition to intervene as a party in a pending suit does not make the petitioner a party, but the original parties are entitled to be heard on the question of his admission, and on filing his petition he should obtain an order of notice to them and have the petition set down for a hearing, which hearing should be followed by an order denying or granting leave to become a party.

3. **Courts ⟸343—Petition in intervention must affirmatively show interest of intervener and necessity for protection.**
A petition to intervene in a pending cause must, under equity rule 37 (198 Fed. xxvii, 115 C. C. A. xxvii), affirmatively show that the petitioner has an interest in the litigation and that his intervention is reasonably necessary to the protection of his interest.

4. **Courts ⟸343—At hearing on intervention, well-pleaded averments of petition are taken as true.**
At the hearing on a petition to intervene in a pending cause, well-pleaded averments of the petition, construed in the light of other proceedings in the cause, are to be taken as true, and affidavits in opposition to the right to intervene and counter affidavits in reply thereto are not to be considered, in view of equity rule 37 (198 Fed. xxvii, 115 C. C. A. xxvii), providing that any one claiming an interest in the litigation may be permitted to assert his right by intervention.

5. **Corporations ⟸506—Equity ⟸114—Persons already represented by party may become parties against plaintiff's objection; "quasi parties."**
The rule that a stranger to a suit will not be permitted, on his application and over the objection of plaintiff, to become a defendant, is subject to exception where the person who seeks to be made a party defendant belongs to the class known as quasi parties; that is, those who are already represented in the suit, or come within the compass of the proceedings, such as stockholders in a corporation, who are recognized as having such a status that the court may, on proper showing, make them parties defendant, notwithstanding objections of plaintiff.

6. **Corporations ⟸206—Stockholders can defend, where directors refuse to.**
Where it is alleged that the directors of a defendant corporation refuse to defend a suit to the prejudice of the stockholders, equity will permit one or more stockholders to intervene and become a party defendant, to protect their own interest and that of all other stockholders who may choose to join them in the defense.

7. **Corporations ⟸401—Common control does not prevent valid dealings between corporations.**
Corporations controlled and managed by the same officers and stockholders have a right to deal with each other, and the directors are presumed to act honestly and according to their best judgment for the interest of all.

8. **Equity ⟸114—Definite tangible facts showing fraud must be alleged by petition in intervention.**
A petition in intervention founded on fraud and misconduct, which does not allege definite tangible facts to sustain the same charge of fraud, is insufficient.

9. **Corporations ⟸506—Petition by stockholders for leave to defend suit against corporation must allege facts constituting defense.**
A petition by a stockholder, asking leave to be made a party defendant to set up a defense not made by the corporation, must disclose the facts constituting the defense.

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10. **Pleading ⊂⊃8(3)—Conclusions of law, not supported by facts, will be disregarded.**

Allegations in petition in intervention by stockholder of defendant corporation that the directors of the defendant were controlled by the plaintiff, to its benefit and to the detriment of the minority stockholders of defendant, are conclusions of the petitioner, which must be ignored, where allegations of fact from which the court may draw its conclusions in the matter are wholly wanting.

11. **Corporations ⊂⊃506—Petition by stockholder to intervene and defend suit against corporation held insufficient.**

In a suit against a corporation to restrain violation of a contract, petition by stockholder of defendant corporation for leave to intervene and defend, which merely stated that intervener intended to present by answer facts showing that the contract was no longer in force, or, failing in that, facts showing a different construction should be placed on it than was placed thereon by a subsequent agreement, does not allege facts indicating whether the defenses are frivolous or substantial, and is insufficient.

In Equity. Suit by the Atlantic Refining Company against the Port Lobos Petroleum Corporation and the Atlantic Lobos Oil Company. On petition of Marcel Denis to intervene for the protection of his rights as stockholder of the Atlantic Lobos Oil Company. Petition dismissed.

Ira Jewell Williams, of Philadelphia, Pa., and Charles F. Curley, of Wilmington, Del., for plaintiff.

William G. Mahaffy, of Wilmington, Del., and Winthrop Dwight, of New York City, for defendants.

Andrew C. Gray and Herbert H. Ward, both of Wilmington, Del., and Alexander B. Siegel, of New York City, for petitioner.

MORRIS, District Judge. The Atlantic Refining Company filed its bill of complaint against Port Lobos Petroleum Corporation and Atlantic Lobos Oil Company (hereinafter called the Oil Company), asserting that, under a contract of October 5, 1916, and supplements thereto, the plaintiff is possessed of certain rights with respect to the transportation and delivery of fixed quantities of oil through the pipe lines of the defendants at a specified price, charging that the defendants threaten, unless restrained, to exclude from their pipe lines oil that plaintiff is entitled to have transported and delivered, and praying injunctive relief. The defendants appeared and filed an answer, alleging that the contracts in question do not confer upon the plaintiff a right to the transportation and delivery of the full amount of oil to which plaintiff asserts it is entitled. Thereupon Marcel Denis presented to the court his verified petition, praying that he be permitted to intervene as a defendant on behalf of himself and others similarly situated, that he be permitted to file an answer on behalf of the Oil Company, and that he have general relief. The allegations of the petition upon which its prayers are based are that the petitioner is a stockholder of the Oil Company, that in presenting the petition he acts on his own behalf and on behalf of a group of minority stockholders of the Oil Company, that the plaintiff and its officers are the owners of the majority of the shares of the capital stock of the Oil

Company, and that a majority of the directors of the latter company are designated by the plaintiff from persons directly connected with or controlled by the plaintiff. A further allegation is that the petitioner—

"intends to present by answer facts calling for the entire abrogation of the contract of October 5, 1916, upon the continued existence of which the claim of plaintiff to relief depends, and also intends to show facts which, granted the continued existence of said contract, requires a different construction from that given it by the so-called agreement of December 27, 1920, coercively and improperly entered into as aforesaid, and the majority of votes for which were cast by directors who were directly interested in and some of whom were directors of the plaintiff."

Leave to file the petition was granted and the petition filed. Thereafter, on motion of the petitioner, an order was entered setting the petition down for hearing on a specified day, and directing that the clerk of the court mail to the plaintiff and the defendants, or their solicitors of record, copies of the order and of the petition. An answer to the petition was filed by each of the parties to the cause. To the answers the petitioners sought to file an affidavit in the nature of a verified replication. This was objected to. That objection makes it necessary to ascertain the proper procedure upon a petition for intervention, and particularly what the record at the hearing to determine the right of a petitioner to be made a party to a cause may consist of.

[1] While I find most helpful notes upon the general subject of intervention in Ann. Cas. 1913D, 1031, and 123 Am. St. Rep. 280, an instructive essay thereon by Mr. Edward C. Eliot in 31 Am. Law Rev. 377, and a discussion of the subject in Foster's Federal Practice, vol. 2, p. 1283 et seq., 21 C. J. 341, and 20 R. C. L. 682, I fail to find therein or in the reported cases a well-settled answer to the question here presented. Certain steps in the procedure are, however, reasonably well fixed. A petition of intervention may be filed only by leave of court. Stone v. Ingham, 105 Mich. 234, 63 N. W. 79. Bradley v. Trousdale, 15 La. Ann. 206; Equity Rule 37 (198 Fed. xxvii, 115 C. C. A. xxvii). Whether permission to file the petition should or should not be granted is to be determined, I take it, from the allegations of the petition itself considered in the light of the other pleadings and proceedings in the cause.

[2] The mere filing of the petition pursuant to leave does not make the petitioner a party to the cause. The original parties are entitled to be heard on the question of his admission, and, upon filing his petition, he should obtain an order of notice to them and have the petition set down for a hearing. Doyle v. New York & N. E. R. Co., 14 R. I. 55; Perrine v. Perrine, 63 N. J. Eq. 483, 52 Atl. 627. The hearing upon the petition should be followed by an order denying or granting leave to the petitioner to intervene and become a party. A form of an order granting such leave is set out in Ex parte Jordan, 94 U. S. 248, 24 L. Ed. 123. After a petitioner becomes a party, he stands to all intents and purposes as if he had been an original party to the suit. Eastmore v. Bunkley, 113 Ga. 637, 39 S. E. 105; Rice v. Durham Water Co. (C. C.) 91 Fed. 433; French v. Gapen, 105 U. S. 509, 525, 26 L. Ed. 951.

[3] There still remains, however, the question as to what issues may be raised at the hearing to determine whether the petitioner may be made a party. It is clear that the petition must show affirmatively that the petitioner has an interest in the litigation and that his intervention in the cause is reasonably necessary to the protection of his interest (equity rule, 37 [198 Fed. xxvii, 115 C. C. A. xxvii]; Blossom v. Railroad Co., 1 Wall. 655, 17 L. Ed. 673; Sage v. Railroad Co., 96 U. S. 712, 24 L. Ed. 641; Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; Williams v. Morgan, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; 11 Enc. of Pl. & Pr. 506), and that defects in this regard may there be taken advantage of.

[4] Consequently the crucial question is whether upon the hearing the well-pleaded averments of the petition must be taken as true, or whether their accuracy and truthfulness may be determined upon opposing and supporting affidavits. In Ex parte Gray, 157 Ala. 358, 47 South. 286, 131 Am. St. Rep. 62, 65, in considering the proper practice in cases of intervention, the court said:

"* * * The petition for intervention is then filed, on which the court examines the petition and answer, and such testimony, by affidavit or otherwise, as may be produced, and determines the question as to whether the petitioner shall be allowed to intervene and become a party to the suit."

This is the only case found authorizing the raising of an issue of fact at the hearing had upon the petitioner's right to be made a party. In Henry v. Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318, on the contrary, the court below had considered a petition of intervention in connection with the other pleadings in the action, and had denied the petitioner's right to intervene. Error was assigned. The Supreme Court said:

"The petition of intervention having been presented in due form and in apt time, the question for our consideration is: Does the petition set forth a state of facts in relation to the parties and the subject-matter of the litigation entitling Henry to be made a party to the action as an intervener? This question must be determined from a consideration of the matters set forth in the petition, taken in connection with the other pleadings and proceedings in the action. In determining this question, whether upon application to file the petition, or upon motion to strike out the petition, or upon demurrer to the petition for insufficiency, the averments of the petition, so far as the same are well pleaded, must be taken as true. Mere uncertainty or ambiguity in the averments of the petition should not be held sufficient to defeat the right of intervention without giving the usual opportunity to amend."

The same court in Wood v. Denver City Waterworks Co., 20 Colo. 253, 38 Pac. 239, 46 Am. St. Rep. 288, in applying the foregoing case, said that it was there held that—

"In determining whether an application to intervene should be allowed, the averments of the petition, so far as the same are well pleaded, must be taken as true."

I find no other cases upon this point. Equity rule 37 (198 Fed. xxvii, 115 C. C. A. xxvii) provides in part:

"Any one *claiming* an interest in the litigation may at any time be permitted to assert his right by intervention. * * *" (Italics ours.)

The language of the rule and, as I think, the sounder reason makes it necessary to conclude that at a hearing upon a petition for intervention the well-pleaded allegations of the petition must be taken as true, and evidence aliunde may not be heard. Consequently, the objection made by the original parties to the cause to the filing by the petitioner of the affidavit in the nature of a replication must be sustained, and the affidavits filed by the original parties to the cause in the nature of answers to the petition must be stricken from the files or ignored.

[5] In view of the foregoing conclusion, and of the fact that the petition alleges that the petitioner is a stockholder of the defendant Oil Company, it becomes necessary now to consider under what circumstances a stockholder of a defendant corporation may be permitted to intervene as a party defendant. It is a well-established rule, to which there are few exceptions, that a stranger to a suit will not be permitted, on his own application and over the objection of the plaintiff, to become a defendant. Ann. Cas. 1913D, 1035; Shields v. Barrow, 17 How. 129, 146, 15 L. Ed. 158; Anderson v. Jacksonville P. & M. R. Co., 1 Fed. Cas. 842, No. 358. But that rule is not absolute, where the person who seeks to be made a party defendant belongs to the class known as quasi parties; that is, "those who are already represented in the suit, or who come within the compass of the proceedings pendente lite," such as stockholders in a corporation. Such persons are recognized as having a status in the suit by representation, and the court may, upon proper showing, make them parties defendant, notwithstanding objections of the plaintiff. Ann. Cas. 1913D, 1036.

[6] Many reasons, such as the appearance of fraud, collusion, or bad faith on the part of the directors of the corporation, or where they stand in a dual relation, which prevents an unprejudiced exercise of judgment, or where a corporation threatens by collusion or otherwise to neglect the proper defense of a suit, have been held sufficient. United Copper Co. v. Amal. Copper Co., 244 U. S. 261, 263, 37 Sup. Ct. 509, 61 L. Ed. 1119; Dickerman v. Northern Trust Co., 176 U. S. 181, 188, 20 Sup. Ct. 311, 44 L. Ed. 423, Ann. Cas. 1913D, 1036, 1037. Where it is alleged that the directors of a defendant corporation refuse to defend a suit to the prejudice of stockholders, a court of equity will permit one or more stockholders to intervene and become parties defendant, so as to file an answer, not for the corporation, but on their own behalf, to protect their own interest, and that of all other stockholders who may choose to join them in the defense. Bronson v. La Crosse Railroad Co., 2 Wall. 283, 302, 17 L. Ed. 725; Guarantee Trust & Safe Deposit Co. v. Duluth & W. R. Co. (C. C.) 70 Fed. 803.

[7] But corporations controlled and managed by the same officers and stockholders have a right to deal with each other. Smith v. Chase & Baker Piano Mfg. Co. (D. C.) 197 Fed. 466, 471; Fletcher's Cyc. Corp. vol. 6, pp. 6848, 6849. As said in Corbus v. Gold Mining Co., 187 U. S. 455, 463, 23 Sup. Ct. 157, 47 L. Ed. 256:

"The directors represent all the stockholders and are presumed to act honestly and according to their best judgment for the interests of all."

[8, 9] A petition founded upon fraud or misconduct, which does not allege definite, tangible facts to sustain the general charge of fraud,

is insufficient and cannot be sustained. Smith v. Chase & Baker Piano Mfg. Co. (D. C.) 197 Fed. 466, 471. A petition by a stockholder, asking leave to be made a party defendant to set up a defense not made by the corporation, must disclose the facts constituting the defense; otherwise, the court has no means of knowing whether the defense, if permitted to be made, would be other than frivolous. 15 R. C. L. 718; State v. J. & M. Paper Co., 4 Boyce (Del.) 246, 255, 88 Atl. 449.

[10] Are the allegations of the petition in the suit at bar sufficient to bring the petitioner within those circumstances which entitle a stockholder to intervene as a party defendant in a suit against the corporation? I think they are not. The petition contains several conclusions of the pleader to the effect that the action of the directors of the Oil Company was controlled by the plaintiff, to its benefit and to the detriment of the minority stockholders of the Oil Company; but these conclusions of the petitioner must be ignored, for allegations of fact from which the court may draw its conclusion in this matter are wholly wanting.

[11] With respect to the defense to be set up the petitioner merely states that he "intends to present by answer facts" to show that the contract of October 5, 1916, is no longer in force, or, failing in this, "to show facts" requiring a different construction to be placed upon that contract than was placed thereon by an agreement of December 27, 1920; but whether the indicated defenses are frivolous or substantial it is impossible to tell, for the facts upon which they are based are not set out in the petition, and the proposed answer was not presented therewith. Should the petition be permitted to stand for an answer, as was permitted by Judge Lurton in Toler v. East Tennessee & C. Ry. Co. (C. C.) 67 Fed. 168, it would contain no well-pleaded defense to the bill of complaint.

The application to be made a party defendant must therefore be denied, and the petition dismissed.

AMERICAN BANK & TRUST CO. et al. v. FEDERAL RESERVE BANK OF ATLANTA et al.

(District Court, N. D. Georgia. March 11, 1922.)

No. 138.

1. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Federal reserve banks can adopt reasonable measures to collect checks deposited with them at par.**

   The federal reserve banks, in the discharge of their duties with respect to the collection of checks deposited with them at par, and in performing the functions of a clearing house, as authorized by Federal Reserve Act, §§ 13, 16 (Comp. St. §§ 9796, 9799), are empowered to adopt any reasonable measure designed to accomplish these purposes.

2. **Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Federal reserve bank can present checks at drawee bank by agents.**

   Where the bank on which checks deposited in a federal reserve bank were drawn refuses to remit by mail without deduction of the cost of ex-

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

change, the reserve bank can employ any proper instrumentality or agency to collect the checks from the drawee bank, and may legitimately pay the necessary cost of such service.

3. Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Daily collection of two or more checks drawn on same bank is not illegal.

The process of the daily collection of checks by a federal reserve bank in the exercise of its clearing house functions is not rendered unlawful because of the fact that of the checks handled two or more of them may be drawn on the same bank.

4. Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Federal reserve banks can publish par clearance list, but not include nonmember banks without consent.

It is a legitimate feature of the federal reserve bank to publish a par clearance list; that is, a list of banks on which checks are drawn that will be collected at par by the federal reserve banks. But such list should not include the name of any nonmember bank without its consent, since a conclusion may be drawn from the appearance of a bank's name on the par list that it agrees to remit at par.

5. Banks and banking ⇐288½, New, vol. 11A Key-No. Series—Federal reserve par clearance list can state that it includes all banks in designated municipality.

The federal reserve bank can include in its published par clearance list the names of towns or cities, with a representation that it will undertake to collect at par checks drawn on any bank, whether member or nonmember, in such town or city.

In Equity. Suit by the American Bank & Trust Company and others against the Federal Reserve Bank of Atlanta and others. Decree entered for injunction as to part only of the acts of defendant complained of.

Smith, Hammond & Smith, of Atlanta, Ga., and Orville A. Park, of Macon, Ga., for complainants.

Randolph & Parker, of Atlanta, Ga., and John W. Davis and Montgomery B. Angell, both of New York City, for defendants.

BEVERLY D. EVANS, District Judge. This case was heard by me on its merits, and after argument and due consideration I find as follows:

[1] 1. Under sections 13 and 16 of the Federal Reserve Act (Comp. St. §§ 9796, 9799), the federal reserve banks are empowered to accept any and all checks payable on presentation, when deposited with them for collection.

2. Checks thus received must be collected at par. The federal reserve banks are not permitted to accept in payment of checks deposited with them for collection an amount less than the full face value of the checks.

[2] 3. In the discharge of its duties with respect to the collection of checks deposited with them, and with respect to performing the functions of a clearing house, the several federal reserve banks are empowered to adopt any reasonable measure designed to accomplish these purposes. To that end a federal reserve bank may send checks to the drawee bank directly, for remittance through the mails of collections without cost of exchange. If the drawee bank refuses to remit with-

out deduction of the cost of exchange, it is in the power of the several federal reserve banks to employ any proper instrumentality or agency to collect the checks from the drawee bank, and it may legitimately pay the necessary cost of this service.

[3] 4. The process of the daily collection of checks, in the exercise of the clearing house functions, is not rendered unlawful because of the fact that of the checks handled two or more of them may be drawn on the same bank.

[4, 5] 5. It is a legitimate feature of the clearing house function of a federal reserve bank to publish a par clearance list; that is, a list of banks on which checks are drawn that will be collected at par by the federal reserve banks. But, inasmuch as a conclusion may be drawn from the appearance of a bank's name on the par list that it agrees to remit at par, or has agreed to enter the par clearance system, I do not think such list should include the name of any nonmember bank, unless such nonmember bank consents. I see no objection to including in the par clearance list the names of towns or cities, with a representation that the federal reserve bank will undertake to collect at par checks drawn on any bank (member or nonmember) in such town or city.

6. In the inauguration of its par clearance system, I find that the Federal Reserve Bank of the Atlanta District was not inspired by any ulterior purpose to coerce or injure any nonmember bank which refused to remit at par. Specifically, I find the charge that the Federal Reserve Bank at Atlanta would accumulate checks upon country or nonmember banks until they reach a large amount, and then cause them to be presented for payment over the counter, so as to compel the plaintiffs to maintain so much cash in their vaults as to drive them out of business, as an alternative to agreeing to remit at par, is not sustained by the evidence.

7. I find the evidence insufficient to sustain any charge in the bill that the Federal Reserve Bank was acting illegally, or exercising any right it had so as to oppress or injure the plaintiff banks. With regard to the publication of the names of nonmember banks on the Federal Reserve Bank's par list, while I do not think the evidence justifies a finding that such publication was done to injure or oppress plaintiff banks, nevertheless I do not think the names of plaintiff banks, or any of them, should be included in the list without their consent.

The general result of my findings is that the plaintiffs are entitled to the writ of injunction against the inclusion of their names on the par list without their consent, but are not entitled to an injunction for any other matter complained against the respondents.

Let an appropriate decree be submitted, giving effect to the foregoing findings.

In re NABORS.

(District Court, N. D. Alabama, E. D., at Anniston. May 16, 1922.)

No. 967.

Bankruptcy ⟸145(4)—Claim against the United States for a tort not an asset of estate.

A claim of bankrupt against the United States, for a personal injury caused by negligence of a soldier, not enforceable, but payable only by special act of Congress, *held* not an asset of his estate which passed to his trustee.

In Bankruptcy. In the matter of W. C. Nabors, bankrupt. On petition to set aside discharge and reopen cause. Denied.

Rutherford Lapsley, of Anniston, Ala., for petitioners.
Blackmon & Holman, of Anniston, Ala., for bankrupt.

CLAYTON, District Judge. Nabors, the bankrupt here, was injured by a government motorcycle being driven by an enlisted soldier of the United States Army on March 9, 1918. He has pending in Congress a claim in the form of a bill to pay him $10,000 damages on account of his injury, and the court is informed that this bill has received the sanction of the Senate of the United States, but it has not passed the House of Representatives.

The petitioners, McAbee & Jenkins, show that they are creditors of the bankrupt, and that he is indebted to them in the sum of $348.95 by provable claim, which has heretofore been duly filed and allowed in this cause. The petitioners further show that on June 15, 1921, the bankrupt filed his voluntary petition, with a schedule of assets and liabilities; that in the conduct of said matter no dividend was paid to the creditors, and that on January 25, 1922, the bankrupt was discharged; and the petitioners show that at the time of the filing of his petition and his discharge the bankrupt failed to schedule as part of the assets of his estate his right of action or claim for damages accruing to him for injuries sustained by him in collision with the motorcycle hereinbefore mentioned.

The petitioners pray for an order setting aside the discharge and reopening the case for further appropriate proceedings in the matter, to the end that the aforesaid right of action or claim of the bankrupt may be administered as a part of his estate. The above claim for injuries sustained in the manner above described by the bankrupt, because of the negligent act of a soldier of the United States, is not a legal liability against the government. If such a claim be paid at all, it will be paid because of the sense of justice or generosity of the Congress. It is manifest that this claim of the bankrupt against the United States government does not pass to the trustee or creditors in bankruptcy as a part of his estate.

A claim for unliquidated damages resulting in personal injuries on account of negligence is not a provable debt. Imbriani v. Anderson, 76 N. H. 491, 84 Atl. 974; In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556; Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445, 565; Weisfield

v. Beale, 231 Pa. 39, 79 Atl. 878; Kellogg v. Schuyler, 2 Denio (N. Y.) 73; In re Schuchardt, 8 Ben. 585, Fed. Cas. No. 12483; Beers v. Hanlin (D. C.) 99 Fed. 695. The principle underlying this case differentiates it from a claim for the conversion of personal property, for the latter is a provable debt, because it does not arise out of injury to the person. Pitcairn v. Scully, 252 Pa. 82, 97 Atl. 120; Cole v. Roach, 37 Tex. 413; Fingold v. Schacter, 223 Mass. 274, 111 N. E. 903.

The principle controlling in this case is stated in German Bank, etc., v. U. S., 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564, to be that—

"It is a well-settled rule of law that the government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."

And that—

"If this be treated as a case of tort, then it is clear that the government is not liable, not only on the ground above stated, but because, under the act of Congress conferring jurisdiction upon the Court of Claims (24 Stat. 505, c. 359), there is an express exception of cases sounding in tort."

It is established beyond dispute that the alleged claim is based entirely on the tort committed by one of the government soldiers, and the matter here must be governed by the rule declared in the above adjudicated case. It follows that the cause of action for the personal injury does not pass to the trustee in bankruptcy or the creditors, and that the bankrupt's claim for personal injuries cannot be administered as a part of the bankrupt estate. North Chicago Street Ry. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Brandies v. Cochran, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760.

The title to property which is vested in the trustee of the bankrupt estate is governed by section 70 of the Bankruptcy Act (Comp. St. § 9654). The position of the petitioners, that the title to the claim against the government for damages became vested in the trustee under subdivision 3 or under subdivision 5 of said section, is not tenable. The first-named subdivision deals with technical powers under the common law, and does not apply to the right of action for personal injury. The other subdivision passes to the trustee—

"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."

The claim here, for damages growing out of a tort alleged to have been committed against the person of the bankrupt, manifestly could not have been levied upon and sold under judicial process. Moreover, the alleged claim being only of a personal nature, the bankrupt could not be compelled to prosecute it. Rights of action arising upon contract, or from the unlawful taking or detention of or injury to the bankrupt's property, pass to the trustee as assets; but this does not include an action for tort resulting in personal injury. The authorities above cited sustain this proposition.

Accordingly decree and order will be entered sustaining the demurrer to the petition, and denying the relief prayed for by the petitioners.

MARSHALL VENTILATED MATTRESS CO. v. D'ARCY SPRING CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1922.)

Nos. 3568, 3574.

1. **Patents ⇐328—1,246,081 for spring cushion, held valid and infringed.**
The Genge patent, No. 1,246,081, for a spring cushion or mattress, claims 6 and 7, *held* valid and infringed; claims 8 and 9 *held* void for lack of invention.

2. **Patents ⇐328—1,172,344, for cushion structure, held not infringed.**
The D'Arcy patent, No. 1,172,344, for a cushion structure, claim 3, *held* not infringed.

3. **Trade-marks and trade-names and unfair competition ⇐68—Complainant held entitled to injunction against unfair competition.**
Complainant, manufacturer of a spring known as the "Marshall spring," though the patent on the same had expired, *held* entitled to an injunction against a circular issued by defendant, headed "Marshall Springs Now Manufactured by" defendant, as at least suggesting that the business of making the springs had been taken over by defendant.

Appeal and Cross-Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Marshall Ventilated Mattress Company against the D'Arcy Spring Company. From the decree, both parties appeal. Modified.

Taylor E. Brown, of Chicago, Ill., for plaintiff.

Otis A. Earl, of Kalamazoo, Mich. (Chappell & Earl, of Kalamazoo, Mich., on the brief), for defendant.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The Marshall Company brought suit against the D'Arcy Company for infringment of the Genge patent, No. 1,246,081, dated November 13, 1917, for a spring cushion for mattresses, and alleged also infringement of trade-mark rights in the word "Marshall," and unfair competition in trade. The D'Arcy Company denied any trespass in these respects, and by its answer and counterclaim alleged infringement by the Marshall Company of patent No. 1,172,344, dated February 22, 1916, issued to D'Arcy for a cushion structure. The District Court found that plaintiff must fail upon the trade-mark and unfair competition issues; that claims 6, 7, 8, and 9 of the Genge patent were valid, and were infringed by defendant; and that claim 3 of the D'Arcy patent (the only one sued upon) was not infringed by the plaintiff. Both parties appeal.

[1] The Genge patent is illustrated in the drawings as applied to a mattress; the device which is said to be an infringement is an automobile cushion, and the latter form only need be considered. The patent has to do only with the wire and spring framework and construction underneath the upholstering. It shows an upper and lower horizontal frame; the lower one carries a mass of closely adjacent upright spiral springs, arranged in longitudinal rows parallel to the front of the cush-

ion. Each frame is approximately rectangular, though with rounded corners, and is made of a heavy wire, bent into the appropriate shape. In connection with the front wire of the upper frame, which constitutes the upper front edge of the cushion, Genge has what he calls a truss. It is a wire of about the same quality as the front edge wire, lies back of it in the same horizontal plane, and perhaps 3 inches distant, and for the central half of its length is parallel to the front wire. Its ends are inclined forward in the same horizontal plane until they meet and join the frame at the front corners. The central and parallel portion of this truss is connected or tied to the front rod by three wire cross-ties, which Genge calls struts. The truss extends back over and lies along the top of and engages with the second row of springs, and its attachment to the front rod is rigid enough so that it sinks down with the front rod in a unitary way when the weight of the occupant comes upon the cushion. It thus tends to maintain the proper relation between the front part of the cushion and the part further back.

Based upon this described structure, Genge makes the following claim:

"(6) In a mattress or cushion comprising a base defining the bottom outline of said mattress or cushion, resilient, elastic means supported on said base, a top border frame defining the top outline of said mattress or cushion, said top border frame having a reinforcing truss connected to one side thereof, said truss overlying and engaging a part of the resilient elastic means adjacent that side of the border frame to which it is connected, and including inclined members attached to the frame at the ends of the side which it reinforces."

The controversy over the validity of this claim has involved the particular meaning of "truss." We cannot think it is a completely appropriate term, when applied to these wire structures. The dominant idea of a truss is that its members are fitted to interpose against the expected strain their capacity for resistance to longitudinal compression and are sufficiently rigid so that they will not buckle. Of course, any wire which can be easily bent into the form of this top framework and truss has a limited capacity for resisting longitudinal compression without buckling; and there is a very imperfect analogy between the performance of these parts and a typical truss in a building or bridge construction. However, the analogy is not fully lacking, and in these devices the distinction between the mere cross brace and the form which Genge calls a truss is not without importance. It is apparent that, if the so-called truss did not have inclined ends, but was for its whole length parallel to the front edge wire, and if each end was firmly attached to the side wires, and it was fairly rigid, it would, when taken in connection with other similar cross braces further back, or with the rear edge of the frame, serve as a truss for the front edge wire. There is no inherent necessity that any member of a truss structure be diagonal. Square or lattice trusses are familiar, though perhaps they usually have diagonal members also. In such a structure the degree of truss effect would depend upon the degree of rigidity of the side wires and of their corner joints with the front edge wire. Unless this rigidity were sufficient, the side wires would tend to bend at the ends of the cross brace, and so there would be a yielding after the cross brace or square truss had exhausted its effect.

Regardless of the prior printed art, it is not to be doubted that the defendant, long before the Genge patent, had made in large quantities spring cushions, which in this part of the structure were precisely like those now said to infringe, excepting that it had used this completely parallel cross brace or square truss; and the only question of validity, therefore, is whether there was patentable invention in angling the ends of this cross brace forward and attaching them to the ends of the sides.

It is true that there would not ordinarily be invention in merely substituting a truss with angling members for a truss with rectangular members; but Genge was not only working in a field of imperfect analogy, as above pointed out, and in one where a great variety of cross bracing had been tried without developing this peculiar application, but he also obtained, at least in theory, from his peculiar angling form two new results. He secured some benefit from interposing the direct endwise thrust resistance of the angling members of his truss as against the tendency to pull the front corners nearer together if the front edge wire should bend, and he also permitted the second row of springs, with which the truss engaged, to yield downward with the front edge or as on a hinge, in a manner or to an extent which would not occur with the completely parallel brace or truss. A combination of some measure of truss effect with some additional freedom of yielding in the front part of the top indicates such a probability of useful interdependent action that we cannot say it was nonpatentable. We therefore agree with the District Court that this claim 6 was valid, and the same conclusions must follow as to claim 7.

Claims 8 and 9 are, in effect, broader. True, they have an additional apparent limitation calling for the cross struts connecting the truss wire with the front edge wire; but such cross connections were present commonly in many earlier structures, including that manufactured by defendant, and this element cannot serve as a limitation importing patentability. On the other hand, these claims omit the requirement that any portion of the truss rod should be inclined toward the front rod and attached thereto, and thus omit the only element of invention which we find in the structure, so far as involved in this case. They cannot be limited to a truss having these inclined ends, unless we overlook the distinction which was evidently intended to be made. Without such limitation these claims read directly upon the earlier manufacture of the defendant. We think they must be considered invalid.

Infringement of claims 6 and 7 is denied only because the inclined end members of the truss are not attached to the frame "at the ends of the side which it reinforces." In defendant's form the front edge wire and the side wires are continuous and turn the corners with a sharp and short bend, at which bent portion there will be increased resistance, against some strains. It is difficult to say that the front wire ends and the side wire begins exactly at the center of the curve; either wire may be considered as going around the bend. Defendant's inclined truss member is fastened to this side wire at or close to the point where the curve ends and straightens out into the side wire. There would be no little tendency for the side wires to bend and yield

at this point of contact, in case of an inward or outward strain upon the edge wire near its center; and this must be the test. The distance from the corner up along the end wire to the point of brace attachment determines the leverage exerted at that point and tending to produce a bend. In the patented form this leverage is eliminated, in defendant's form it is negligible; in the old noninclined form it is substantial. The avoidance of that tendency in the side wire to bend at the end of the brace or truss is the advantage which Genge attained by attaching his trusses at the ends of the front edge wire. It is not necessary to say just how far away from true parallelism the ends of the cross brace or truss may be inclined, without becoming the "inclined members" of the claim but we think that in this structure they are inclined down to and attached at the ends of the front edge wire within the meaning of claims 6 and 7.[1]

[2] In the cross-suit upon the D'Arcy patent, claim 3 is involved. It reads as follows:

"In a spring structure, the combination of the bottom border frame of wire, coiled springs, spring supporting bars secured to said border wire, a cushion cover having its lower edges wrapped around said border frame, and binding members of sheet metal curved in cross section disposed to embrace said bottom border frame and said cover, the distance between the edges of said securing members being less than the diameter of the border frame whereby the cover is secured to the frame and a metal binding edge provided for the cover."

It is sufficient to say of this patent and of the plaintiff's alleged infringing structure that, if we give to the claim the very narrow range of equivalents authorized by the small inventive step, if any, which D'Arcy took, we must conclude that there is no infringement. Discussion of the details would not be profitable. We agree with the conclusion of the trial court that in plaintiff's structure the lower edges of the cushion cover are not so "wrapped around" the border frame that the clips form "a metal binding edge for the cover," within the only meaning which can safely be given to that phrase.

[3] The remaining question is as to the claimed trade-mark rights and unfair competition. Defendant began its sale of this article by putting out a circular which contained an illustration of a cushion spring like that made by plaintiff, including the truss of the Genge patent. This circular was headed "*Marshall Springs* Now Manufactured by *D'Arcy Spring Company.*" Counsel argue on the one hand that "Marshall" or "The Marshall Line" is plaintiff's general trade-mark applied to all its output of different articles and indicating origin, and, on the other hand, that "Marshall Springs" had become the trade-name of springs made under a certain Marshall patent, which at this time had recently expired. The testimony in this record is far from satisfactory as to whether the term "Marshall Springs" had acquired this significance in the appropriate market (see the Singer Case, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118), and we conclude that the case does not require a decision of the questions so argued. The only evi-

[1] In Plaintiff's Exhibit 3, showing defendant's structure, the clips at the ends of the truss have become loose, and do not show the original point of attachment. We assume that they were as illustrated in defendant's circular.

dence of any claimed violation of plaintiff's rights on this branch of the case is found in the issue of this circular. It was almost immediately discontinued, only a few copies having gone out. We think the plaintiff at the time of filing the bill was entitled to an injunction against this circular, for a special reason to be mentioned; and there is no occasion to go further. This reason is that the use of the phrase "now manufactured by" in this association suggests, if it does not indicate, that the business of making the Marshall springs had been taken over by defendant. The circular actually produced the impression upon some of plaintiff's customers that plaintiff had gone out of business. The fact that the circular had not been continued long after filing the bill hardly justified the complete dismissal of the bill as to this branch of the complaint. We think that for this dismissal clause of the decree there should be substituted an order for an injunction against this particular circular, and without further finding as to the broader complaint.

The costs would not be important on this issue, as the general costs of the suit were awarded to the plaintiff, and there were none separately applicable. We see no room for any accounting of damages as to this circular. Ludington v. Leonard (C. C. A. 2) 127 Fed. 155, 62 C. C. A. 269; Gaines v. Rock Spring Co. (C. C. A. 6) 226 Fed. 531, 543, 141 C. C. A. 287.

After the appeal record was filed in this court, the D'Arcy Company applied to have the case reopened for further proofs, and supported this application by affidavits tending to show that the truss with inclined ends in this combination was developed by engineers of the Nordyke & Marmon Company, and was communicated by them to Genge in the summer of 1916. The Marshall Company met this application by the claim that sufficient diligence in the discovery of this evidence was not shown and by proof of facts in explanation or denial of the applicant's affidavits. The issue is wholly one of fact. Without undertaking its decision in its present form, it is enough to say that the origination of the idea by the Nordyke & Marmon Company and its communication from that source to Genge at a date earlier than Genge's reduction to practice, do not appear with that degree of certainty or highly persuasive inference which would have justified us in reopening the case when the motion was filed, and in overlooking the D'Arcy Company's lack of diligence in not discovering this evidence for more than a year after its answer was filed, although it knew that the Nordyke & Marmon Company had been large users of this class of cushions, and although it made inquiry and search among several less prominent users. The motion to reopen must be denied.

The case is remanded, with directions to set aside the decree and enter a modified decree in accordance with this opinion. Each party will pay its own costs in this court.

ROSSMAN v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1922.)

No. 3620.

1. **Internal revenue ⟹2—Statutes held impliedly repealed by National Prohibition Act.**

Rev. St. § 3242 (Comp. St. § 5965), penalizing the carrying on of the business of manufacturing stills, etc., without paying the special tax, and section 3265 (Comp. St. § 6003), penalizing the failure of any person manufacturing any still, etc., to notify the collector before its removal from the place of manufacture, are repealed by implication by the National Prohibition Act.

2. **Intoxicating liquors ⟹223(1)—Charge of unlawful possession of "distilling apparatus" not limited to completed still.**

Where counts for having possession of property designed for the manufacture of intoxicating liquor intended for use in violation of National Prohibition Act, tit. 2, § 25, and for unlawful possession for sale of a utensil intended and designed or intended for use in unlawful manufacture in violation of section 18, further described the property and utensil as a still and distilling apparatus, the words "distilling apparatus" could not be limited to a completed still fully equipped and ready for operation, but might cover a 15-gallon pot and coil of copper tubing or worm, which, when connected by gooseneck, would produce a completed still.

3. **Intoxicating liquors ⟹233(2), 236(19)—Evidence held admissible, and to warrant finding that possession of distilling apparatus was not for sale for legitimate purposes.**

In a prosecution for violations of the National Prohibition Act, it was the duty of the jury to consider evidence that witnesses told defendant they wanted to buy a still to make corn whisky, that he told them he had a still, and sold them a copper utensil and copper worm as a still to be used for such purpose, and took the purchasers to his codefendant to have the means of connecting them supplied, and from such evidence could properly find that defendant was not in possession of such articles, and was not offering them for sale, for legitimate purposes.

4. **Criminal law ⟹878(4)—Conviction on each of two counts for violation of National Prohibition Act held unwarranted.**

Assuming that National Prohibition Act, tit. 2, § 25, prohibiting the possession of property designed for the manufacture of liquor intended for unlawful use, includes such possession for purpose of sale, there could be no conviction on a count under that section, and also on a count under section 18, relative to possession for sale, where the evidence showed conclusively that possession was for purpose of sale only, and not for defendant's own use in manufacturing liquors.

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

Solomon Rossman was convicted of violations of the National Prohibition Act and revenue laws, and he brings error. Reversed in part, and affirmed in part.

George W. Edwards, of Youngstown, Ohio, for plaintiff in error.

D. J. Needham, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., and D. J. Needham, Asst. U. S. Atty., both of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. Solomon Rossman was convicted in the United States District Court, Northern District of Ohio, Eastern Division, upon four of the five counts of an indictment charging the plaintiff in error and Emile Faller jointly with violations of the National Prohibition Act (41 Stat. 305) and the revenue laws of the United States.

The first count charged them with the unlawful possession of certain property, known as a still and distilling apparatus, designed for the manufacture of intoxicating liquor in violation of the National Prohibition Act. The second count charged them with unlawfully and feloniously possessing for sale a certain utensil, known as a still and distilling apparatus, designed and intended for use in the unlawful manufacture of intoxicating liquor in violation of the same act. The third and fourth counts charged, respectively, offenses under sections 3242 and 3265 of the Revised Statutes (Comp. St. §§ 5965, 6003). The fifth count charged a conspiracy between the plaintiff in error, Emile Faller, and divers other persons, to the grand jurors unknown, to engage in and carry on the business of manufacturing stills in violation of law.

The District Court, on motion of the plaintiff in error, quashed the fifth count of this indictment. Emile Faller having pleaded guilty, the plaintiff in error, Solomon Rossman, was tried separately upon the other counts of this indictment, and a general verdict of guilty was returned by the jury. A motion for a new trial was overruled, and defendant sentenced to pay fines of $100 each on the first, second, and fourth counts, and $200 on the third count, and that the defendant be confined in the Stark County Workhouse, at Canton, Ohio, for 60 days from and after the 14th day of April, 1921.

[1] It is conceded by counsel for the government, and properly so, that sections 3242 and 3265 of the Revised Statutes are repealed by implication by the National Prohibition Act. United States v. Yuginovich, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed. 1043, decided by the Supreme Court, June 1, 1921; Gray v. United States (C. C. A.) 276 Fed 395.

It is insisted upon the part of the plaintiff in error that the verdict of guilty on the first and second counts of this indictment is not sustained by the evidence. The government offered evidence tending to prove that Prohibition Officers D. M. Brown and Roy C. Wilton, on October 5, 1920, called at the store of the plaintiff in error in Youngstown, Ohio, and informed him they desired to purchase a still, and that they wanted this still to make corn whisky; that the plaintiff in error said to them: "I have some stills over here in the window." Thereupon he exhibited to them a number of copper pots or utensils that were then and there in his possession, and offered to sell to them a 15-gallon still for $25; that, after making some objections to the price demanded, these prohibition agents asked the plaintiff in error if he knew of a tinsmith who would put a gooseneck on the copper pot or utensil, so as to permit the attachment of a coil of copper tubing or worm thereto. The plaintiff replied that he did know such a tinsmith, but refused to give his name or address unless Brown and Wilton would buy the

still. Thereupon Brown and Wilton left the store of the plaintiff in error, but returned early in the afternoon of the following day, and purchased this copper pot or utensil from the plaintiff in error at the price demanded the night before, and also purchased a coil of copper tubing or worm for $13.50, in addition to the price paid for the pot; that the plaintiff in error then took Brown and Wilton, together with this copper pot or utensil and the coil of copper tubing, to the shop of his codefendant, Emile Faller, a tinsmith, who in consideration of $11 then paid to him by Brown and Wilton, made and affixed a gooseneck to the copper pot and supplied the union for the purpose of attaching the coil of copper tubing or worm to this gooseneck, thereby producing a completed still, ready for operation, from the material purchased from Rossman, with the sole addition of the gooseneck and union supplied by Faller.

[2] It is insisted upon the part of the plaintiff in error that this evidence does not show that he was in possession of a still, because it was not a still until the tinsmith had supplied the means of attaching the worm to the copper pot or utensil. The trial court properly overruled the motion of plaintiff in error for a directed verdict, based solely upon this contention, and submitted the case to the jury. The first count of this indictment charges the defendants with having in their possession certain property designed for the manufacture of intoxicating liquor intended for use in violation of section 25 of title 2, of the National Prohibition Act. The second count charges the defendants with the unlawful possession for sale of a certain utensil designed and intended for use in the unlawful manufacture of intoxicating liquor, in violation of section 18, title 2, of the National Prohibition Act.

It is true that each of these counts, after stating the offense in the language of the statute, designates both the "property" named in the first count and the "utensil" named in the second count as "a still and distilling apparatus." This is but a further description of the "property" and "utensil" intended for use in the unlawful manufacture of intoxicating liquor, and unlawfully in the possession of the defendants, as charged in the first and second counts of this indictment. If it were conceded that these descriptive words "still and distilling apparatus" are necessary, in addition to the descriptive words used in the statute, to describe fully the offenses charged, and not mere surplusage, nevertheless the phrase "distilling apparatus" cannot be limited to a completed still, fully equipped and ready for operation. Certainly the two most important parts of a still, to wit, a 15-gallon pot or utensil and the coil of copper tubing or worm, may constitute "distilling apparatus," within the meaning of that term as used in this indictment.

[3] It was the duty of the jury, in the determination of this question, to take into consideration the evidence offered by the government that these prohibition agents informed the plaintiff in error that they wanted to buy a still for the purpose of making corn whisky; that he told them he had a still for sale, and did sell them this copper utensil and copper worm as a still to be used for the purposes named; and that in connection with such sale he took the purchasers and the prop-

erty purchased by them to his codefendant, Faller, to have the means of connecting these articles supplied. It is undoubtedly true, as claimed by counsel for plaintiff in error, that these articles have legitimate uses for which they can lawfully be sold; but from the evidence in this case the jury could properly find that the defendant was not in possession thereof, and was not offering the same for sale, for such legitimate purposes.

There is, however, another question in this case, that was not presented by counsel for plaintiff in error, either to the trial court or to this court; but, in view of the fact that it is vital to the defendant, we think it should be considered by this court in the disposition of this error proceeding. Wiborg v. U. S., 163 U. S. 632, 659, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Clyast v. U. S., 197 U. S. 207, 222, 25 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. U. S., 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Tucker v. U. S., 224 Fed. 833, 841, 140 C. C. A. 279; Morse v. U. S., 174 Fed. 539, 544, 98 C. C. A. 321, 20 Ann. Cas. 938.

[4] Section 25, on which the first count of this indictment is based, prohibits the possession of property designed for the manufacture of liquor intended for use in violation of title 2 of the National Prohibition Act. Section 18, on which the second count of the indictment is based, prohibits the possession for sale of any utensil, contrivance, machine, etc., designed or intended for use in the unlawful manufacture of intoxicating liquor. The possession of this character of property is an essential element of each of the offenses charged in the first and second counts respectively. If section 25 comprehends and includes property designed for the manufacture of liquor intended for use by any person, including a possible purchaser, then the evidence necessary to sustain the second count of this indictment would also sustain the offense charged in the first count, and in that event the defendant could not be convicted upon both the first and second counts. Nielsen, Petitioner, 131 U. S. 176, 188, 9 Sup. Ct. 672, 33 L. Ed. 118; Reynolds v. U. S., 280 Fed. 1, decided by this court April 4, 1922.

It is wholly unnecessary to decide, and we do not decide, whether section 25 is broad enough to include intended use by a purchaser, or is limited to such intention on the part of the person manufacturing or in possession of the same, for the reason that there is no evidence in this record tending to show that the plaintiff in error intended to use this property for the manufacture of intoxicating liquors in violation of the National Prohibition Act; but, on the contrary, the evidence conclusively shows that he was in possession of this property for the purpose of sale. Therefore, regardless of the proper construction of section 25, the defendant, upon the evidence in this case and the law applicable thereto, could not be convicted upon both counts; but the evidence and the law fully sustain his conviction upon the second count.

For the reasons stated, the conviction and sentence upon the first, third, and fourth counts are reversed, including the money fines assessed upon each of these counts, and the 60 days' imprisonment in

the Stark County Workhouse, at Canton, Ohio, and the conviction and sentence upon the second count is affirmed, including the fine assessed by the court on this count.

CRAINE v. OLIVER CHILLED PLOW WORKS.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1922.)

No. 3816.

1. **Negligence ⟸20—Shipper of dangerous machine held negligent as to carrier's employé.**

   In a complaint for injuries to a ship employee while handling a potato digger, allegations that the defendant manufacturer shipped the machine without removing therefrom sharp knives, which were concealed from view, and without guarding those knives, or informing the carrier of the danger, *held* to show the machine was so inherently dangerous as to impose a liability on the shipper independent of any contract relation with the injured employee.

2. **Negligence ⟸111(3)—Intervention of independent cause between negligence alleged and injury is matter of defense.**

   The intervention of a failure of the carrier to warn its employees of the danger of handling a machine shipped by defendant as an independent cause of the employee's injury, while handling the machine, is a matter of defense.

3. **Negligence ⟸56(1)—Shipment of dangerous machine held proximate cause of injury to carrier's employee.**

   The negligence of a shipper in delivery for shipment of a machine on which there were concealed knives, not guarded to protect those who handled the machine, without warning to the carrier of the character of the shipment, is the proximate cause of the injury to an employee of the carrier while handling the machine.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action at law by Harry Craine against the Pacific Steamship Company and the Oliver Chilled Plow Works to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant Steamship Company. From a judgment dismissing the action as against the Oliver Chilled Plow Works, after that defendant's demurrer to the complaint was sustained, plaintiff brings error. Reversed, with directions to overrule the demurrer.

The action is against the Pacific Steamship Company and Oliver Chilled Plow Works to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant the Pacific Steamship Company on board its vessel the City of Topeka. It is alleged in the complaint that the defendant the Oliver Chilled Plow Works was the shipper of a potato digger by the City of Topeka; that said defendant placed the potato digger on the wharf where the ship was taking on a cargo of miscellaneous freight by the use of ship's appliances commonly used in loading freight; that the potato digger was constructed with knives and other sharp parts, which were concealed from view and were not observable; that in shipping the potato digger said defendant had negligently and carelessly failed to remove the knives and sharp parts, or to box or cover or shield the same, so that they would not have exposed persons engaged in handling the machine to the danger of cutting their hands while carrying the same into the hold of the ship, all of

which was well known to said defendant by properly inspecting the machine before shipment; that while plaintiff was engaged in carrying the potato digger across the floor of the hold of said vessel, as he was required to do, the fore and middle fingers of his left hand became caught in the knives and other sharp parts of the potato digger, causing the plaintiff to lose his said fingers, and he was damaged in the sum of $10,000 and in the further sum of $2,150.

The defendant the Oliver Chilled Plow Works demurred to the complaint on the ground that it did not state a cause of action against said defendant. The demurrer was sustained, and, no application being made by the plaintiff to amend the complaint, the action was dismissed as to the defendant the Oliver Chilled Plow Works. Plaintiff brings error.

Wm. P. Lord and Arthur I. Moulton, both of Portland, Or., for plaintiff in error.

Oglesby Young and George A. Pipes, both of Portland, Or., for defendant in error.

Before ROSS, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The defendant the Oliver Chilled Plow Works contends that there was no contractual relation or direct privity between the plaintiff and that defendant, imposing upon the latter the duty of warning the plaintiff of the concealed danger incident to the handling of the machine in the usual manner in storing it on board the ship. The absence of contractual relations between the plaintiff and the defendant the Oliver Chilled Plow Works and lack of privity between the parties are not denied, but the duty of that defendant to warn the plaintiff of the danger in handling the machine, as a duty to all persons so related to its carriage, is insisted upon by the plaintiff. It is further contended by the defendant Oliver Chilled Plow Works that its failure to warn the plaintiff of such concealed danger was not, under the circumstances, the proximate cause of the injury, but that the failure of the defendant the Pacific Steamship Company to inspect the machine and warn the plaintiff, as an employee of the latter, of such concealed danger, was the proximate cause of the injury.

Did the defendant the Oliver Chilled Plow Works, as the shipper of such a machine, owe a duty to the employees of the carrier to exercise reasonable care to see that the machine was in a reasonably safe condition for handling by the employees of the carrier? It is not alleged that the Pacific Steamship Company had notice of the concealed danger incident to the handling of the machine, or had reasonable cause to suspect that there was such concealed danger in the structure of the machine, or in its fitness for safe shipment.

In the Nitroglycerine Case, 15 Wall. (82 U. S.) 524, 21 L. Ed. 206, a box had been delivered to the defendants, composing the firm of Wells Fargo & Co., express carriers. The box contained no notice of its contents. The shipment was made in New York to be carried to San Francisco. The box was carried in the usual manner and delivered in the office of the defendants in San Francisco, where it exploded, killing a number of persons and injuring the premises occupied by the defendants, and other premises of the plaintiff leased to and occupied

by other parties. The box was found to have contained nitroglycerine. One of the questions the court was called upon to determine was whether the carrier was negligent in not requiring of the shipper notice of the contents of the box when it was offered for shipment, and its dangerous character. Mr. Justice Field, speaking for the court, held that it was not the duty of the carrier—

"to know the contents of any package offered to him for carriage when there are no attendant circumstances awakening his suspicions as to the character, that there can be no presumption of law that he had such knowledge in any particular case of that kind, and that he cannot accordingly be charged, as a matter of law, with notice of the properties and character of packages thus received. * * * The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled."

In the case of Parrott v. Barney, 1 Sawy. 423, 18 Fed. Cas. 1236, No. 10,773 (the Nitroglycerine Case in the lower court), Judge Sawyer reviews the authorities upon this question very fully and says:

"There was no negligence under the circumstances, in not inquiring as to the contents of the package. The defendants were acting in the ordinary course of their business. It was a culpable violation of duty on the part of the owner to deliver a dangerous article exhibiting no external indications of its real character, without informing them as to the danger. In the exercise of his lawful rights, every man has a right to act on the hypothesis that every other person will perform his duty and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to a danger, which can only come to him through a disregard of law on the part of some other person. Jetter v. N. Y. & H. R. R. Co., 2 Keyes [*48 N. Y.] 154; Earhart v. Youngblood, 27 Pa. St. 332; Deyo v. N. Y. Cent. R. R. Co., 34 N. Y. 10, 11; Curtis v. Mills, 5 Car. & P. 489."

In the leading English case of Brass v. Maitland, 119 Eng. Rep. 940, 944, Lord Campbell, C. J., said:

"It would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general ship may not safely be stored away in the hold, must ask every shipper the contents of every package. If he is not to do so, and there is no duty on the part of the shipper of a dangerous package to give notice of its contents or quality, the consequence is that without any remedy against the shipper, although no blame is imputable to the owners or those employed by them, this package may cause the destruction of the ship and all her crew and the lives of all who sail in her."

[1] We are not, however, determining the sufficiency of the complaint to state a cause of action against the Pacific Steamship Company. That question is not before us. We are dealing with the single question: Does the complaint state facts sufficient to constitute a cause of action against the defendant the Oliver Chilled Plow Works? That defendant contends substantially that the machine was not so imminently or inherently dangerous as to impose a liability upon the shipper independent of contract. The complaint alleges the fact that plaintiff was injured by handling the machine shipped by the Oliver Chilled Plow Works and that the dangers incident to such handling were concealed from view and were not observable; that the knives and other sharp parts had not been covered, guarded, or removed, and that plaintiff

was not informed of such danger. We think this statement is sufficient to constitute a liability independent of contract, subject, however, to the determination of the next question.

[2, 3] It is next contended by the defendant the Oliver Chilled Plow Works that under the rule of proximate cause the complaint states facts sufficient to introduce the defendant carrier as an independent agent between the shipper and the plaintiff, whose failure to warn the plaintiff of the danger incident to the handling of the machine was the proximate cause of the injury. This contention is based upon a mere inference. If it is a fact, it is a matter of defense for this defendant. It was not stated in plaintiff's complaint and he was not required to do so. But, assuming that such an inference might be drawn, or that the pleadings might be made to present such a defense, what, then, would be the application of the rule of proximate cause?

This question has been before the courts in many cases, arising in a great variety of relations between the parties; but we shall not attempt to state the conclusions of the court in any except in such cases as are of admitted authority and applicable to the facts stated in the complaint before us. In Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256, Mr. Justice Strong, delivering the opinion of the Supreme Court, said (94 U. S. on page 474, 24 L. Ed. 256):

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. Scott v. Shepherd, 2 W. Bl. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In the later case of Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, the same learned justice said (95 U. S. on page 130, 24 L. Ed. 395):

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

The court then quotes from Mr. Phillips in his work on Insurance as follows:

"The maxim 'causa proxima spectatur' affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental * * * or the consummation of the catastrophe."

The court quotes further:

"In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster. * * * The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss."

The English case of Farrant v. Barnes (1862) 11 C. B. N. S. 553, 142 Eng. Rep. 912, is very much in point. The action was to recover damages for an injury sustained by the plaintiff from the breaking of a carboy labeled as containing "acid," without any further identification. The carboy in fact contained nitric acid, an exceedingly corrosive and dangerous liquid. While the plaintiff was carrying the carboy, part of the contents escaped, and, flowing over the plaintiff, injured him. The original producer and shipper was the defendant Barnes, whose foreman delivered the carboy to one Russell, who delivered it to the plaintiff. The latter was the servant of Russell, the carrier. The carboy was to be carried to its destination according to the accustomed course of business. Erle, C. J., said:

"The application to the plaintiff being an application to take charge of and to carry and deliver a dangerous article, it was the duty of the defendant (the shipper), who knew the danger, to take care that the dangerous character of the article should be made known to all persons who were to be concerned in the carriage of it."

Willes, J., was of the same opinion. He said:

"A person who gives another dangerous goods to carry, goods which require more care and caution than ordinary merchandise, and which are likely in the absence of such caution to injure persons handling them, is bound to give notice of their dangerous character to the party employed to carry them, and is liable for the consequences which are likely to ensue from the omission to give such notice."

After referring to cases supporting this doctrine, the court continues:

"Where a person employs another to carry an article which from its dangerous character requires more than ordinary care, he must give him reasonable notice of the nature of the article, and if he fails to do so he is responsible for the probable consequences of his neglect."

This case has been cited as an authority in this country in a number of cases. In Schubert v. Clark, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, there is a review of the leading American authorities upon the subject and a striking application of the principle of liability of the producer or manufacturer of an article who puts it on the market with a concealed danger and injury results therefrom. It was held, as stated in the syllabus of the case:

"If one engaged in the business of manufacturing goods not ordinarily of a dangerous nature, to be put upon the market for sale and for ultimate use, so negligently constructs an article that by reason of such negligence it will obviously endanger the life or limb of any one who may use it, and if the manufacturer, knowing such defects, and knowing that the same are so concealed that they are not likely to be discovered, puts the article in his stock of goods for sale, he is liable for injuries caused by such negligence to one

into whose hands the dangerous implement comes for use in the usual course of business, even though there be no contract relation between the latter and the manufacturer."

In the recent case of Bryson v. Hines (C. C. A.) 268 Fed. 290, 11 A. L. R. 1438, several federal and state authorities are cited where the question has been carefully considered. In answer to the defense set up in that case that "one injured by a dangerous or defective instrumentality in the hands of another person cannot recover against a third person who sold or furnished it, because of lack of privity of contract," the court said (268 Fed. on page 294, 11 A. L. R. 1438):

"But the opposite rule applies where the person selling or furnishing the article or instrumentality knows it to be dangerous, and also knows it will be used by other persons not aware of the danger; and this rule holds, even if the person to whom the article was sold knows the danger. Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 179, 29 Sup. Ct. 270, 53 L. Ed. 453; O'Brien v. American Bridge Co., 110 Minn. 364, 125 N. W. 1012, 32 L. R. A. (N. S.) 980, 136 Am. St. Rep. 503, and numerous authorities cited; Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. In such case the additional tort of the buyer in concealing the danger does not cancel that of the seller; the person injured has his remedy against two wrongdoers, instead of one."

We think that under the weight of authorities the complaint states a cause of action against the defendant the Oliver Chilled Plow Works. The judgment of the District Court is accordingly reversed, with directions to overrule the demurrer.

McCREE v. DAVIS, Director General of Railroads.

(Circuit Court of Appeals, Sixth Circuit. April 14, 1922.)

No. 3590.

1. **Carriers ⟸307(1)—Railroad, as private carrier, may contract against liability for negligence.**

A railroad company, though a common carrier, when acting outside the performance of its legal duties, may contract as a private carrier and stipulate against liability for injury to persons caused by its negligence.

2. **Carriers ⟸307(4), 320(1)—Contract against liability for willful or wanton negligence invalid; willful or wanton negligence as affecting limitation of liability held for jury.**

Plaintiff, a circus performer, by her contract with a circus company, released it from any liability for personal injuries which might be sustained by her while being transported in the circus train, and also any railroad company engaged in moving such train, whether due to the fault or negligence of employés of either company. The circus company made a contract with defendant railroad company, by which the latter agreed to furnish trackage, motive power, and crew to move the circus train over a designated route; the contract providing that, while so employed, the members of the crew should be deemed servants of the circus company, and that defendant should not be liable to such company, nor to any person or persons, for injury to any persons or property transported thereunder, caused by defects in tracks, negligence of the train crew, "or arising from any cause whatsoever." Plaintiff, while traveling in the

circus train, was injured in a collision between that train and a train of defendant. *Held* that, while the latter contract was effective to release defendant from liability for ordinary negligence, it was invalid, as against public policy, as a release from liability for willful or wanton negligence, and evidence tending to show that those in charge of defendant's train ignored block signals, which gave warning of the train ahead, and crashed at full speed into the circus train, which was standing still, was sufficient to require submission to the jury of the question of willful or wanton negligence.

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

Action at law by Hettie McCree against James C. Davis, Director General of Railroads, as Agent (Michigan Central Railroad Company). Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error, hereinafter called the plaintiff, commenced an action in the United States District Court for the Northern District of Ohio, Western Division, against Walker D. Hines, Director General of Railroads, to recover damages for personal injuries sustained by her on the 22d day of June, 1918, in a collision between two railway trains on the lines of the Michigan Central Railroad Company at Ivanhoe, Ind., which collision, it is averred in the petition, was caused by the wanton and willful negligence of the defendant in moving a train of cars on the tracks of the Michigan Central Railroad Company and approaching the rear of the train on which plaintiff was riding, at the rate of 60 miles an hour, notwithstanding the block signals, with which the defendant's railway system was equipped, were displayed far in the rear of the forward train, in such manner as to show that the track in the rear of plaintiff's train was not clear, and that to proceed along such track would result in a collision. Later the defendant in error, James C. Davis, the present Director General of Railroads, as Agent under section 206 of the Transportation Act of 1920 (41 Stat. 461), was substituted as defendant in this action, and will hereafter be designated as defendant in this statement of facts and opinion.

Hettie McCree is the wife of Reno McCree, both of whom are circus performers. Early in 1918 they entered into a joint contract with the circus company, which contract provides, in substance, that the plaintiff and her husband would release and forever discharge the Hagenbeck-Wallace Shows Company from all claims, damages, liabilities, and causes of action for personal injury or loss of property sustained while in performance of duty, or while traveling in circus trains, or on railway tracks or yards, whether due to the fault or negligence in any degree, if any, of the circus company, its agent or employés, or any transportation company, its officers or servants, in any manner, and also a release and discharge of every railroad company, its officers and servants, engaged in transporting the Hagenbeck-Wallace Circus, from all claims, demands, liabilities, and causes of action for injury to person or property while on its tracks or yards, or while being transported by such company. The contract further provided that the plaintiff and her husband would protect, indemnify, and save harmless the Hagenbeck-Wallace Shows Company with respect to any money it might be compelled to pay or surrender, or to which it may be subject, in consequence of any accident or injury or death of the plaintiff or her husband while occupying circus cars, or while upon the track of any railroad company, and further authorized the Hagenbeck-Wallace Shows Company to assign this contract to any such railroad to be used in its defense.

The Hagenbeck-Wallace Shows Company on the 28th day of May, 1918, entered into a contract with the Michigan Central Railroad Company and the Indiana Harbor Belt Railroad Company, each for itself and not for the other, by the terms of which contract these railway companies agreed to furnish tracks, siding, motive power, and crews necessary for the transportation of the Hagenbeck-Wallace Shows Company circus trains over their respective lines from Toledo, Ohio, to Franklin Park, Ill., via a number of stations in

Michigan and Indiana, and to deliver at Franklin Park, Ill., the loaded equipment and circus cars and train to the Chicago, Milwaukee & St. Paul Railway. The fifth paragraph of this contract reads in part as follows:

"Fifth. The liability of the respective parties hereto as to all persons and property transported or to be transported in pursuance of this agreement shall be governed by the provisions thereof, and in that behalf it is agreed that this contract is not made with the said railroad company as a carrier, either common or special, of the said persons or property or any thereof (the compensation to be paid by said second party being wholly inadequate consideration for any such undertaking), but as a hirer to the party of the second part of the motive power and of men to operate the same, and of the right to use the road and tracks of the said railroad company, to the extent necessary in the premises, and that the conductors, engineers, trainmen, and other employés furnished by the said railroad company hereunder shall, as between the parties hereto, while engaged in such employment, be deemed to be the servants of the party of the second part, and that the said railroad company shall not be liable to the said party of the second part, nor to any person or persons, for any injury or damage which may happen to said persons, cars, or property to be or which will be transported hereunder, which may be caused by defect in said railroad or tracks or unsuitableness thereof for such transportation, or by the negligence of said conductors, engineers, trainmen, or other servants, or any or either of them, or arising from any cause whatsoever."

This contract was made pursuant to Freight Tariff I. C. C. 5105, filed with the Interstate Commerce Commission May 29, 1918.

About 11 o'clock p. m., June 21, 1918, and after the night performance in Michigan City, Ind., the plaintiff and her husband retired to their sleeping berth in the car provided for them by the circus company. This car, with three or four other sleeping cars, was attached to the rear part of the circus train, consisting of about 25 cars in all, which train was to be transported that night, to Hammond, Ind. Neither the plaintiff nor her husband paid any passenger fare, but accepted the transportation provided for them by the circus company in accordance with their contract with that company.

There is evidence in this record tending to prove that, as this section of the circus train approached Ivanhoe tower about 3:45 a. m. on the 22d of June, it was compelled, on account of a hot box, to stop about 300 feet east of the E. J. & E. tracks and east of Ivanhoe tower, where there is a spur track leading from the Michigan Central to the Gary & Western tracks; that the circus train moved on the crossover and stopped with about 10 or 11 cars remaining on the main track of the Michigan Central and about 14 or 15 cars on the crossover track to the Gary & Western; that east of Ivanhoé tower the tracks of the Gary & Western Railroad parallel the tracks of the Michigan Central for a distance of 4 or 5 miles. There is also evidence tending to prove that the Michigan Central was then equipped with automatic block signals; that the Ivanhoe tower was equipped with such a signal, and also with other arms to indicate whether the crossover track was open or not; that directly east of the Ivanhoe tower there are a series of block signals; that, whenever a train is in one block, the signals in the first block, immediately to the rear, will show red, and the signals in the second block to the rear will show yellow; that, if for any reason the means of controlling these signals fail to operate, then all signals in all of these blocks will show red.

There is also evidence tending to prove that the circus train was followed by another train consisting of some 20 empty Pullman coaches, to be used for the movement of troops, which train is usually referred to in the evidence and briefs as the troop train; that, when the circus train stopped, the rear brakeman procured a couple of fusees, got off the train, and started to walk back eastward along the track. After he had walked some 200 or 300 feet east he heard the exhaust of the troop train, but was unable to tell from the sound whether the troop train was on the Michigan Central tracks or the tracks of the Gary & Western; that he could not see the train, because it was around a sharp curve three-quarters of a mile east of the Ivanhoe crossing; that he continued walking to the rear, without increasing his speed until he

saw the headlight coming around the curve; that he knew the Michigan Central was equipped with a block system, and he also knew that there was a block signal just around the curve—that is, just west of it; that when he saw the train was upon the Michigan Central track he realized the engineer of the approaching train was not obeying this block signal; that he then started to run eastward down the track, and as the troop train kept coming onward he lit one of the fusees he had taken with him and swung it a few times across the track; that he observed no indication that the train was checking its speed, and when it was almost upon him he stepped off of the track to his left, and threw the lighted fusee at the window of the engine cab. This availed nothing, and the train shortly thereafter crashed into the rear end of the circus train.

At the conclusion of the plaintiff's evidence the defendant moved for a directed verdict, which motion was sustained by the trial court, and the plaintiff's exceptions noted.

Harold W. Fraser and Percy R. Taylor, both of Toledo, Ohio (Marshall & Fraser, of Toledo, Ohio, on the brief), for plaintiff in error.

J. Walter Dohany, of Detroit, Mich. (Potter & Carroll, of Toledo, Ohio, and Frank E. Robson, 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). The trial court, as appears from its opinion, copied into the record in this case, sustained the motion of the defendant for a directed verdict upon the theory that the contract between the plaintiff and her employer, the circus company, and the contract between the circus company and the railroad company, were valid contracts, barring plaintiff from recovery of any damages in this action. It is unnecessary to consider these contracts in detail. If either is valid, it would be a bar to plaintiff's recovery of damages for injuries which she may have sustained by reason of the ordinary negligence of the railway's employés.

[1] While the validity of the contract between herself and the circus company might well be challenged as an Ohio contract (section 6243, Gen. Code Ohio; Railway Co. v. Kinney, 95 Ohio St. 64, 115 N. E. 505, L. R. A. 1917D, 641, Ann. Cas. 1918B, 286), regardless of the attempt to escape the settled public policy of Ohio by providing that the laws of the District of Columbia, or some other state or country, having no connection whatever either with the making or performance of the contract, should control (Insurance Co. v. Clements, 140 U. S. 226, 232, 11 Sup. Ct. 822, 35 L. Ed. 497; Insurance Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181, quoted and approved in Insurance Co. v. Hill, 193 U. S. 551, 554, 24 Sup. Ct. 538, 48 L. Ed. 788), or as so offending against the public of Ohio that it would not be enforced in the courts of Ohio (Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274; Grosman v. Union Trust Co., 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917B, 613), or by a federal court in Ohio, for the reason that the law of Ohio is, in a case of this character, equally the lex fori as if the case were pending in an Ohio court (Pritchard v. Norton, 106 U. S. 129, 1 Sup. Ct. 102, 27 L. Ed. 104; Trust Co. v. Grosman, 245 U. S. 412, 418, 38 Sup. Ct. 147, 62 L. Ed. 368; Grosman v. Union Trust Co., 228 Fed. 610, 143 C. C. A. 132, Ann. Cas. 1917A, 613; Keystone Wood

Co. v. Boom Co., 240 Fed. 296, 153 C. C. A. 222), nevertheless the decision of either of these questions would avail nothing, for the reason that the authorities are unanimous in holding that the railroad company, although a common carrier, when acting outside the performance of its legal duties, may contract as a private carrier and stipulate from liability for injury to persons or property caused by its negligence, and that the employés of the circus company, accepting transportation under such a contract, are bound by its terms (Railroad Co. v. Maucher, 248 U. S. 359, 39 Sup. Ct. 108, 63 L. Ed. 294; Clough v. Grand Trunk Ry. Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. [N. S.] 446; Wilson v. Railroad Co. [C. C.] 129 Fed.. 774; Railroad Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; Railway Co. v. Henry, 170 Ind. 94, 103, 105, 83 N. E. 710).

[2] There is, however, a serious controversy between counsel as to the correct construction of the fifth paragraph of this contract between the railroad company and the circus company. It is contended on the part of the defendant that the words "or arising from any cause whatsoever" comprehend and include the negligence of any of the railway company's servants and employés. It is contended on the part of counsel for plaintiff in error that this construction is entirely too broad, and that this provision should be construed in accordance with the doctrine of ejusdem generis. It is undoubtedly a canon of construction that all contracts limiting liability must be strictly construed against the carrier. Nevertheless the words used in a contract must be given their plain, usual, and ordinary meaning, and where that meaning is clear and unambiguous it cannot be controlled or changed by any rules of interpretation that might be useful and applicable to the interpretation of ambiguous language or uncertain or indefinite terms in a contract. This language is plain and comprehensive. In so many words it provides that the railway company shall not be liable to the circus company, or to any person or persons, for any injury or damage which may happen to said person, cars, or property "arising from any cause whatsoever." It is true that there are a number of specific causes of accident or injury mentioned, such as defects in railroad or tracks, or unsuitableness of tracks for the purpose, or the negligence of conductors, engineers, trainmen or other servants or any or either of them.

It would seem from other parts of this paragraph that the employés specifically mentioned, were the conductors, engineers, trainmen, or other employés furnished by the railway company to the circus company for the moving of the circus train and engaged in the handling of the circus train, nevertheless the application of the doctrine of ejusdem generis to this comprehensive provision "or arising from any cause whatsoever" would necessarily defeat the intent, purpose, and effect of this provision. This court is therefore of the opinion that paragraph 5 of this contract must be construed as a release of this railway company from all damages to persons and property of the employés of this circus company caused by the ordinary negligence of any of the employés of the railway company, and that, the plaintiff in error having accepted transportation under this contract, she is bound by its terms. The railroad company, however, could not contract, either with the

circus company or the employés of that company, for a release from any willful and wanton negligence on its part; therefore this comprehensive provision, "or arising from any cause whatsoever," cannot be held to include wanton and willful negligence on the part of the railroad company or its employés, and, if so construed, it would be void as against public policy.

The second amended petition charges that the injury to the plaintiff was occasioned by the wanton and willful negligence of the defendant's agent, servants, and employés in charge of and operating the troop train, which collided with the rear end of the circus train, and if there is any evidence tending to support this allegation of the plaintiff's petition, then she would be entitled to have that question submitted to a jury, regardless of the contracts, and regardless of the fact that she did not sustain the relation of passenger to the railway company. It is insisted, however, that there is no such thing as willful negligence, for the reason that the term implies intentional injuries, and that, in the case of intentional injury, negligence is of no importance. There is, however, a substantial difference between the terms "willful negligence" and "intentional injury," as these terms are commonly understood. A person may be guilty of willful negligence, without having formed the actual intent to injure any person, much less the particular individual who happens to be injured by the result of that negligence.

It is also said that the terms "wanton" and "willful" are merely vituperative epithets, that add nothing whatever to the charge of negligence. The Supreme Court of the United States does not seem to entertain this view of wanton and willful negligence. On the contrary, in the case of Railroad Co. v. Mohney, 252 U. S. 152, 157, 40 Sup. Ct. 287, 289 (64 L. Ed. 502, 9 A. L. R. 496), that court said:

"But the Court of Appeals affirmed the judgment on two grounds, one of which was that all of the judges were 'clearly of the opinion that the negligence in the case, under the evidence, was willful and wanton.' This court does not weigh the evidence in such cases as we have here, but it has been looked into sufficiently to satisfy us that the argument that there is no evidence whatever in the record to support such a finding cannot be sustained. A carrier by rail is liable to a trespasser or to a mere licensee willfully or wantonly injured by its servants in charge of its train (Commentaries on the Law of Negligence, Thompson, §§ 3307, 3308 and 3309, and the same sections in White's Supplement thereto), and a sound public policy forbids that a less onerous rule should be applied to a passenger injured by like negligence when lawfully upon one of its trains. This much of protection was due the plaintiff as a human being who had intrusted his safety to defendant's keeping. Southern Pacific Co. v. Schuyler, 227 U. S. 601, 603; Chicago, Rock Island & Pacific Ry. Co. v. Maucher, 248 U. S. 359, 363."

It is said, however, that the doctrine announced by the Supreme Court in the Mohney Case applies to passengers only, because the court expressly used the word "passenger" in connection with willful and wanton negligence. The court, however, in the language above stated, expressly applied this rule of liability for willful and wanton injury to trespassers or mere licensees. In Railway Co. v. Maucher, supra, the Supreme Court said:

"Furthermore, plaintiff was not even a passenger on the railway. His claim rests, not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another."

To the same effect is the doctrine announced in Railway Co. v. Schuyler, 227 U. S. 601, 613, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901.

This plaintiff was not a trespasser or mere licensee. Even if she did not sustain the relation of a passenger to the railroad company, she was being transported, either by the railroad company, itself, or by the circus company using the tracks, motive power, and train crew furnished to the circus company by the railroad company, not gratuitously, but at a price satisfactory to the railroad company, and paid to the railroad company by the circus company. Therefore she was entitled to ride upon this train, and she was rightfully upon the tracks of the defendant company. Under the authority of the cases above cited, the plaintiff as a human being was entitled, at the very least, to be protected from the willful and wanton negligence of the agents and servants of the railroad company engaged in the operation and movement of other trains upon its tracks. It was said by this court in the case of Fluckey et al. v. Southern Ry. Co., 242 Fed. 468, 155 C. C. A. 244, that:

"Gross and wanton negligence of a railway company, to avoid the contributory negligence of a person struck by a railway motor car, must be really willful or so highly reckless as to constitute the equivalent of willfulness."

In Perna v. Rapids Ry. Co., 250 Fed. 728, 731, 163 C. C. A. 60, 63, this court said:

"We think there was error in failing to give effect to the charges introduced into the amended declaration and to the evidence tending to support them. This was not to present a case of mere negligence on the part of a wrongdoer, which might be defeated by the contributory negligence—that is, the mere negligence—of the person injured. It is a case of culpability in the wrongdoer, different in kind from ordinary negligence, and creates liability in favor of an injured person whose own ordinary negligence contributes to the injury; the two kinds of culpability thus involved have no relation to each other"—citing Aiken v. Holyoke Street Railway, 184 Mass. 269, 271, 68 N. E. 238; McGhee v. Campbell, 101 Fed. 936, 942, 42 C. C. A. 94, 100.

The court also quotes with approval from the opinion of McGhee v. Campbell, supra, the following:

"In cases where the injury is wanton or willful, the doctrine of contributory negligence has no application."

While the doctrine announced in these cases is not applicable to the facts in the case at bar, nevertheless they are pertinent for the purpose of showing that this court has not heretofore considered the terms "gross," "wanton," and "willful" as merely vituperative adjectives.

It is a settled rule of law that a contract purporting to release the defendants from all liability for negligence would be ineffective as a defense, where the injury to the plaintiff results from such willful and wanton negligence on the part of the servants of the defendant. Railway Co. v. Mohney, supra. The wanton and willful negligence charged in the Mohney Case was that the second section of the train ran past two block signals indicating danger ahead, and collided with the rear car of the first section in which Mohney was riding, causing him serious injury. Therefore the question here presented as to the

facts constituting wanton and willful negligence is identical with the question in the Mohney Case, and, as we have heretofore noted in this opinion, the Supreme Court in the Mohney Case was merely applying the rule of liability to a trespasser or to a mere licensee for willful or wanton negligence to one riding upon a pass, regardless of whether that pass was or was not gratuitous.

The plaintiff in this case has specifically stated the facts upon which she predicates the averment that the negligence of the defendant's servants was willful and wanton. There is evidence in this record tending to prove these averments of her petition charging willful and wanton negligence on the part of the employés of the railway company other than those employed in the movement of the circus train, and who under no construction of this contract between the circus company and the railway company could be held to be the servants of the circus company. Therefore it was a question for the jury to determine whether the plaintiff had sustained, by a preponderance of the evidence, the truth of the allegations of her petition in this respect, and, if so, whether the failure of the railway employés in charge of the troop train to observe and obey the block signals and the signals given by the rear brakeman of the circus train evidenced such reckless disregard for human life and human safety as to constitute willful and wanton negligence.

For the reason above stated, the trial court erred to the prejudice of the plaintiff in error in sustaining the motion of the defendant for a directed verdict. The judgment of the District Court is reversed, and the cause remanded for a new trial in accordance with this opinion.

HINES, Director General of Railroads, v. WOODSON.

(Circuit Court of Appeals, Seventh Circuit. January 17, 1922.)

No. 2964.

1. **Railroads ⟸5½, New, vol. 6A Key-No. Series—No liability without previous notice for obstruction of stream by predecessor in title.**

   The Director General of Railroads *held* not liable for flooding of land alleged to be due to obstruction of a stream by a bridge built by a railroad company many years before he took control of its operation, and of the improper construction of which he was not given notice.

2. **Railroads ⟸108—Change of bridge over water course held not required by statute.**

   Hurd's Rev. St. Ill. 1917, c. 114, § 20, requiring railroad companies to restore water courses which their roads follow or cross to their former state, and to construct such culverts or sluices as the natural lay of the land requires for proper drainage, *held* not to require the Director General of Railroads to change the construction of a bridge built by the railroad company before the statute was enacted, and which also, under the conditions existing when it was built, conformed to the requirements of the statute.

3. **Waters and water courses ⟸168—Prescriptive right gives no right to require change.**

   The fact that owners of land constructed an artificial channel through which water flowed under a bridge previously built by a railroad com-

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

pany and maintained it for more than 20 years gave them a prescriptive right, if at all, only in the use of the channel in its then condition and no right to require the bridge to be altered.

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

Action at law by Orion A. Woodson against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed.

Defendant in error, herein called plaintiff, for 13 years part owner of a 10-acre tract of land and lessee for the same time of the land of the coplaintiff (dismissed out of this case), obtained a judgment against plaintiff in error, Director General of Railroads, herein called defendant, on the charge that defendant had wrongfully and illegally caused to be placed and maintained within the channel of a natural water course two bridges, by reason whereof the timber and piling parts of said bridges caught driftwood, etc., thereby obstructing the natural flow of the water, so that it overflowed and injured plaintiff's crops. The Wabash Railway Company was also made a defendant, but was dismissed from the case by plaintiff.

The general course of the Keokuk line of the Wabash Railroad from Bluffs, in Scott county, Ill., to bridge 277A, the most easterly of the two bridges complained of, was substantially east and west. The natural flow of all waters in that vicinity was from the north and northeast to the south and southwest, and the railroad, probably at the time of its construction, built, as a part of its road, bridge 500, one of the bridges complained of, just east of Bluffs, and made numerous other openings for the passage of the water to the south. Wolf creek, originating in the territory north and east of Bluffs, passed unobstructed through bridge 500 to the south and west, and it is conceded that no injury accrued to plaintiff from that bridge. This is important because it is the only bridge covered by the declaration built over a natural water course, and with that bridge out of the case there is no complaint or evidence that the openings in the roadbed, as it was originally built, were not and had not at all times since been sufficient to permit the escape of the waters from north of the railroad to the south.

Bridge 277A, which it is claimed caused the damage suffered by plaintiff, was built in 1888, and was supported by abutments at each end and by three bents, or wooden piling, one in the middle and the others about 16 feet either side of the middle, and the bridge has been maintained in that position and condition ever since its construction. Before the building of that bridge there probably had been an opening or passageway for cattle, through which no water passed, unless at times some surface water passed toward the south.

The evidence shows that Wolf creek, passing through bridge 500, followed down the south side of the railroad to a point some 600 to 1,000 feet from the point where bridge 277A was afterwards placed, and there it emptied off into the swamp southwest of the railroad and over the land in question in this case.

Bridge 277A was built by the Wabash Railroad on the request of the former owner of plaintiff's land and the owners of other lands, as a part of their plans to reclaim their lands from overflow. A year after 277A was built the landowners made a channel under the bridge and along the south side of the right of way towards the west, and also built on the south thereof a low levee, so that the waters from Wolf creek, instead of overflowing their lands, were carried through the channel to and under the bridge. That part of the channel made along the south side of the right of way of the railroad was so made that it was necessary to make a right angle turn to get under the bridge. The bridge was made some 10 feet longer than was asked for by the property owners, and the three bents above mentioned were placed at an angle from northwest to southeast, so as to facilitate the flow of the water. In addition to the fact that the evidence shows the bridge to have been properly constructed and adequate for all known purposes when built, the evidence also shows no complaint whatever, by anybody, then or since, except that in 1919 brush,

plank, poles and a variety of driftwood were caught by the bents, so that the passage of the water was stopped and backed up, from which the overflow resulted. This is the injury for which recovery is sought.

There is some evidence in regard to the levee, wholly uncontradicted, that is important in this case, and it is that from a point 200 to 250 yards northwest of bridge 500 down to bridge 277A there was, 30 years ago, a small levee, which was built higher at different times since then. There is no evidence that shows whether the process of building up was completed more than 20 years ago or not, but it does appear that in 1919 the levee had been raised to such a height in places that, if there was sufficient water, and the levee held, the water would go over the top of the Wabash rails.

While the plaintiff testified that it does not take much of a rain for the débris, rubbish, and driftwood to accumulate at bridge 277A and stop the flow entirely four or five times in a season, yet it does not appear that plaintiff's crops were damaged at any time except in 1919, the year in question. On the other hand, the plaintiff testified that he raised some corn, wheat, and alfalfa on this land every year when it was not too wet to put them in, and that there had never been a season since he had been there that the rain had bothered it over an hour or two. The carrying capacity of the ditch, by reason of the closeness of the levee to the railroad embankment, grew smaller as the artificial channel approached bridge 277A, so that at a point near 277A the area was only about one-third of what it was to the west near bridge 500, and in addition to this, at various points across the channel there were barbed wire fences and rail fences, and at one point the plaintiff had constructed a bridge of planks and poles to enable him to pass from his land over the top of the levee and across the railroad track, which bridge at the time of the overflow in question was carried away and lodged against bridge 277A, contributing its part to whatever stoppage there was at the bridge.

From these facts several questions are presented upon various assignments of error, but defendant, at the close of all the evidence, made a motion to instruct the jury to return a verdict for the defendant, which motion was denied. Error was assigned on this refusal of the court, and, as such a motion raised every legal objection to a recovery by the plaintiff on the pleadings, evidence, and law, we consider the questions as arising under that motion.

Walter Bellatti, of Jacksonville, Ill., for plaintiff in error.

Oscar J. Putting, of Springfield, Ill., and John A. McKeene, of Winchester, Ill., for defendant in error.

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge (after stating the facts as above). [1] 1. Defendant contends that the Director General of Railroads neither built the bridge nor had any notice of its insufficiency, and therefore cannot be held liable for damages. We are of opinion that the courts of Illinois have determined this question in accordance with defendant's contention.

Plaintiff's urge is that in Groff v. Ankenbrandt, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 342, the only question was the sufficiency of one count of the declaration, which did not allege that defendant erected the levee. In this, we think that counsel is in error. What the court said was:

"Inasmuch as the count does not state that the levee or embankment was erected by the defendant or originally placed by him where it is, it will be presumed that such levee or embankment was already upon the land when the defendant became possessed of it, and that consequently he was only responsible for allowing the obstruction to remain as it was when the premises came into his hands."

The court further said:

"Where a party comes into possession of land, as grantee or lessee, with an existing nuisance upon such land, and he merely permits the nuisance to remain or continue, he cannot be held liable in an action for damages until he has been first notified or requested to remove the nuisance."

In Tetherington v. St. Louis, Troy & Eastern R. Co., 226 Ill. 129, 132, 133, 80 N. E. 697, 699 (12 L. R. A. [N. S.] 571), the Supreme Court reaffirmed the holding in the Groff Case, but held that authority not applicable to the facts in the Tetherington Case. After quoting the Illinois statute (Hurd's Stats. 1917, c. 114, § 20) relied on in this case by plaintiff, the court said:

"This section, we think, changed the rule of law with reference to nuisances as held in the Groff Case, supra—at least in so far as applied to railroads constructed after the passage of the act."

The Tetherington Case can have no application here, because it there appeared that the embankment was built by the original company, in violation of the express terms of the act, in that it failed and neglected to construct necessary culverts and sluices to protect the adjoining owners against overflow, whereas in the case at bar the proofs show that all necessary openings were made so as not to obstruct the natural flow of the waters, and that the bridge in question, when built by the Wabash Railroad, many years before the Director General had anything to do with it, was constructed pursuant to the request of property owners, and was much more than sufficient to meet all of the then contemplated requirements as a new artificial water course; and, too, it was built long prior to the enactment of the statute of 1891.

The District Court of Indiana cited with approval the Groff Case in Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 57 Fed. 441. The latter case was quoted from and approved in Phila. & R. R. Co. v. Smith, 64 Fed 679, 682, 12 C. C. A. 384, 27 L. R. A. 131 (3d C. C. A.). In 1916 the Eighth Circuit Court of Appeals, in Union Pac. R. Co. v. Campbell, 236 Fed. 708, 711, 150 C. C. A. 40, cited and approved the Smith Case and Central Trust Co. Case, supra.

[2] 2. Was there any obligation upon the defendant to in any manner alter or change the bridge under the circumstances shown in the evidence? In the Tetherington Case, supra, the court not only reaffirmed the doctrine of the Groff Case, but in its construction of the statute of 1891, above cited, said that the effect of that act was to change the law with reference to nuisances, as held in the Groff Case, in so far as applied to railroads constructed after the passage of the act.

Before the Tetherington Case, decided in 1907, Wabash R. Co. v. Sanders, 47 Ill. App. 436, was decided in 1893, and the court there said, referring to the statute of 1891:

"This section shows that it applies to roads constructed after that act went into effect."

Renner v. St. Louis, Iron Mt. & S. Ry. Co., 197 Ill. App. 11, decided in 1915, is to the same effect.

It is not thought that the statute of 1891 can have any influence on this case. Authority is thereby given to a railroad to construct its railway across, along, or upon any stream of water or water course, but requires that it shall restore the stream or water course to its former state, or to such state as not unnecessarily to have impaired its usefulness. Inasmuch as the water course in question in this case did not exist when the bridge in question was constructed, there was no stream of water or water course to restore. The further provision "that in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof" cannot possibly apply to this case, because there was no natural lay of the land at the point of bridge 277A that required or made necessary any bridge to carry water toward the north. It necessarily follows that all of those cases, like the Tetherington Case, supra, Ramey v. B. & O. S. W. R. Co., 235 Ill. 502, 85 N. E. 639, and many like cases decided under the statute of 1891, or under some special charter requirement of like character, or under a common-law obligation not to erect and maintain a nuisance, can have no bearing on this case, for the reasons above given, and also for the further reason that the bridge, when it was constructed, was not a nuisance that was in violation of the rights of plaintiff or any one else. On the contrary, it seems to have been built for the sole accommodation of the property owners, of whom a remote grantor in the chain of plaintiffs' title presumably was one. At least the record shows that that land before that time was low, swampy land, overflowed by the water which subsequently passed through bridge 277A. No statutory or common-law obligation devolved upon the Director General.

[3] Great stress is laid upon the averment and claim that the water flowing under bridge 277A became, after a lapse of 20 years, a natural water course, and also gave the plaintiff and other property owners prescriptive rights.

In Ribordy v. Murray, 177 Ill. 134, at page 140, 52 N. E. 325, 327, a water course is described as follows:

"If the conformation of the land was such as to give the surface water flowing from one tract to another a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water course, within the meaning of the rule applicable to this class of cases. Lambert v. Alcorn, 144 Ill. 313."

In Lambert v. Alcorn, 144 Ill. 313, 324, 33 N. E. 53, 56 (21 L. R. A. 611), supra, the court added:

"Doubtless such water course can exist only where there is a ravine, swale, or depression of greater or less depth, and extending from one tract on to the other, and so situated as to gather up the surface water falling upon the dominant tract and to conduct it along a defined course to a definite point of discharge upon the servient tract."

Plaintiff relies upon Broadwell Drainage Dist. v. Lawrence, 231 Ill. 86, 99, 83 N. E. 104, 108, in support of his contention that the water as it flowed under the bridge was a natural water course. All that that

case held is that, if an artificial channel has been made to serve as a permanent channel, and the flow of water is continued for the period of prescription, owners of land through which it flows may acquire the right to use the artificial channel as if it were a natural stream. That much admitted, it does not follow that it is a natural water course. After quoting from many authorities, the court quotes from Washburn on Easements language which it accepts as the general principle underlying all such cases:

"Where one who owns a water course in which another is interested or by the use of which another is affected does or suffers acts to be done affecting the rights of other proprietors whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the courts often apply the doctrine of estoppel, and equity, and sometimes law, will interpose to prevent his causing such change to be made."

Even if it appears that property owners, including the plaintiff, gained some prescriptive right in the flow of the water under bridge 277A, the underlying principle stated by Washburn and adopted by the Illinois courts is based upon the proposition, not that either party may be compelled by the other to make changes, but that the existing conditions must continue without change. In C., B. & Q. R. Co. v. Ives, 202 Ill. 69, 66 N. E. 940, the court said:

"In order that a way may be established by prescription the use and enjoyment thereof must have been adverse, under a claim of right, exclusive, uninterrupted, and with the knowledge and acquiescence of the owner of the land in or over which the easement is claimed, for the period of twenty years. Rose v. City of Farmington, 196 Ill. 226. A mere permissive use never ripens into a prescriptive right. Washburn on Easements, p. 132."

The Indiana Court of Appeals, in McCaslin v. State, 38 Ind. App. 184, 75 N. E. 844, said:

"In Worthley v. Burbanks, 146 Ind. 534, 45 N. E. 779, it is said that, in order to constitute adverse possession, five indispensable elements must appear: '(1) It must be hostile and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; (5) it must be continuous.' In support of this rule the court cites numerous authorities. In Peterson v. McCullough, 50 Ind. 35, the court said: 'To acquire a right by prescription, there must be an actual enjoyment. Prescription acquires for the party precisely what he has possessed, and nothing more, and in proving a prescription the user of the right is the only evidence of the extent to which it has been acquired. The use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate, in, over, or out of which the easement prescribed for is claimed, and while such owner was able in law to assert and enforce his rights, and to resist such adverse claim if not well founded.'"

These authorities state the general rule with reference to rights by prescription. The piles or bents under bridge 277A were part of the bridge when it was constructed. When the property owners dug the trench under the bridge the bents and piles were there, and have been ever since. Neither the plaintiff nor any property owner ever had any right to the flow of water under the bridge, except as its flow was affected by the presence of the piles and bents. It necessarily follows, then, that plaintiff never had any right which was hostile to the rail-

road company's rights to retain and maintain the piles and bents, and it does not appear that there was at any time until the commencement of this suit any claim of right to have the bents or piles removed. There was no enjoyment without the presence of the piles, and, if it is true that "prescription acquires for the party precisely what he has possessed, and nothing more, and in proving a prescription the user of the right is the only evidence of the extent to which it has been acquired," it necessarily follows that the plaintiff gained nothing by prescription as against the presence of the piles or bents. In this case it is the plaintiff that is insisting upon a change, not the defendant.

This case must not be confused with cases arising under drainage and other acts in Illinois, such as Cache River Drainage Dist. v. C. & E. I. R. Co., 264 Ill. 97, 105 N. E. 699, cited by plaintiff, and East Side Levee & San. Dist. v. East St. L. & C. Ry., 279 Ill. 123, 116 N. E. 720.

4. It appears that the diverting of the waters, the right to the continuance of which was gained by prescription, if at all, did not begin at the point where the waters went upon the defendant's right of way and under the bridge, but that the diversion began some hundreds of yards toward the east, and that the railroad company at no time had anything to do with diverting the waters. The record discloses that, if the small levee, built about the time the bridge was built, had not been increased from time to time, great quantities of water would have at times continued to flow over the plaintiff's land, and never would have arrived for passage under the bridge, and it seems clear from the record that without additional height being added to the levees the débris, driftwood, etc., would probably not have reached the bridge at all, but would have gone off over plaintiff's land. There is nothing in the record whatever to show that the levee had been there for 20 years or more. It also appears that plaintiff himself contributed to the injury by placing across the waterway an insecure bridge, which was carried down by the water, lodged against the bridge, and formed one of the main obstructions causing the overflow. Other property owners placed rail and other fences in the stream that were doubtless carried down to the bridge by high water.

The judgment is reversed, and the cause remanded for proceedings in harmony with this opinion.

SMITH v. GALLEY.

(Circuit Court of Appeals, First Circuit. May 17, 1922.)

No. 1541.

1. **Master and servant ⟸201(1)—Concurrent negligence of master and fellow servant actionable.**

The employer is liable if his negligence contributed with that of a fellow servant to produce the injury complained of.

2. **Master and servant ⟸107(1)—Injury to workman in hatch held actionable.**

Where the evidence showed that the methods pursued and the instrumentalities used by the employer in the conduct of his business were

dangerous, and that the dangers could have been easily avoided by rules or regulations requiring men in the hatch to keep out from under a bucket, which discharged its contents on libelant when it was raised, or by simple safety devices, a decree against the employer was proper.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Libel in admiralty by Frederick J. Galley against Robert M. Smith to recover for personal injuries to libelant, sustained while in employment of libelee. Decree for libelant (272 Fed. 999), and respondent appeals. Affirmed.

Charles A. Strout, of Portland, Me. (Strout & Strout, of Portland, Me., on the brief), for appellant.

Raymond S. Oakes, of Portland, Me., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for the District of Maine in favor of the libelant, Galley, in an admiralty suit brought by him against the libelee, Smith, for personal injuries sustained while in the employment of the latter,

[1] The sole question is whether the libelant's injury was occasioned by the negligence of fellow servants or was due to the negligence of the libelee. The court below found that it was due to the negligence of the libelee. The libelee contends that this was error; that the evidence clearly shows that the injury complained of was occasioned by the negligence of fellow servants, and that he was in no way at fault. It must be conceded that, if the libelee was negligent and his negligence contributed with that of fellow servants to produce the injury complained of, the decree of the court below must be sustained.

[2] We do not find it necessary to review the evidence in detail. It clearly shows that the methods pursued and the instrumentalities employed by the libelee in the conduct of his business were dangerous; that the dangers could have been avoided by rules or regulations requiring the men in the hatch to keep out from under the bucket when it was being raised, or by providing a pennant so that the usual slack in the cable on the burden winch would not come in contact with the arm or handle on the bucket and raise the latch, or by providing some simple catch to hold the latch, so that it would not be raised and the bucket discharged in case the handle became engaged with the slack in the cable or hit against the hatch coamings; that the libelee had reason to apprehend this danger; that reasonable care required him to provide against it, which he failed to do; and that by reason of this failure the slack in the cable of the burden winch engaged the handle of the bucket, raised the latch, and caused the bucket to discharge its contents upon the libelant, while at work in the hatch.

The decree of the District Court is affirmed, with costs to the appellee.

WAHL v. MAIN.

(Court of Appeals of District of Columbia. Submitted March 15, 1922. Decided April 3, 1922. Rehearing Denied April 29, 1922.)

No. 1485.

1. **Patents ⟸83—Original application, containing subject-matter disclosed, but not claimed, in prior application, must be made within two years after patent to another.**

Where an application for a patent disclosed, but did not claim, an invention subsequently patented to another, the original applicant must file his original application, making such claim, within two years after the issuance of the other patent, unless the delay is excused, by analogy to the statute of public use (Rev. St. § 4886 [Comp. St. § 9430]).

2. **Patents ⟸106(2)—Whether public knowledge of invention prevents patent to party entitled to priority cannot be determined in interference proceedings.**

Whether the party entitled to priority in interference proceedings had knowledge of the invention disclosed in a prior application, which did not claim it, so as to prevent the issuance of a patent to him, is a question which cannot be decided in interference proceedings.

Appeal from the Commissioner of Patents.

Interference proceeding between John C. Wahl and Fred F. Main. From a decision of the Commissioner of Patents, awarding priority to Main, Wahl appeals. Affirmed.

See, also, Wahl v. Barrett, 50 App. D. C. 391, 273 Fed. 355; Same v. Wright, —— App. D. C. ——, 273 Fed. 766; Id., —— App. D. C. ——, 276 Fed. 455.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., for appellant.

B. C. Stickney and William L. Morris, both of New York City, for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a decision of the Commissioner of Patents awarding priority of invention to appellee, Main. Main filed his application November 12, 1910, upon which a patent was issued January 2, 1912. Wahl filed his application May 23, 1911.

The invention relates to combined typewriting and computing machines, the object of which is to provide a computing mechanism, operable from the numeral keys, and so connected with the carriage of the typewriter, that computation may be effected as the typewriter prints in any column. It is unnecessary to consider the mechanism, since the appeal can be disposed of upon questions of law.

Wahl reduced the invention to practice as early as April 1, 1910, in what has been designated as "the Jacobson Machine." This is prior to any date which can be accorded Main. The same invention was considered by this court in the case of Wahl v. Wright (Nov. 7, 1921) —— App. D. C. ——, 276 Fed. 455. In that case, the court affirmed the findings of the tribunals of the Patent Office that the Jacobson machine constituted a reduction to practice. The same holding has

been made by the Examiner and Board of Examiners in Chief in the present case, and in this we again concur.

[1] Wahl failed to make the counts of the present issue in his original application, but attempted, almost 4½ years after the issue of the Main patent, to copy the counts from Main's application. No excuse is offered by Wahl for his delay in copying the claims. The tribunals below, therefore, held Wahl estopped to make the claims under the holding in Chapman et al. v. Wintroath, 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491. In that case it was held that, where an application discloses an invention, which was not claimed by the inventor until the invention was later patented to another, the original inventor is allowed two years, after the issue of such intervening patent, within which to file a second or divisional application claiming the invention. The allowance of this period of two years by the court was made by analogy to the statute of public use. R. S. § 4886 (Comp. St. § 9430). Wahl undoubtedly would have had the right to make these claims at any time within two years from the issue of the patent to Main, but his failure to do so operates as an estoppel.

[2] But it is contended on behalf of Wahl that in no event can Main be awarded priority, since the Jacobson machine had been completed and knowledge thereof imparted to the public before Main came into the field. This, however, raises a question with which we are not concerned in this proceeding. Norling v. Hayes, 37 App. D. C. 169.

The decision of the Commissioner of Patents is affirmed. The costs incurred on the petition for certiorari to be paid by the moving party.

In re CHAS. R. LONG, JR., CO.

(Court of Appeals of District of Columbia. Submitted March 13, 1922. Decided April 3, 1922.)

No. 1476.

1. **Trade-marks and trade-names and unfair competition ⟸3(4)—"Stabrite," applied to metal polish, is descriptive word.**
   The word "Stabrite," as applied to a polish or coating for the front end and stacks of locomotives to preserve the metal, is a descriptive word, and cannot be registered as a trade-mark, in the absence of evidence of its having acquired a secondary meaning.
2. **Trade-marks and trade-names and unfair competition ⟸44—Commissioner can require disclaimer of descriptive words apart from associations shown.**
   The Commissioner of Patents has authority to require, as a condition precedent to registration of a trade-mark, that the applicant shall disclaim the use of a descriptive word apart from the associations shown.
3. **Trade-marks and trade-names and unfair competition ⟸43—Descriptive words are not protected by act giving effect to trade-mark convention.**
   Act March 19, 1920, to give effect to the convention for the protection of trade-marks and commercial names, which, by section 1, par. "b," excepts from its operation the marks specified in Trade-Mark Act, § 5, par. "a" and "b" (Comp. St. § 9490), which prohibit, among other things, the registration of descriptive words as trade-marks, does not enlarge the rights of an applicant to have registered a trade-mark containing a descriptive word.

Appeal from the Commissioner of Patents.

Application by Chas. R. Long, Jr. Company for registration of a trade-mark. From a decision of the Patent Office requiring a disclaimer of a descriptive word as a prerequisite of the registration of the mark, the applicant appeals. Affirmed.

Thomas M. Baker, of Washington, D. C., Paul Carpenter, of Chicago, Ill., and William S. Glyck, of New York City, for appellant.

T. A. Hostetler, of Washington, D. C., for Commissioner of Patents.

ROBB, Associate Justice. Appeal from a Patent Office decision requiring appellant to file a disclaimer of a descriptive word as a prerequisite to the registration of a claimed trade-mark.

One specimen of the mark filed with the application comprises a diamond-shaped figure around a similar figure inclosing a third diamond shaped figure containing the word "Stabrite." Appellant, however, contends that the following is the mark relied upon:

[1] In its application appellant alludes to the goods upon which its mark is applied as "a polish or coating for the front end and stacks of locomotives to preserve the metal over which it is applied." The Examiner, being of the view that the predominating feature of the mark by which the goods would become known is the word "Stabrite," and that the diamond-shaped figures surrounding it merely accentuate the word, required appellant to add to the drawing additional words apparently appearing on the mark as actually used, and to file a disclaimer of the descriptive word "Stabrite." The Commissioner, entertaining the view that the words required to be added form no part of the mark, ruled that it would be necessary to disclaim the use of the descriptive words "apart from the associations shown."

Appellant first challenges the ruling that the word "Stabrite" is descriptive. We agree with the Patent Office that, as here used, it is aptly so, and that there is no evidence of its having acquired a secondary meaning.

[2] It is next insisted that the Commissioner is without authority to require disclaimers. But in Beckwith v. Commissioner of Patents, 252 U. S. 538, 40 Sup. Ct. 414, 64 L. Ed. 705, it was ruled that it is not error for the Commissioner to require a disclaimer in a proper case.

[3] In his reply brief and in his argument at bar, however, appellant has contended that his rights are enlarged by the Act of March 19, 1920 (41 Stat. 533), "to give effect to certain provisions of the convention for the protection of trade-marks and commercial names, made

or signed in the city of Buenos Aires, in the Argentine Republic, August 20, 1910." But paragraph "b" of section 1 of that act, particularly relied upon by appellant, excepts from its operation marks specified in paragraphs "a" and "b" of section 5 of the Trade-Mark Act of February 20, 1905 (33 Stat. 724 [Comp. St. § 9490]). Under paragraph (b) of the Trade-Mark Act, a mark consisting "merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods," may not be registered. The act of 1920, therefore, does not change the status of appellant here.

It is apparent that the question whether the mark before the Patent Office is registerable is not before us, and therefore not decided. We merely decide that, assuming the mark is registerable, it was not error for the Commissioner to require the disclaimer.

The decision is affirmed.

Affirmed.

HOPP v. CALLOWAY et al.

(Court of Appeals of District of Columbia. Submitted February 13, 1922. Decided April 3, 1922.)

No. 3681.

1. **Appeal and error ⟸1008(1)—Finding of trial judge should not be disturbed, unless it is clearly error.**
   In a suit to establish a trust, a decision of the trial judge, who observed the witnesses, that plaintiff's conveyance was made to defraud his wife, will not be disturbed, unless clearly error.

2. **Trusts ⟸48—Plaintiff, because of fraud, held not entitled to enforce trust.**
   Where plaintiff conveyed realty to defendant's ancestor, and took a secret deed back, to defraud his wife of her inchoate dower interest, and later let a mortgage be foreclosed, after which his grantee repurchased, plaintiff, because of his fraud, cannot enforce a trust against his grantee's heir.

Appeal from the Supreme Court of the District of Columbia.

Suit by Richard Hopp against Thomas J. Calloway and others. From a decree dismissing plaintiff's petition, plaintiff appeals. Affirmed.

Irving Williamson, of Washington, D. C., for appellant.

James A. Cobb, Mason N. Richardson, C. S. Shreve, and William L. Houston, all of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, dismissing appellant's petition for the establishment and enforcement of a trust.

On December 26, 1906, Susan Hopp, mother of appellant and the owner and occupant of the real estate in controversy, executed a deed of trust to secure an indebtedness of $3,000, payable three years after date, with interest at 5 per cent. per annum, payable semiannually. She died in April of 1907, before the first installment of interest became due, and more than 2½ years before the principal fell due. Appellant,

her only son and heir, and Adeline Hume, were living with her at that time, and continued to reside on the premises until the death of Mrs. Hume in 1917. Hopp had been separated from his wife for several years, although the parties had not been divorced. On May 8, 1907, which it will be observed was prior to the due date of the first installment of interest, Hopp conveyed the property to Mrs. Hume by deed in fee for an expressed consideration of $10. This deed was recorded. At the same time Mrs. Hume executed a similar deed to Hopp, which was not recorded until August of 1908.

In his petition appellant avers that this step was necessary, because he had discovered that his mother was in arrears in her payments under the deed of trust; that a new loan was required, and that his wife had refused to join in the necessary conveyance; and that he held the deed from Mrs. Hume, reconveying the property to him, "until it was found, under advice given to him, that the conveyance to said Hume as trustee did not remove the difficulty as to the inchoate dower of his wife, and that it would be impossible for said Hume to execute a new deed of trust, which would be accepted as a means of obtaining a loan to take up the old trust, and so on August 4, 1908, the deed from said Hume, trustee, above referred to, to the plaintiff, was recorded," etc. In September following the property was sold under foreclosure proceedings, although the evidence leaves no room for doubt that appellant would have had no difficulty in meeting the interest due.

At the foreclosure sale the surplus in the hands of the trustees was, by direction of Hopp, paid to Mrs. Hume. The purchaser at this sale was the appellee Calloway, who entered into a secret written agreement with Mrs. Hume, under which, upon the fulfillment of certain conditions and payments on her part, the property was to be conveyed to her. Thereafter payments were made under this agreement, and Mrs. Hume was recognized by Calloway as the equitable owner. After her death, Hopp filed his petition. The appellee Delia Hume is the daughter of Adeline Hume, and she has been recognized by Calloway "as the successor in title in respect of said property of said Adeline Hume."

[1] The learned trial justice, who had opportunity to observe the witnesses, reached the conclusion:

"That the conveyance under which this title was vested in Adeline Hume was procured by the plaintiff for the purpose of fraudulently depriving his wife of her inchoate right of dower, and he is not entitled to the aid of a court of equity in the premises."

In such a case as this, where all the circumstances point to the conclusion reached by the trial justice, that conclusion ought not to be disturbed, unless error clearly appears. Comptograph Co. v. Adder Co., 41 App. D. C. 427; McLarren v. McLarren, 44 App. D. C. 555; Ellison v. Splain, 49 App. D. C. 99, 261 Fed. 247. It is sufficient to say that in our view the conclusion here is fully sustained by the evidence.

[2] Appellant contends that he consulted Calloway, who is an attorney, and that the foreclosure proceedings and the agreement with Mrs. Hume were the result. Calloway denies that he acted for Hopp, but the question is not important, since it is apparent that the intent of Hopp to defraud his wife of her dower was formed long prior to the

foreclosure proceedings. The deed to Mrs. Hume and the secret deed back to Hopp, in the circumstances in which they were made, clearly indicate this. The facts, then, bring this case clearly within the rule that—

"It is against the policy of the law to enable either party, in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another." Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Schermerhorn v. De Chambrun, 64 Fed. 195, 12 C. C. A. 81.

Appellant has no standing in a court of equity, and the court below was right in so holding.

The decree is affirmed, with costs.

Affirmed.

KNABE v. TERRELL & LITTLE, Inc.

(Court of Appeals of District of Columbia. Submitted February 9, 1922. Decided April 3, 1922.)

No. 3624.

Time ⇐10(9)—Half day preceding Christmas, on which municipal court was not open, not excluded from time to file bond.

Under Code, § 31, requiring a bond for appeal from a municipal court to be filed within six days, exclusive of Sundays and legal holidays, the day preceding Christmas is not to be excluded in computing the time, though the clerk's office was closed during the afternoon of that day, where the appellant did not attempt to file his bond thereafter until more than six days, exclusive of Sundays and legal holidays, after the entry of the judgment.

Appeal from the Municipal Court of the District of Columbia.

Landlord and tenant proceedings between E. J. Knabe and Terrell & Little, Inc. From a judgment dismissing an appeal from a judgment in the municipal court, Knabe appeals. Affirmed.

Raymond M. Hudson, of Washington, D. C., for appellant.

B. H. Warner, Jr., and Joseph Stein, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the municipal court of the District, dismissing appellant's appeal from a judgment in the municipal court, in a landlord and tenant proceeding in which the appellant was defendant, for failure to perfect the appeal by filing a bond "within six days, exclusive of Sundays and legal holidays, after the entry of judgment." Code, § 31.

The appeal was entered in the municipal court on the 18th of December, 1920, and the bond was not filed until the 28th of that month. Appellant filed a petition in the court below, alleging that the municipal court, including the clerk's office, was closed on the afternoon of the day preceding Christmas, and that this half day should be excluded in counting the six days within which the appeal was required to be perfected.

Without stopping to inquire whether this addition to the municipal court record could be thus made (see Dreslin v. Phillips, —— App. D. C. ——, 279 Fed. 303, present term, or whether the exclusion of this time really would benefit appellant, we will determine whether the time should have been excluded. The Code excludes Sundays and legal holidays for the obvious reason that it is assumed that business will not be transacted on those days, and hence that one would be unable to procure sureties or to perfect his appeal on such days. Assuming that the municipal court was not in session on the afternoon preceding Christmas, appellant was in no way prejudiced, because that day was not a legal holiday, and he did not attempt to file his bond until the next Tuesday, which was more than six days, exclusive of Sundays and legal holidays, after the entry of judgment.

It follows that the judgment below was right, and must be affirmed, with costs.

Affirmed.

R. HARRIS & CO. v. WELLER et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1922. Decided May 1, 1922.)

No. 3725.

1. **Brokers ⟨⟩106—Evidence held to show purchaser knew it was paying agent's commission.**

   Where the original contract for the sale of a building provided that a portion of the sum paid should apply on account of the purchase price, and $10,000 on fee charged, and a subsequent agreement stated the purchase price at $10,000 less than the former, but the vendor's agent required settlement on the basis of the original contract price, the purchaser's attorneys must have known that the contract required them to pay the agent's commission, which is not an unusual provision in contracts, though the commission is customarily paid by the vendor.

2. **Vendor and purchaser ⟨⟩341(1)—Delay of one year in seeking damages arising from sale held to bar relief.**

   The right of a purchaser to relief against an excessive purchase price exacted from him in the purchase of a large building, where the purchaser's representatives were business men, who knew that delay in a transaction of that magnitude would be almost certain to prejudice the rights of a former owner, is barred by a delay of one year in seeking relief.

3. **Landlord and tenant ⟨⟩81½, New, vol. 15A Key-No. Series—Expectation of renewal of lease is not property right as between the parties.**

   The expectation by a tenant that the landlord would renew his lease at the expiration of its term is not, as between the landlord and tenant, a valuable property right, though it may give the tenant a right against interference therewith by others.

4. **Vendor and purchaser ⟨⟩35—Owner has right to remain undisclosed.**

   Equity will grant no relief to a purchaser because the owner remained undisclosed, as he had a right to do, even though the purchaser might have made a better trade with the owner, if the latter had been disclosed.

5. **Brokers ⟨⟩102—Fact that agent exacted for principal more than the latter's minimum price is no ground for relief.**

   The fact that the agent for the undisclosed owner of a building demanded on behalf of his principal, and received from the purchaser, a larger price for the building than the minimum for which the vendor would

sell, and in addition required the purchaser to pay his commission, which was fixed at a reasonable amount, does not entitle the purchaser to equitable relief.

6. Vendor and purchaser ⊂=334(7)—Purchase price held not excessive.
Where the tenant of the ground floor of a building, for whom the location possessed peculiar value, paid for the building a sum which exceeded by $115,000 the amount paid for the building by his vendor a short time before, but his vendor had made a good-faith offer of $100,000 for the immediate cancellation of the lease, the price paid by the purchaser was not excessive.

7. Vendor and purchaser ⊂=122—Contract cannot be rescinded in part only.
A contract of sale cannot be avoided in part only, though whenever the point at which fraud begins clearly appears, there may be such a division.

Appeal from the Supreme Court of the District of Columbia.

Suit by R. Harris & Co., a corporation, against Joseph I. Weller and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

D. W. O'Donoghue and A. A. Alexander, both of Washington, D. C., for appellant.

Stanton C. Peelle and C. F. R. Ogilby, both of Washington, D. C., for appellees.

ROBB, Associate Justice. The appeal is from a decree dismissing plaintiff's bill for relief, growing out of the purchase by it of the Jenifer Building, so called, a six-story brick store and office building located at the northwest corner of Seventh and D Streets, Northwest, in this city. The facts, as detailed by the bill, are substantially these:

Plaintiffs and their predecessors, for approximately 25 years, had conducted a jewelry store under the name of R. Harris & Co., occupying for this purpose the first floor and basement of the Jenifer Building, which for some time (the exact period not being mentioned) was owned by Miss Josephine Davis, one of the defendants. On March 11, 1915, plaintiff's immediate predecessor entered into a written lease of that portion of the building occupied by the firm for the term of 5 years, beginning March 1, 1916, and the lease was duly recorded. This lease "was in effect a renewal of a then existing lease agreement, which, in turn, was in effect a renewal of a still prior lease agreement." The owner of the building "was in the habit of renewing and extending or giving a new lease, from time to time," and this "was a very valuable asset" of the business. In May of 1915 Abraham D. Prince, who prior to that time had conducted the business under the name of R. Harris & Co., died, and his daughters, as devisees and legatees under his will, sold to the plaintiff corporation the personal property and good will of the business "and the unexpired lease, * * * which included the expectancy" that at the expiration of the lease it would be renewed or a new lease given. Plaintiff, desiring to continue business in the same location after the expiration of the lease, communicated with the owner of the building, Miss Davis, in the early part of the year 1919, looking to the renewal of the lease. Plaintiff was referred to Henry E. Davis, Esq., the brother of Miss Davis, who, "after several months of

negotiation," and after he had informed plaintiff that a new lease or renewal would be given, finally, on April 18, 1919, "informed plaintiff that no definite promise for a new lease or renewal of lease could be given," and shortly thereafter Mr. Davis informed plaintiff that the building had been sold by his sister, "and, without informing plaintiff of the name of the alleged purchaser, told plaintiff that in the matter of said alleged sale his said sister was represented by the defendant National Savings & Trust Company, or by its president, the defendant William D. Hoover, and that the alleged purchaser in said alleged purchase was represented by the defendant Joseph I. Weller." Plaintiff was further informed that the new purchaser "would, no doubt, give plaintiff a new lease, * * * to take effect on the expiration of its then existing lease." Mr. Hoover was consulted, but he refused to give plaintiff any information as to the identity of the new purchaser, other than to inform plaintiff that Mr. Weller, a local lawyer and real estate broker, represented the purchaser.

On April 14, 1919, plaintiff received a letter from Mr. Weller, who stated that he recently had negotiated the sale of the Jenifer Building, and asked whether plaintiff would consider a proposition to cancel its lease and give possession in about 60 days from date; that, if this could be accomplished, the purchaser desired to remodel the building in time "for the fall business of 1919." Thereafter, on April 27, 1919, plaintiff meanwhile having sought a renewal of the lease, Mr. Weller wrote plaintiff that his client, the new owner, had purchased the property for the purpose of occupying it, "and they therefore would not be interested in tying up a large amount of money in a building merely to lease it to some one else"; that he expected to have an answer from the purchaser as to whether the purchaser would be willing to sell it. He further stated that, if plaintiff was "willing to accept $100,000 cash to cancel the existing lease, and to give possession on July 1st," he was of opinion that his party would be willing to give it. This letter was followed by efforts on the part of plaintiff to effect the purchase of the property.

On May 17, 1919, there was recorded a deed, dated May 15, 1919, from Miss Davis to the defendant Helma M. Erickson, a clerk in the office of Mr. Weller and without financial resources. The consideration for this transfer was $75,000 cash and $225,000 secured by deed of trust, in which Mr. Davis, Mr. Hoover, and Mr. Weller were named as trustees. On July 9, 1919, there was recorded a deed in trust, dated June 30, 1919, conveying the Janifer Building to the United States Mortgage & Trust Company, a New York corporation, with its principal place of business in New York City. Under this deed of trust the trust company was empowered to lease, sell, or mortgage, or otherwise dispose of, the Jenifer Building.

In June of 1919 plaintiff employed Alexander Wolfe, a local attorney, "to represent it in negotiations with the defendant Weller to purchase the Jenifer Building." Mr. Wolfe undertook this service, and, after some preliminary negotiations, on October 20, 1919, he wrote Weller, who previously had offered to submit a bid of $410,000 to his client, that he (Wolfe) had had numerous conversations with his clients,

and that they took the position "that the price of $410,000 is an excessive price for this property." Mr. Wolfe said, however, that acting under his advice they finally had agreed, if Weller could give positive assurance that the property could be purchased for that sum, to authorize Wolfe to accept the offer, and that he was inclosing an agreement to that affect and a deposit, in the form of a check, for $10,000. On the 23d of October following, Weller, as agent for the owner, sent Wolfe an acknowledgment of the receipt of the check "under sale contract dated October 23, 1919, setting forth the purchase price of said property at $410,000, with the terms as set forth in said contract, provided said contract is approved, and, if not approved, that the said sum of $10,000 be returned to R. Harris & Co. within a period of five days from date hereof." Wolfe, on October 25th, notified his client of the receipt of this communication from Weller.

On October 31, 1919, Wolfe verbally informed the president and secretary of the plaintiff company that Weller had conveyed to him (Wolfe) information that the building could not be purchased for less than $415,000, with a cash deposit of $25,000, and that Weller had offered to return the $10,000 check, which he represented had not then been cashed. Thereupon plaintiff drew its check, dated November 1, 1919, payable to Weller as agent, in the sum of $15,000, and delivered the same to Wolfe, who in turn made delivery to Weller, taking from Weller a receipt, dated November 1, 1919, "the same being written at the bottom of the previous receipt for said $10,000, thus making the total cash deposit of $25,000, in accordance with the demand of the defendant Weller as communicated to plaintiff by Wolfe." Thereupon a written agreement of even date for the purchase of the building was entered into between plaintiff and Weller, as agent of the owner, the price being fixed at $415,000, with $25,000 cash deposit, the assumption of the trust for $225,000, the execution of a second trust in the sum of $43,000 for the benefit of the United States Mortgage & Trust Company, and the payment of the further cash sum of $122,000. At the end of this agreement, and immediately before Weller's signature, was the following:

"Approved by the agent of the owner of the above-described property under authority to him by said owner. Of the purchase price of $415,000, the sum of $405,000 shall apply on account of purchase price and $10,000 on account of fee charge."

The Columbia Title Insurance Company and the Real Estate Title Insurance Company have joint offices and are jointly interested in the business of examining, searching, and certifying titles to real estate, and in making settlements in the matter of real estate purchases. These companies represented the plaintiff in this transaction, and, when the president and secretary of the plaintiff, on December 6, 1919, were about to call at the office of these companies to effect a settlement on their agreement to purchase the Jenifer Building, they stopped at Mr. Wolfe's office at his suggestion, and there met Mr. Weller, who, in the presence of plaintiff's officers, asked Wolfe whether they "had seen the new agreement of sale of the Jenifer Building, and then Wolfe produced from his desk three copies of a new agreement, and showed it to

the president and secretary; that being the first time that plaintiff or any of its officials had seen or heard, directly or indirectly, of the same." This so-called new agreement reduced the sum to be paid in excess of the cash deposit to $380,000, instead of $390,000, but in other respects it was the same. Weller insisted that, although the total price named in this new agreement was $405,000, "the plaintiff, in making settlement at the Title Insurance Companies' offices, would be required to make settlement on the basis of the purchase price of $415,000 to be paid by plaintiff; that, in view of the exigencies of the situation then presented to it, the fact that plaintiff's necessities in carrying on its business required it to be located in the building, and the fact that plaintiff, in reliance on the signed agreement of November 1, 1919, had made all arrangements to complete the purchase of the building, and particularly in view of the fact that the defendant Weller absolutely refused to go ahead and complete settlement of the sale to plaintiff by delivering the deed conveying the Jenifer Building to plaintiff, unless the new agreement was executed by plaintiff to take the place of the then existing agreement, and in view of this refusal of the defendant Weller, plaintiff was confronted with the necessity of yielding to said duress and compulsion of the defendant Weller, or enter upon litigation to compel the conveyance of the building to it in accordance with the existing agreement, with the record title to the building not being in it during the litigation, but in the defendants United States Mortgage & Trust Company, * * * plaintiff, under said exigencies and duress and compulsion practiced on it by the defendant Weller, signed the new agreement." Thereupon plaintiff, having fulfilled the conditions of the agreement, received a deed dated November 29, 1919, executed by the mortgage and trust company, and conveying the premises to plaintiff in fee simple.

Subsequent to this settlement—and, in the absence of a more specific statement, and because of the inherent probabilities, we must assume it was very soon thereafter—plaintiff discovered that Weller, notwithstanding his statement to the contrary, had cashed the check for $10,000. It may be noted here that this check was not certified.

Plaintiff says it did not discover, until the month of May, 1920, "that the defendant Weller was charging, or purporting to charge, plaintiff with a fee of $10,000, or with any fee or charge of commission whatsoever in the matter"; that it discovered (but when it is not stated) the circumstances surrounding the transfer to Miss Erickson, namely, that the transfer to her "was merely to hide the name and identity of the real person or persons in interest"; and, finally, that "owing to the means employed by the defendants Weller, Erickson, United States Mortgage & Trust Company, and others as hereinbefore set forth, * * * the plaintiff was, under the duress and compulsion practiced upon it, induced to pay more for the Jenifer Building than the real person or persons in interest, or real owner or owners of the building, would have been willing to accept on a sale thereof to plaintiff, and has been damaged accordingly; that plaintiff, in addition, has been damaged to the extent of the $10,000 of its money paid over by the defendants the Title Insurance Companies to the defendant Weller in

the settlement of the purchase as hereinbefore set forth; and that plaintiff, by reason of the means and duress and compulsion practiced upon it as hereinbefore set forth, was induced and compelled to pay more for the purchase of the Jenifer Building than the building was at said time, and is now, actually worth."

The prayers of the bill are: First, for the discovery of the identity of the real owner; second, an accounting by Weller of the cash received by him from the Title Companies; third, that the United States Mortgage & Trust Company and the Union Exchange National Bank, both foreign corporations, be restrained from disposing of the notes for the $43,000; fourth, for a personal decree against Weller, and any other defendant or defendants, in such sum or sums as the court may find plaintiff to be entitled; and, fifth, for general relief.

[1] Plaintiff corporation presumably is composed of business men. If affirmatively appears that Julius I. Peyser, Esq., was its secretary and attorney throughout this transaction, and that Mr. Wolfe, another attorney, also represented plaintiff. We therefore are not dealing with a case involving parties unfamiliar with business affairs or likely to be easily imposed upon. In such circumstances, courts ought to look with disfavor upon any undue delay in seeking equitable relief. Here plaintiff received its deed to this property early in December of 1919. Nothwithstanding the averment in the bill, to the effect that its officers did not discover until May of 1920 that they actually had paid Weller a fee of $10,000, the conclusion is irresistible that at the time the transaction was completed they must have known, not only that fact, but ever other material circumstance upon which they rely. Attached to the first agreement of November 1, 1919, was this provision:

"Of the purchase price of $415,000, the sum of $405,000 shall apply on account of purchase price and $10,000 on account of fee charge."

It would be a tax upon our credulity to ask us to assume that Mr. Peyser and Mr. Wolfe, who represented the plaintiff, and who were in touch with Mr. Weller, did not fully understand the exact meaning of this plain provision. It meant, and could have meant, only one thing, namely, that the purchaser was to pay the agent a fee of $10,000. While it is customary for the owner to pay such a fee, it is not at all unusual for an express agreement to the contrary to be made. The agreement of even date, which superseded this agreement, did not differ from it in effect, for under the second agreement plaintiff was to pay $405,000 for the property and pay Weller a fee of $10,000. For aught that appears, the second agreement may have been drawn by Mr. Wolfe, who produced it. At all events, it presumably was signed under the advice of plaintiff's two attorneys. The first agreement was enforceable, and plaintiff was put to an election whether to sign the second agreement or stand on the first. There is no question as to Weller's authority to represent the legal owner, the United States Mortgage & Trust Company, whose deed plaintiff finally accepted; and that Miss Erickson was an employee of Mr. Weller, and without financial resources sufficient to enable her to purchase this property, must have become known to plaintiff's officers immediately. Moreover, the owner had a right to place the record title in Miss Erickson, and thus

make her a conduit of title. This alone, therefore, was not a suspicious circumstance. We already have intimated that the fact that Mr. Weller cashed the check for $10,000 must have been discovered very soon thereafter. The check not having been certified, it was not strange that he should have cashed it, and thus made the deposit a reality. Immediately upon ascertaining that the owner would not accept $410,000 (which we must assume included his fee), Mr. Weller offered to return the deposit. This was a strict compliance with the language employed in his receipt, for he there said: "The sum of $10,000 to be returned to R. Harris & Co." if the contract was not approved.

[2] Plaintiff further says that it has been unable to discover the real owner, and alleges that it has been compelled to pay more for the property than the real owner "would have been willing to accept on a sale thereof to plaintiff." For aught that appears, plaintiff had as much information on this point when it received the deed as now. We have, then, a case where a corporation, composed of business men and represented by able counsel, deliberately accepted a deed to a piece of property, and thus ostensibly closed the transaction. Notwithstanding that, in a transaction of this magnitude, delay would be almost certain to prejudice the rights of the former owner, plaintiff waited almost one year before bringing suit, and even then asked, not for a rescission, but, in substance, for a reduction in price. We are of the view that, in the circumstances, even had plaintiff sought rescission, the delay would have been too great. McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419.

[3] While the decree might be affirmed, therefore, on the ground of undue delay in seeking redress, we prefer to discuss the merits to some extent. In the first place, the contention that the expectancy of a renewal or extension of plaintiff's lease was a valuable property right, as between plaintiff and the owner, cannot be sustained, since the rights of the parties to a lease are controlled by its terms and the statute. Morse v. Brainerd, 42 App. D. C., 448. Indeed, any other rule would tend to perpetuities. The case of Davis v. Gray, 16 Wall. 203, 227, 228, 21 L. Ed. 447, is relied upon by plaintiff, but that case involved the question of equitable relief against forfeiture of a land grant by the state of Texas to a railroad company upon the fulfillment of certain conditions precedent. The Civil War having caused delay in the fulfillment of those conditions, the court relieved against forfeiture of the grant by allowing additional time for the fulfillment of the conditions. The court incidentally referred to the good will of a lease, which the landlord was in the habit of renewing, as property subject to protection in equity, and cited Phyfe v. Wardell & Woolley, 5 Paige (N. Y.) 268, 28 Am. Dec. 430, wherein the Chancellor said:

"Although, as between landlord and tenant, the complainant had no legal or equitable right to a renewal, as it depended upon the mere volition of his landlord, yet, in regard to third persons, he had an interest which a court of equity recognizes as a valuable and vendible interest."

It was further pointed out that a renewal of a lease by a tenant in possession is considered in equity as a mere continuance of the original

lease. In that case the complainant, as the lessee of premises, part of which he had let to a subtenant, contracted with the defendants to sell his interest in the premises to them, for the purpose of enabling them to obtain a renewal without prejudice to the rights of the subtenant. In consequence of the agreement the defendants obtained a new lease in their own names, and then proceeded to evict the subtenant, whereupon the complainant was compelled to make good his loss. It was held that the complainant was entitled to a decree for specific performance of the agreement with the defendants, and to be indemnified against the claim of the subtenant. It is apparent, therefore, that the case involved third parties, as did Jones v. Slauson et al. (C. C.) 33 Fed. 632, cited by plaintiff.

[4] The conclusion that, had the real owner of the building come forward, a better trade might have been effected than was secured through his agent, furnishes no basis for equitable relief. As we have seen, the deed was delivered early in December of 1919, all the material facts were of record, and certainly all were attempted to be set forth in the bill filed in November of 1920, yet the real owner has not complained, and hence must be assumed to be without cause for complaint. The owner had an absolute right to be represented by an agent and to remain as an undisclosed principal. Huffman v. Long, 40 Minn. 473, 42 N. W. 355; Moorehead v. Gilmore, 77 Pa. 118, 18 Am. Rep. 435. It is not averred that he had fixed a price for the property and that the agent exacted a higher price and fraudulently retained the difference, as in Hokanson v. Oatman, 165 Mich. 512, 131 N. W. 111, 35 L. R. A. (N. S.) 423, and other cases cited by plaintiff.

[5] The most the agent has done in this case has been to secure the highest possible price for the property of his principal, and to exact from the purchaser, presumably by direction of his principal, his broker's commission. It will be observed that $10,000 is approximately 2½ per cent. of the purchase price of $405,000, and is not an unreasonable fee. Certainly the agent was entitled to do what his principal could have done, namely, obtain the highest price the purchaser could be induced to pay, and such is the law. McLennan v. Exchange Co., 170 Mo. App. 389, 156 S. W. 730; Ripy v. Cronan, 131 Ky. 631, 639, 640, 115 S. W. 791, 21 L. R. A. (N. S.) 305. In the case last cited the court, after directing attention to the fact that no obligation to buy rested upon the purchaser, said:

"If the law were as contended for by appellant, then every vendee of property could escape the obligation of his contract, just so he afterwards established the fact that at the time of the sale the vendor or the agent representing him was willing to take less than he represented that he would take for the property disposed of. This would impose no duty on the purchaser. The validity of his purchase would depend, not upon what he was willing to pay, but upon the price at which the property might be purchased."

[6] While it is alleged that the price paid for the property was excessive, the facts disclosed by the record tend to the contrary. Although it was sold by Miss Davis for $300,000, plaintiff's lease on the ground floor and basement had a substantial term to run, and that this lease seriously affected the value of the property is apparent from the

averment that plaintiff was tentatively offered $100,000 by the purchaser to cancel it. As the good faith of this offer is not impugned, we must assume that the new owner was willing to expend a total of $400,000 to get what plaintiff received for $415,000—that is, immediate possession of the entire property—and plaintiff admits the property possessed peculiar value to it.

[7] Reduced to its last analysis, the plaintiff was confronted with the necessity of making an election between buying this property or removing its business to another location. With knowledge of every material circumstance, it deliberately chose the former course, and must abide the consequences. We are clearly of the view that there is no ground for the rescission of this contract, much less for the particular relief prayed, for it is the rule that a contract of sale cannot be avoided in part only, although, whenever the point at which fraud begins clearly appears, there may be such a division. Veazie v. Williams, 8 How. 134, 12 L. Ed. 1018.

The facts alleged in plaintiff's bill impose no equitable or legal liability upon the defendants, or any of them; so that it would be futile to direct a transfer of the case to the law side of the court, and we therefore affirm the decree, with costs.

Affirmed.

WARDMAN v. HANLON (two cases).

(Court of Appeals of District of Columbia. Submitted April 3, 1922. Decided May 1, 1922.)

Nos. 3711, 3712.

1. **Husband and wife ⇐229(2)—Declarations for injuries to tenant's wife held to state action ex delicto, and not ex contractu.**

Declarations alleging that defendant had leased an apartment to plaintiff husband, whereby defendant agreed to give plaintiffs the use of the apartment, and that it then became the duty of defendant to furnish to plaintiffs the use of the bathroom properly equipped with running water of proper temperature, which he failed to do, resulting in injury to the plaintiff wife, states a cause of action ex delicto, not ex contractu, the allegation of lease being merely by way of inducement to establish the status from which the alleged duty arose, and defendant cannot claim the action was contractual, especially where he pleaded not guilty, which was the proper plea in an action of tort, but not in an action on contract.

2. **Husband and wife ⇐209(2)—Action in tort may be maintained by tenant's wife.**

Regardless of whether the wife of a tenant can maintain an action for breach of the landlord's covenant, she can maintain an action in tort for breach of the landlord's duty arising from the status created by the lease.

3. **Landlord and tenant ⇐162—Landlord of apartment building owes duty to keep portions for common use reasonably safe.**

Where the control of the entire structure has not passed into the tenant's hands, but the landlord retains exclusive control over a part of the building for the common use of the tenants, the law places on the landlord an implied duty to use reasonable care to keep the parts retained under his control in a reasonably safe condition.

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4. Landlord and tenant ⟸162, 169(4)—Furnishing scalding water in toilet tank supports inference of landlord's negligence.

The landlord of an apartment building, who had exclusive control of the supply of water to the building and of the pipes through which it was conveyed to the bathroom in plaintiffs' apartment, owed the tenant's family the duty to exert reasonable care to prevent steam and scalding water from entering the toilet tank, and the fact that the tenant's wife was injured by scalding water in the tank supports an inference that the landlord failed to perform that duty.

5. Evidence ⟸460(5)—Parol evidence is admissible to prove leased premises include a bathroom.

Where the written lease to plaintiffs covered a numbered apartment in a designated building, without stating what the apartment comprised, parol evidence was admissible to show that it included a bathroom.

6. Landlord and tenant ⟸169(11)—Proof of proper construction of plumbing does not entitle landlord, sued for negligent operation, to a directed verdict.

Where the declaration for injuries to a tenant's wife charged negligent operation of the water supply system, whereby hot water entered the toilet tank, proof by the landlord that the plumbing system was properly constructed and was not negligently maintained did not entitle the landlord to a directed verdict.

7. Landlord and tenant ⟸169(4)—Res ipsa loquitur does not make landlord insurer or compel inference of negligence.

The doctrine of res ipsa loquitur merely permits an inference of the landlord's negligence from the fact that scalding water and steam entered a toilet tank, and it does not compel such inference, nor make the landlord an insurer of the safety of his tenants.

8. Landlord and tenant ⟸164(1)—Rule landlord does not warrant condition does not exempt from liability for negligent operation.

The rule that there is no implied warranty by a lessor that the leased premises are safe and fit for occupation does not defeat the landlord's liability for injuries to a tenant, caused by negligent operation of the plumbing system which was under his control.

9. Trial ⟸260(1)—Requested charges covered by general charge were properly refused.

Charges requested by defendant were properly refused, where, in so far as they stated the law correctly and were applicable to the case, they repeated what was said by the court in its general charge.

Appeal from the Supreme Court of the District of Columbia.

Separate actions by Mary A. T. Hanlon and by J. Leo Hanlon against Harry Wardman, to recover damages for personal injuries to the plaintiff in the first action. Judgment for the plaintiffs in each action, and defendant appeals. Affirmed.

Dan Thew Wright and Philip Ershler, both of Washington, D. C., for appellant.

D. W. O'Donoghue and A. A. Alexander, both of Washington, D. C., for appellees.

SMYTH, Chief Justice. These cases were submitted on the same record. Mary A. T. Hanlon, plaintiff in the first case, is the wife of the appellee, plaintiff in the second one. She averred in her declaration that the defendant, at the time of the accident which forms the basis of the action, was in the control of, and operating, an apartment house in Washington; that she was then in the lawful possession and

occupancy of an apartment therein, under a lease from the defendant to her husband, for the use of himself and family; that the apartment included a bathroom, equipped with the usual toilet facilities; that the defendant negligently and carelessly allowed the flush tank connected with the toilet in the bathroom, and pipes leading to it, to become filled with superheated water and steam; that while she was using the toilet she opened a valve for the purpose of admitting water to flush the bowl, and thereupon a stream of scalding water and steam was thrown against her bare body at that place where the limbs join the trunk, causing severe burns, from which she suffered great pain and agony. Her husband, alleging substantially the same facts, sued for the expense which he was put to in providing her with medical and surgical attention, and servants, and for loss of her society and consortium.

To each declaration the defendant filed a plea of not guilty. The evidence was without substantial conflict, but there was a dispute as to the inference to be drawn from it. Verdicts were returned in favor of the plaintiffs, upon which judgments were entered. Appellant brings the cases to this court asking for a new trial.

[1] He alleges many errors, but groups them under five captions. He argues that the action is ex contractu and not ex delicto, and says the plaintiffs were not entitled to recover, because they were not able to show that any particular provision of the written contract was violated. He did not so construe plaintiffs' declarations when he filed his pleas, for, instead of presenting the pleas appropriate in an action on contract, he pleaded not guilty, which was proper in an action for tort. It is true the declarations aver a lease, but only for the purpose of establishing the status of the parties from which flowed the duties later alleged. The allegations with respect to the contract are made by way of inducement to the general cause of action, and not as the foundation of it. In an early case this language occurs:

"The subjects proper for action on the case are of two distinct classes. First, where there is a tort * * * entirely unconnected with any contract. Secondly, when there is a contract, either express or implied, from which a common law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action." Emigh v. Railroad Co., 4 Biss. 114, Fed. Cas. No. 4,449.

In accord with these views is the opinion of the learned Judge Hammond in Whittenton Manufacturing Co. v. Memphis & Ohio R. P. Co. (C. C.) 21 Fed. 896, where he refers to many authorities.

The declarations say that the plaintiffs were in possession of the apartment at the time of the accident under a letting whereby the defendant had agreed to give to them the use of the apartment, which included a bathroom and toilet facilities. Stress is laid upon the word "whereby," and it is urged that it indicates that whatever rights the plaintiffs had were contractual. But this is not all the declarations allege on the point. Following immediately the part just mentioned they say:

"And it then and there became and was the duty of the defendant to furnish to the plaintiff's husband and his family * * * the use of said bath-

room, suitably and properly equipped with running water," of a proper temperature, for flushing the bowl, etc.

In other words, having set forth the relation of the parties as established by the lease, they then aver the duties which the common law attaches to the relation.

[2] Cases which rule that a declaration must proceed upon some definite theory are quite beside the question with which we are dealing. The doctrine they announce is not in dispute here. Nor is it correct to say that this case turns on whether or not a lessee of premises or his wife may recover for personal injuries due to the lessor's failure to keep a covenant. Plaintiffs, as we have said, did not sue for breach of a covenant but for breach of a common-law duty arising out of the contract of tenancy. Many decisions are found in appellant's brief to the effect that the wife of a tenant cannot maintain a tort action against the landlord for injuries, where the action is based on a violation of the landlord's agreement to repair. The reason assigned is that there is no privity of contract between the landlord and the tenant's family. But we repeat: This action is not bottomed on contract, and hence the doctrine of those cases is inapposite.

[3] There is a wide distinction between cases where the landlord retains exclusive control over a particular part of the building and those where the control of the entire structure has passed completely out of him and into the possession of the tenant. O'Hanlon v. Grubb, 38 App. D. C. 251, 257, 37 L. R. A. (N. S.) 1213. Cases pointing out this distinction are Iowa Apartment House Co. v. Herschel, 36 App. D. C. 457, 465, Ann. Cas. 1912C, 206; Security Savings & Commercial Bank v. Sullivan, 49 App. D. C. 119, 261 Fed. 461; Squire, Vandervoort & Co. v. Ryerson, 150 Ill. App. 255, 261; Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097; Doyle v. Franek, 82 Neb. 606, 118 N. W. 468. He who has no power of control over an agency which causes an injury is not liable for the consequence of its careless management. The rule is quite different, however, where he has the exclusive power of control, as the defendant had here. In such a case he is liable for what happens through his neglect.

Thus in the Shoninger Case, supra, 219 Ill. 245, 76 N. E. 355, 3 L. R. A. (N. S.) 1097, where the suit was for damages resulting to the plaintiff in consequence of having fallen down an unguarded elevator shaft in a building, the landlord being in exclusive control of the elevator, the court said that the law was well settled—

"that a landlord who rents different parts of a building to various tenants and retains control of the stairways, passageways, hallways, or other methods of approach to the several portions of the building for the common use of the tenants, has resting upon him an implied duty to use reasonable care to keep such places in a reasonably safe condition, and that he is liable for injuries which result to persons lawfully in the building from a failure to perform such duty."

This states the law correctly, and by a parity of reasoning is as applicable to the landlord who retains exclusive control of the supply of water for toilet purposes as to one who has control of the things mentioned in the quotation.

[4] A prayer to instruct the jury that there was not sufficient evidence of negligence on the part of the defendant was properly refused. It was admitted that the supplying of the water, the pipes through which it was conveyed to the bathroom, and its temperature were under the exclusive control of the defendant. Clearly, he owed to the tenant and each member of his family the duty to exert reasonable care to prevent steam or scalding water from going through the pipes, for by furnishing the water he in effect represented that it would be suitable for the purpose intended, so far as proper care on his part could make it. The accident and the circumstances under which it transpired were sufficient to support, although they did not compel, the verdicts of the jury that he had violated his duty. They gave "ground for a reasonable inference that, if due care had been employed, * * * the thing that happened amiss would not have happened." In such a case the law says "res ipsa loquitur." Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905; Robertson v. Washington Railway & Electric Co., —— App. D. C. ——, 279 Fed. 180.

[5] Is there a variance between the declarations and the proof? Appellant points to the averment in the declarations that the landlord agreed to furnish to the tenant a bathroom and toilet facilities, and says there is no provision in the written lease whereby he expressly undertook to supply those things. Nor is there anything in it defining what an apartment comprises. The apartment is identified by a number, and what it embraces may be shown by parol. Speaking of a like lease, this court said:

> "Parol testimony may be introduced when it is apparent that the written instrument does not express the whole agreement of the parties." O'Hanlon v. Grubb, 38 App. D. C. 251, 256 (37 L. R. A. [N. S.] 1213).

And it is so apparent here; in consequence, there is no variance.

[6] Appellant asked the court to charge the jury to return a verdict for defendant on the ground that the evidence showed that the plumbing system in the building was properly constructed and was not negligently maintained, which it refused to do. Even if the jury found these things, it would not justify a verdict for defendant, because it would not tend to show that the system had been carefully operated, and failure to so operate it was the basis of plaintiffs' case. As we have already shown, the circumstances under which the accident occurred were sufficient to support a conclusion of negligence. It follows that the request was properly refused.

[7] Exception is taken to the instruction of the court applying the doctrine of res ipsa loquitur to the case. We have already pointed out that this is a proper case for its application, but we add, in response to what is said in appellant's brief, that this doctrine does not require that negligence must be inferred from the mere happening of an accident. Nor does it make the landlord a surety for the safety of the premises without reference to the terms of the lease, nor eliminate the necessity of notice in a proper case. This must be manifest from the above discussion of the subject.

[8] There is no claim that there was a defect in the water system, but it is averred, and correctly, the jury found, that it was negligently and carelessly managed by the defendant, who was in exclusive control. Cases to the effect that there is no implied authority by a lessor that the leased premises are in good condition or are safe and fit for occupation have no tendency to illustrate any of the questions involved here.

[9] Finally, the appellant states without argument that there is an error in the failure of the court to give certain other instructions requested by him. We have examined them, and, so far as they state the law correctly and are applicable to the case, we find they repeat what was said by the court in its general charge, and hence the requests were properly refused. Finney v. District of Columbia, 47 App. D. C. 48; Sinclair v. United States, 49 App. D. C. 351, 265 Fed. 991; Smith v. United States, 50 App. D. C. 208, 269 Fed. 860; Henry v. United States, 50 App. D. C. 366, 273 Fed. 330.

Finding no error, we affirm the judgments, with costs.

Affirmed.

STANDARD OIL CO. v. McDANIEL.

(Court of Appeals of District of Columbia. Submitted April 5, 1922. Decided May 1, 1922.)

No. 3719.

1. **Municipal corporations ⟸706(8)—Evidence held to authorize instruction under last clear chance doctrine.**

   Evidence that plaintiff's intestate started across the street diagonally away from defendant's approaching truck and without paying attention to the truck, whose driver was sounding his whistle and horn, and that the driver of the truck, though intestate was in plain view and could have been avoided by stopping the truck or swerving to the right, made no attempt to do either until he was within two feet of intestate, warranted the court in giving an instruction authorizing verdict for the plaintiff under the last clear chance doctrine.

2. **Municipal corporations ⟸705(10)—Possibility that pedestrian could have saved himself at any moment does not prevent recovery under last chance doctrine.**

   The fact that a pedestrian, injured by a truck, could have saved himself by the exercise of the slightest degree of care at any time before he entered upon the line of danger, does not prevent recovery under the last chance doctrine, where the driver could have seen that the pedestrian was oblivious to the danger and could have avoided the accident.

3. **Municipal corporations ⟸705(10)—Concurrent negligence no defense to recovery under last chance doctrine.**

   Where the evidence warranted a recovery by plaintiff under the doctrine of last clear chance for the death of his intestate, caused by defendant's motor truck, a charge requested by defendant that there could be no recovery if the injury was caused by the concurrent negligence of both parties was properly refused, since the rule of concurrent negligence does not defeat recovery under the last chance doctrine, which considers the negligence of the party having an opportunity to avert the accident as the sole proximate cause of the injury.

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4. Municipal corporations ⊂=706(8)—Requested instruction that truck driver could presume pedestrian would save himself until danger was imminent held properly refused.

In an action for the death of a pedestrian, who was struck by defendant's motor truck, a requested instruction that the truck driver could presume that pedestrian would exercise reasonable care so long as the danger of striking him did not appear imminent was properly refused, since the word "imminent" does not indicate how near the danger must be, and the test is whether the driver employed reasonable care, which is usually a question for the jury.

Appeal from the Supreme Court of the District of Columbia.

Action by Samuel Leigh McDaniel, as administrator of the estate of Samuel B. McDaniel, deceased, against the Standard Oil Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph T. Sherier, of Washington, D. C., for appellant.

Wilton J. Lambert and R. H. Yeatman, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is an action to recover damages for the death of plaintiff's intestate through the negligence of the defendant, appellant here. From a judgment on the verdict of a jury, defendant appeals.

On the morning of the accident employés of the defendant drove two large trucks, loaded with gasoline, each weighing about seven tons, west on Pennsylvania Avenue, N. W., to Eighth street, then turned into Louisiana avenue, where it intersects that street, and proceeded southwest. There is evidence that the trucks were racing. The one in the lead was driven by a man named Hargett. Pedestrians were compelled to run in order to avoid being struck by it. As it proceeded, McDaniel, who was some distance in front of it, left the south curb of the avenue, where he had been talking with another person, and went diagonally in a northwesterly direction across the avenue. As he did he seemed to continue conversation with the person whom he had left behind, all the time keeping his head turned to the left and away from the advancing truck. He had reached about the center of the avenue when the truck struck him. There was nothing to obstruct Hargett's view of McDaniel for a considerable time before the accident occurred. He admitted that he saw him crossing the avenue some time before he struck him, that his head was turned away from him, and that he showed no appreciation of the approaching danger although he (Hargett) blew the whistle and sounded the Klaxon on the truck. But he did not apply the brakes until he came within two feet of McDaniel. There was plenty of room for Hargett to turn to the right and thus avoid the collision, but he did not do so. Instead he continued straight ahead. It must have been perfectly apparent to him that, if McDaniel did not awaken to his peril, he would be struck, unless the truck was stopped or swerved to the right, and it was in his power to do either.

[1] The complaint of the appellant relates to the granting of a prayer requested by the plaintiff and to the refusal of three prayers

made by appellant. The prayer given at the instance of the plaintiff said in effect that, if McDaniel was guilty of negligence in exposing himself to risk of injury, nevertheless, if Hargett saw, or by the exercise of reasonable care could have seen, him in time to avoid injury, and negligently failed to do so, the jury should find for plaintiff. The objection to this is based on the assumption that there was not sufficient evidence to warrant the jury in finding that Hargett was guilty of negligence after he had discovered, or could have discovered, McDaniel's peril. We cannot accede to this. From the facts we have recited it must be patent that there was quite enough evidence to warrant the jury in finding that if Hargett had used reasonable care he could have avoided the collision. We recently held in Bremmerman v. Georgetown & T. Ry. Co., 50 App. D. C. 378, 380, 273 Fed. 342, on facts quite similar to those now before us, that there was sufficient to sustain a finding of negligence on the part of the defendant. In that case the motorman on a street car saw the person approaching the track diagonally, so that his back was partly turned to the advancing car. He showed no sense of consciousness that danger was near. The motorman did nothing to stop the car until it was too late. The court said:

"It should have been apparent to a reasonably prudent person, situated as was the motorman on the rapidly approaching car, that the decedent was not aware of the approach of the car, and therefore did not appreciate his peril. * * * But he failed to do anything, either to warn the decedent or arrest the speed of the car, until the accident was unavoidable."

The same must be said of the driver in the instant case. A like doctrine was announced in Capital Traction Co. v. Apple, 34 App. D. C. 559; Washington Railway & Electric Co. v. Cullember, 39 App. D. C. 316; Washington-Virginia Railway Co. v. Himelright, 42 App. D. C. 532; and it is the settled law in this jurisdiction.

[2] Appellant urges that the exercise of the slightest degree of care at any moment before McDaniel reached the line of danger would have saved him. Perhaps so, but that is immaterial. This case does not turn on his negligence, but on the negligence of Hargett after he, as a reasonably prudent man, had reason to believe that McDaniel was unconscious of the approaching danger. Where the driver of a truck observes, or should observe, a person about to cross in front of him, and it is reasonably apparent that he does not appreciate that danger is near, the driver should employ all reasonable means in his power to avoid injuring him. He should proceed on the theory that the pedestrian may continue in his course heedless of his peril, and therefore should bring his vehicle under control so that he may stop if necessary before striking. He has no right under such circumstances to act on the assumption that the pedestrian will halt in time to save himself, or, if he does not, and is injured, that the fault will be his and not the driver's. It is the law that—

"The contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 687 (36 L. Ed. 485), citing several cases.

The same view is expressed in Chunn v. City & Suburban Railway, 207 U. S. 302, 309, 28 Sup. Ct. 63, 52 L. Ed. 219, which went up from this District.

[3] Appellant asked the court to instruct the jury that, if they believed that McDaniel and the driver were at fault, and that the injury was caused by the concurrent negligence of both parties, there could be no recovery by the plaintiff. Under the facts of the case, if the instruction had been given, it would have nullified the one with respect to the doctrine of last clear chance. The rule of concurrent negligence was modified a long time ago by Davies v. Mann, 10 Mees. & W. 545, so as to admit the last-named doctrine. 1 Thomp. Neg. § 241, and cases cited in note.

"The party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury." 1 Shear. & R. Neg. (5th Ed.) § 99.

See also Great Northern Ry. Co. v. Harman, 217 Fed. 959, 133 C. C. A. 631, L. R. A. 1915C, 843; Salt Lake & U. R. Co. v. Trumbull, 246 Fed. 806, 159 C. C. A. 108.

The third and fourth instructions requested by the plaintiff remain to be noticed. By the first the court was asked to charge the jury that they should return a verdict for the defendant. For the reasons already given, it is obvious that this instruction should not have been granted.

[4] As to the fourth it said, in effect, that the driver had the right to indulge in the presumption that McDaniel was in the full possession of his senses and would exercise reasonable care under the circumstances for his own protection so long as the danger of striking did not "appear imminent." How near must the danger be in order that we may speak of it as "imminent"? It may be that, if the driver waited until it became imminent before doing anything to avoid the accident, he would have waited too long. That is what Hargett seems to have done. The word does not occur in the formulas found in the United States Supreme Court cases cited above. They employ reasonable care alone as the test. Whether such care was observed is usually a question for the jury, as it was here. We think the use of the word would have had a tendency to confuse, rather than aid, the jury, and that the court did not err in refusing the request embodying it.

The judgment is affirmed, with costs.

Affirmed.

EICHELBERGER et al. v. ARLINGTON BUILDING, Inc., et al.

(Court of Appeals of District of Columbia. Submitted February 7, 1922. Decided May 1, 1922.)

No. 3506.

1. **Corporations ⟸1—Corporation is a distinct entity, and property belongs to it and not to stockholders.**
   A corporation is a distinct entity, and property acquired by it belongs to it, and not to the stockholders, even where all the stock is owned by one person.
2. **Corporations ⟸1—Entity disregarded, when used to perpetrate fraud.**
   The separate entity of a corporation is not recognized, where its recognition would result in promoting illegality, fraud, or injustice, since the franchise is granted by the state for a useful purpose, and may not be employed to further wrong, and where it is so employed the law will go beyond the fiction, and treat the stockholders as if the corporation did not exist.
3. **Corporations ⟸30(5)—Alleged creation of and conveyance to corporation by partners held not fraudulent, so as to justify disregarding corporate entity and treating stockholders as owners of property.**
   Where a bill charged that a corporation formed by partners, purchasers of a building, to take title to the property, was a mere shell or paper corporation, but not alleging that it was not properly organized, or that it was being fraudulently used, and its allegation that the property was conveyed to the corporation for the purpose of hindering plaintiff, one of the alleged partners, of his just claims and demands as one of the purchasers, was not sustained by the proof, it was not shown that the corporation was formed for a fraudulent or illegal purpose, so as to justify disregarding its corporate entity and treating the stockholders as the owners of the property.
4. **Judgment ⟸17(1)—Personal judgment cannot be rendered, unless personal service is had.**
   Service by publication gives no right to a personal judgment against individuals not personally served.
5. **Corporations ⟸393—Custody of corporate funds does not give jurisdiction over stockholders.**
   The fact that the court acquired custody of funds belonging to a corporation does not give it jurisdiction over the stockholders controlling it, who were not personally served, and none of whose funds were within the court's jurisdiction, there being no showing of fraud which justified the court in disregarding the corporate entity.
6. **Appearance ⟸10—Defendant appearing as witness at hearing on motion to dismiss does not submit to jurisdiction.**
   A defendant, who entered a special appearance to move to dismiss the bill because of want of personal service on him, can appear as a witness and testify at a hearing on his motion to dismiss, without submitting to the jurisdiction of the court.
7. **Appearance ⟸10—Party can defend on merits and reserve right to review overruling of motion to dismiss.**
   A defendant, whose motion to dismiss for want of service on him has been overruled, can contest the suit on its merits, and at the same time reserve for review the question whether the court had erred in overruling his motion.

Appeal from the Supreme Court of the District of Columbia.

Suit by Harry D. Eichelberger and another against the Arlington Building, Incorporated, and others. From a decree sustaining motions

to quash the service and dismissing the bill, claimants appeal. Affirmed.

Dan Thew Wright and R. H. McNeill, both of Washington, D. C., for appellants.

Charles A. Douglas and Joseph V. Morgan, both of Washington, D. C., and Lewis C. Williams, of Richmond, Va., for appellees.

SMYTH, Chief Justice. Eichelberger filed his bill against Oliver J. Sands, James O. Winston, Thomas S. Winston, Jules Breuchaud, the Arlington Corporation, The Arlington Building, Incorporated, William G. McAdoo, Secretary of the Treasury of the United States, and John Burke, Treasurer of the United States, asking for certain relief.

The bill alleges that Eichelberger was a partner with Sands, the Winstons, and Breuchaud for the purpose of purchasing and selling at a profit what is known as the Arlington Hotel property, Washington, and that he, by virtue of the partnership, was to have a one-eighth interest in the property and the profits derived from the sale of it; that the property was subsequently purchased by the partnership, and title taken in the name of the defendant the Arlington Corporation; that the corporation was a mere shell affair, organized for the purpose of carrying into effect the partnership agreement, and that he, Sands, the Winstons, and Breuchaud were its directors; that, for the purpose of hindering the plaintiff in procuring his rights under the partnership, the directors organized another corporation, called the Arlington Building, Incorporated, and caused the first corporation to convey to it the property mentioned; that the building corporation was also a shell affair, organized to shield Sands, the Winstons, and Breuchaud, the only persons interested in its capital stock, and that plaintiff's ownership of the one-eighth interest in the partnership and in its profits "is evidenced by a certain paper writing signed by the plaintiff, by said Oliver J. Sands, James O. Winston, Thomas S. Winston, and Jules Breuchaud, and which paper was at or about the time of its execution delivered to the American National Bank of Richmond, Va., as agent and trustee for the plaintiff"; that the property, since its purchase by the partnership, had largely increased in value, and was readily salable at large profit; that the partnership expended large sums of money in and about the improvement of the property; that it had been sold to the United States government for $4,200,000; that the sum was payable by the Treasurer of the United States to the vendors, and would be paid to them by the Secretary of the Treasury and the Treasurer of the United States, unless they are restrained from doing so. The bill prayed for an injunction against the Secretary of the Treasury and the Treasurer, and for an accounting against the other defendants.

By agreement $50,000 was paid into the registry of the court to await the disposition of the case, and the Secretary of the Treasury and the Treasurer of the United States were dismissed from the suit. One McNeill filed what he called an intervening bill, and later a supplemental bill, but they are immaterial to the controversy.

At first personal service was not made on any of the defendants, except the Secretary of the Treasury and the Treasurer of the United

States. Afterwards they were served by publication. Appearing specially, the Winstons, Breuchaud, Sands, and the Arlington Corporation moved to quash the service made upon them, on the ground that there was no personal property in the District of Columbia belonging to them, or either of them, and that the personal property in the District of Columbia alleged as the basis of the motion for the order directing that they be served by publication belonged wholly to the Arlington Building, Incorporated.

Later one of the Winstons and the Arlington Corporation, by service on Winston, were served personally, it is claimed. He appeared specially and attacked the service, on the ground that at the time it was made he was a resident of Virginia, and was in the District attending as a witness in this case. Much testimony was taken, at the close of which the court sustained the motions to quash, and dismissed the bill, interventing bill, and supplemental bill.

It will be remembered that the bill charges that the agreement upon which Eichelberger bases his suit is in writing, signed by Sands, the Winstons, Breuchaud, and himself. There is but one agreement in the record signed by those persons, and it does not state that Eichelberger is entitled to anything from them. It does provide that a certain percentage of the profits derived from the property shall be paid to the American National Bank of Richmond, Va., but there is no provision for the payment of anything to Eichelberger. Pieces of oral and written evidence, when considered together, seem to indicate that Eichelberger was to receive part of the profits, but this does not prove the contract alleged in the bill.

[1] The money in the hands of the United States against which Eichelberger is seeking to enforce his claim represents, as we have said, a part of the purchase money paid by the United States government for the property. Concededly, the Arlington Building, Incorporated, had title to this property at the time of the sale, and conveyed it to the government. A corporation is a distinct entity, and property acquired by it belongs to it, not to the stockholders. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481; McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590. And this is true, even where all the stock is owned by one person. Atchison, T. & S. F. Ry. Co. v. Weeks et al. (D. C.) 248 Fed. 970; Peckett et al. v. Wood et al., 234 Fed. 833, 148 C. C. A. 431.

[2] But there is an exception to the entity rule, where its recognition would result in promoting illegality, fraud, or injustice. In other words, since the franchise is granted by the state for a useful and valid purpose, it may not be employed to further wrong. Where it is so employed the law will disregard the rule, go behind the fiction, and treat the stockholders as if the corporation did not exist. McCaskill Co. v. United States, supra; United States v. United Shoe Machinery Co. (D. C.) 234 Fed. 127; Linn & Lane Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541.

[3] The bill does not charge that the corporation was formed, or is

being used, for any of the purposes just mentioned. It is, however, alleged that it is a mere shell or paper corporation. Just what is meant by this is not clear. There is no claim that it was not properly organized under the laws of its domicile. It has stockholders and directors. It is true the stockholders control it, but that surely does not render it invalid. The bill also charges that the conveyance to the corporation was with the intention of hindering and delaying the plaintiff "in his just claims and demands." Even if we construe this as charging that the corporation is being used for an improper purpose, there is no proof in the record to sustain it. The right claimed is against the individuals who own the stock of the corporation. It is true they conveyed the property to the corporation, but it is admitted that they own all, or substantially all, the corporate stock. A judgment in favor of Eichelberger could be enforced against their stock holdings. Even if it could not, there is neither allegation nor proof that they are insolvent, and have not sufficient other property to respond to any judgment that might be obtained against them. How, then, can it be said that the creation of the corporation and the conveyance to it of the property had the effect of perpetrating fraud or injustice against Eichelberger?

[4, 5] Since the claim alleged was upon a contract made by Sands and his associates, the plaintiff was not entitled to judgment against the corporation. Even if the claim was against them, they were not subject to judgment, as they had not been served personally, and they could not be served by publication, because there was no property of theirs in the custody of the court. Fidelity & Deposit Co. of Maryland v. Nelson, 267 Fed. 746, 50 App. D. C. 102, where many cases are cited.

[6] But counsel argues that, because one of the Winstons actually appeared in court and gave testimony, he submitted to its jurisdiction. And the question is asked: How can a defendant come into court to be a witness in his own case, on his own behalf, without appearing personally? We do not think the query as applied to the facts of this case presents any difficulty. Winston appeared specially and moved to quash the alleged service, for the reasons which we have already stated. His motion and the one made by his codefendants came on for hearing together. It appeared that, in order to dispose of them, it would be necessary to go into the testimony bearing on the question as to whether or not the money impounded in the registry of the court belonged to the moving defendants or to the corporation. This induced an agreement, made in open court, for the convenience of all concerned, that the testimony taken should apply, not only to the motions, but also to the merits, and that if, at the conclusion of the testimony, it was found that the property belonged to Sands and his associates, the motions should be overruled and an accounting ordered.

[7] Winston appeared as a witness in support of his motion. We do not think that under the circumstances he thereby submitted himself to the jurisdiction of the court over his person. Church v. Church, 50 App. D. C. 239, 270 Fed. 361, 14 A. L. R. 769, and cases cited. The fact that this is a civil proceeding does not distinguish it from the

Church Case, as is amply shown by decisions there referred to. If Winston's motion had been overruled at the opening of the case, he would then have had a right to contest the suit upon its merits, and at the same time reserve for our review the question as to whether or not the court had erred in overruling his motion, provided, of course, he had noted a proper exception. In re Chicago, Rock Island & Pacific Railway Co., Petitioner, 255 U. S. 273, 41 Sup. Ct. 288, 65 L. Ed. 631, decided February 28, 1921. We perceive no difference in principle between what we have just supposed and what he did. Of course, the mere fact that the two Winstons were in court during the taking of testimony with respect to the motions did not give the court jurisdiction over their persons, for the reasons given in the Church Case, supra.

We think no error was committed, and therefore we affirm the decree, with costs.

Affirmed.

RHEES v. MORRIS.

(Court of Appeals of District of Columbia. Submitted April 7, 1922. Decided May 1, 1922.)

No. 3739.

1. **Dismissal and nonsuit ⟸25—Nonsuit can be entered as to minor defendants, and action continued against adults.**

   In action for broker's commission against the owners of property, some of whom were minors, it was proper, under Code, §§ 1205, 1209, after issues were joined, to enter a nonsuit as to the minors and to proceed against the remaining defendants.

2. **Appeal and error ⟸928(1)—Instructions not in record presumed correct.**

   Where the charge is not in the record, the Court of Appeals must assume the instructions were proper.

3. **Tenancy in common ⟸51—One cotenant can contract to pay broker's commission.**

   One of several owners of property can make a valid agreement with a broker to pay the latter a commission for procuring a purchaser for the property, though some of the co-owners are minors.

4. **Brokers ⟸86(1)—Evidence held to sustain verdict finding against contention that broker's contract was delivered on a condition.**

   In an action for a broker's commission, evidence that the broker refused to take the contract, when defendant stated he had no authority from the co-owners, but accepted contract a few days thereafter, when the plaintiff stated he had such authority, except as to the owners who were minors, *held* to sustain a verdict finding against defendant's contention that contract was delivered to the broker on condition it should not take effect until the other owners authorized it.

5. **Brokers ⟸44—Appointment of broker as trustee to sell infants' interest in property held not to defeat right to commission under contract with adult owner.**

   A broker's right to commission for procuring a purchaser for property under a contract with one of the adult owners is not defeated by the fact that the broker was thereafter appointed trustee to sell the interest of the infant owners, on the theory that the subject-matter of the agency was thereby taken out of such adult owner's control and the brokers'

agency was terminated, since a contract employing a broker to procure a purchaser does not require the party employing him to have any interest in the property or control over it.

Appeal from the Supreme Court of the District of Columbia.

Action by Charles W. Morris against B. R. Rhees and others to recover on a contract for broker's commission. Judgment for plaintiff against the named defendant, and that defendant appeals. Affirmed.

Levi Cooke, Guy H. Johnson, and Ralph P. Barnard, all of Washington, D. C., for appellant.

Thomas C. Bradley, of Washington, D. C., for appellee.

SMYTH, Chief Justice. Morris sued Rhees and others to recover money claimed to be due him on a contract. He alleged that under the contract he was employed by Rhees as his exclusive agent to procure a purchaser for a tract of land located in the District of Columbia, and was to be paid a certain commission if he submitted a bona fide offer of purchase, or if the property was sold by Rhees or any other person during the time the agreement was in force.

Rhees, his mother, sisters, and two minors were the owners of the land. He entered into negotiations with Morris, a real estate agent, for the purpose of having him procure a purchaser for the property. At first Rhees said to Morris that he represented the adults and had authority from them to make sale of the property, but that, as some of the owners were infants, no sale could be made without an order of court. Morris declined to accept the agency unless Rhees had full authority to act for all the parties interested. Thereupon the contract in suit was signed by Rhees and Morris personally. Rhees did not assume therein to represent any one but himself. He alone, according to the terms of the contract, employed Morris. The contract was delivered, and Morris, acting under it, conveyed prospective purchasers to the land, advertised it, and continued to do so until he was informed by Rhees that the property had been sold. Later it developed that a sale was effected through another real estate agent.

[1, 2] Upon learning of the disposition of the property, Morris demanded his commission as provided in the contract; but Rhees refused to pay, and Morris then brought this action. He sued Rhees in his own right and as trustee, under the order of the Supreme Court directing the sale of the property, and sued the other defendants in their own right, alleging that they, acting through Rhees as their duly authorized agent, entered into the contract. Issues having been joined, a nonsuit was entered as to the minors, and the suit proceeded against the remaining defendants. This course was proper under Code, §§ 1205, 1209. Under correct instructions—we must assume, because the court's charge is not in the record (Boley v. Griswold, 20 Wall. 486, 488, 22 L. Ed. 375; Sturges v. Carter, 114 U. S. 511, 522, 5 Sup. Ct. 1014, 29 L. Ed. 240; Shreveport v. Cole, 129 U. S. 36, 42, 9 Sup. Ct. 210, 32 L. Ed. 589)—the case was submitted to a jury, which found against Rhees and in favor of the other defendants. From a judgment on the verdict Rhees appeals.

A similar contract was made by Rhees and Morris with respect to other land owned by the same parties. Morris procured a purchaser for the other land, but it was necessary to apply to a court of equity for authority to sell. The application was made, and Morris appointed a trustee to make the sale. He sold the property, and his action was ratified by the court, and thereupon he resigned as trustee.

Rhees asks for a reversal upon two grounds, namely: (a) That the contract was unenforceable from the beginning; and (b) that, if enforceable at any time, it was terminated by plaintiff's accepting the trusteeship in the equity suit.

[3, 4] The contract was not violative of any law. It was deliberately entered into by Rhees. Morris, with Rhees' knowledge and acquiescence, proceeded to perform it, and observed its provisions until Rhees breached it. But Rhees urges that it was delivered upon condition that it was not to become binding until he had obtained full authority from all the owners, including the minors, to employ Morris. The record, however, does not bear him out in this. Morris says he told Rhees he would not undertake to sell unless Rhees had "full authority to act for all parties interested in the property"; that Rhees then left his office, and in a few days thereafter returned and said that he had such authority. Thereupon Morris handed him drafts of the two proposed contracts. We are concerned only with the one in controversy. He read it, made objection to the amount of the commission named therein, then waived the objection, and signed the contract. Nothing was said to the effect that it was not to become effective until Morris had secured authority from the other owners. There was no reason for saying anything about it, according to Morris' theory, because Rhees had already assured him that he had the authority. The fact that Morris knew, or should have known, that Rhees did not have the authority to speak for the others, is immaterial. He did not by his contract attempt to dispose of their interests, or to impose any obligation upon them. He was a part owner of the property, and it was entirely proper for him to engage Morris to procure a purchaser and to agree to pay him for his services.

Rhees gives a somewhat different version of the affair. He says he informed Morris that he did not have authority from the adults, and could not, of course, secure any from the minors, but that nevertheless he signed the contract, because Morris insisted. He does not say, however, that he did so on condition of any kind—certainly not on the condition that it would not be binding until he had secured the authority of all the others. That Morris did not understand that the contract was conditional is evidenced by the undisputed fact that he proceeded at once to perform it by advertising and otherwise endeavoring to procure a purchaser. Even if we assume that there was a dispute of fact with respect to whether or not the delivery of the contract was conditional, that dispute was submitted to the jury and resolved against Rhees. It must therefore be said that the contract was delivered unconditionally and is enforceable.

Cases are cited by the appellant to the point that, where a contract is delivered on condition, it does not become effective until the condi-

tion is satisfied. We do not deny this principle, but it has no application, because the jury found there was no condition.

[5] The appointment of Morris as trustee by the equity court to sell the property covered by the other contract is of no importance. The suit in which the appointment was made was a friendly one, instituted by Rhees for the purpose of securing authority to sell the minors' interest. It embraced the property covered by both contracts. Rhees' theory is that, when the court acquired jurisdiction of the parties and the property, the subject-matter of the agency was taken out of his control, and thereby the Morris agency was terminated. But this is a misapprehension of the scope of the contract. It did not authorize Morris to sell the property, but to procure a purchaser. To make such a contract it was not necessary that Rhees should have had any control whatever over the property, or even any interest in it.

There is no merit in either of the contentions advanced by Rhees, and therefore the judgment is affirmed, with costs.

Affirmed.

DEVLIN v. ESHER et al.

(Court of Appeals of District of Columbia. Submitted April 5, 1922. Decided May 1, 1922.)

No. 3729.

Dower ⇐46(4)—Inchoate right of wife of tenant in common is defeated by sale for partition.

Under Code, § 88, providing that the wife of a tenant in common need not be made a party to partition, but that her rights shall attach to the portion assigned to her husband, section 89, authorizing the court to assign dower to a widow before sale, section 90, authorizing sale for partition free from right of dower by the wife of any cotenant, and section 93, providing for division of the proceeds of the partition sale among the parties, the inchoate dower right of a wife of a tenant in common, as distinguished from the vested right of the widow of such tenant, is not to be set off to the wife on sale of the property for partition, but her husband is entitled to his entire distributive share.

Appeal from the Supreme Court of the District of Columbia.

Partition proceedings between Albert D. Esher and others, in which Ilma Devlin filed exceptions to the auditor's report. From a decree overruling the exceptions, Ilma Devlin appeals. Affirmed.

W. C. Sullivan, of Washington, D. C., for appellant.

Albert D. Esher, of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree of the Supreme Court of the District, overruling appellant's exceptions to the report of the auditor of that court, the sole question being whether the wife of a tenant in common of real estate is entitled, in partition proceedings, to dower in her husband's share of the proceeds of the sale thereof.

Section 88 of our Code provides that, in an application to the court to decree a partition of real estate between tenants in common, it shall

not be necessary to make the wife of any cotenant a party to the proceeding, but that—

"her right of dower shall attach to whatever part of such property may be assigned in severalty to her husband, and the other parts thereof shall be assigned free of said right of dower."

Section 89 provides that, whenever a decree is rendered for the sale of land in the whole of which a widow is entitled to dower, if she shall not consent to a sale free of her dower, the court may, if it appears advantageous to the parties, cause her dower to be laid off and assigned as aforesaid. But if she will consent in writing to a sale of the property free of her dower—

"the court shall order the same to be sold free of her dower, and shall allow her, in commutation of her dower, such portion of the net proceeds of sale as may be just and equitable, not exceeding one-sixth nor less than one-twentieth, according to the age, health, and condition of the widow."

Section 90 reads as follows:

"Whenever real property is decreed to be sold for the purpose of division of the proceeds between tenants in common because the said property is incapable of being divided between them in specie, the court may decree a sale of the property free and discharged from any right of dower by the wife of any of the parties in his undivided share."

Under section 93 there shall be a division of the proceeds of a partition sale "among the parties, according to their respective rights."

In Randall v. Krieger, 23 Wall. 137, 148 (23 L. Ed. 124), after pointing out that, since the Statute of the 3 and 4 William IV, abolishing dower ad ostium ecclesiæ and ex assensu patris, dower given by law is the only kind which has existed in England, "and it is believed to be the only kind which ever obtained in this country," the court said:

"During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the Legislature."

Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384, involved the question whether, in a partition suit between cotenants, the wife of one of them is a necessary party, and, if not made such a party, whether she will be bound by the proceeding and sale, though she outlives her husband and becomes his surviving widow. Both these questions, after an exhaustive consideration, were ruled against the wife. There the statute provided that the monies arising from a partition sale, after payment of costs and expenses, "shall be paid by such Commissioner to the persons entitled thereto, according to their respective shares." 2 Gav. & H. Rev. St. p. 365, § 23. The court, after pointing out that a wife's interest exists by virtue of seizin of the husband and therefore is subject to any incumbrance, infirmity, or incident attaching to that seizin, including the right to compel a partition by sale, said:

"But there is another reason why the right to partition by sale is paramount to the inchoate right of the wife, of a cotenant, and that is the cotenant's title is an actual present existing estate in the real property, whereas the inchoate right of the wife therein is only the possibility of such an estate accruing to the wife dependent upon uncertain future events which may never happen, and, therefore, such estate may never exist. To hold that the cotenant's right to partition is not paramount to his wife's inchoate right, is to hold that a present absolutely existing estate is not superior and paramount to a mere possibility of the existence of such an estate."

In Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355, it was held that a partition sale and deed, without making the wife of a cotenant a party, extinguished her inchoate right of dower, under a statute similar to our Code.

In Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, 68 Am. St. Rep. 427, a well-reasoned case, it was ruled that when land is taken by the right of eminent domain, the wife of the person whose land is so taken is not entitled, by reason of her inchoate right of dower, to have a portion of the proceeds set apart for her in the event she survives her husband.

In Moore v. New York, 8 N. Y. 110, 59 Am. Dec. 473, recognized and affirmed in Witthaus v. Schack, 105 N. Y. 332, 11 N. E. 649, the court said:

"The question is whether the possibility of dower accruing to the wife after marriage, but before the death of her husband, is an interest in law, within the purview of this statute. * * * Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment, nor is it in any sense an interest in real estate."

Washburn on Real Property thus states the law:

"The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate that she not only takes her dower out of such part only of the common estate as shall have been set off to her husband in partition, but if by law the entire estate should be sold in order to effect a partition, she loses by such sale all claim to the land, although no party to such proceeding." 1 Washb. Real Prop. 208.

Coming back to the provisions of our Code, we find that, under section 88, if a partition in kind is made, the wife's dower interest attaches to the part assigned her husband. Section 89 deals with the vested dower interest of a widow, as distinguished from the "mere expectancy or possibility" of a wife's interest. Randall v. Krieger, 23 Wall. 137, 148, 23 L. Ed. 124. Recognizing this vested character of a widow's interest, Congress in this section required that interest to be either assigned or commuted, but in section 90, dealing with the "mere expectancy or possibility" of a wife's interest, Congress in terms provided that a partition may be decreed "free and discharged from any right of dower by the wife of any of the parties in his undivided share." And in section 93 it is provided that the proceeds of such a sale shall be divided "among the parties, according to their respective rights." We think the conclusion irresistible that the terms "parties" and "rights" mentioned in section 93 are defined and limited by the provisions of the preceding sections to which we have referred; in other words, that under the provisions of section 90 the husband is the sole

party interested, and hence entitled to his distributive share in the proceeds of the partition sale, as found by the trial court.

Decree affirmed, with costs.

Affirmed.

RUDOLPH et al. v. KNOX et al.

(Court of Appeals of District of Columbia. Submitted April 7, 1922. Decided May 1, 1922.)

No. 3737.

1. **District of Columbia ⟸16—Act of 1914 did not authorize macadamizing country roadway; "fixed pavement."**

   Within Act July 21, 1914, authorizing an assessment for the improvement of the roadway of any street by laying a new pavement not less than one square in extent from curb to curb, where the material used is fixed pavement, the term "fixed pavement" does not include common or water-bound macadam, and the reference to the square and the curbs applies to a city or village street, and not to a country road, so that the act does not authorize an assessment for macadamizing a country road.

2. **District of Columbia ⟸16—Act of 1916 is limited to "streets," and does not authorize paving country road.**

   Act Sept. 1, 1916, § 8, authorizing levy of assessments for the cost of paving a roadway with macadam or other pavement against the property abutting the side of the street so improved, and providing that only the cost of the roadway abutting the property between the lines normally projecting from the building line at intersecting streets is limited to "streets," which are defined as public ways in a city, town, or village, and does not authorize a levy of the cost of improving a country road against farm property abutting thereon.

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

3. **Statutes ⟸245—Levying taxes are strictly construed.**

   Statutes levying taxes are to be strictly construed, and their provisions are not to be extended by implication beyond the clear import of the language used.

Appeal from the Supreme Court of the District of Columbia.

Suit by Anna M. Knox and others against Cuno H. Rudolph and others, as Commissioners of the District of Columbia, and the District of Columbia, to cancel a special assessment. Decree for plaintiffs, and defendants appeal. Affirmed.

F. H. Stephens, of Washington, D. C., for appellants.

Vernon E. West, of Washington, D. C., for appellees.

SMYTH, Chief Justice. This is an appeal from a decree canceling a special assessment levied by the appellants on the property of the appellees for paving a roadway in front of their property with what is designated as common macadam.

There is an agreed statement of facts which shows that the property lies in a rural section of the District of Columbia, and that it abuts on what is known as Naylor road; that it consists of a farm of a little over 56 acres; that it is rough, broken, hilly, and cut by deep ravines, and is not fit for any other purpose than that of pasturing and farming;

that it is valued at about $11,300, and that the assessment amounts to $2,199.53; that the land extends along the road 2,660 feet; that Naylor road is an old highway, having been in existence for over 30 years, connects the District line with an important Maryland state highway, and is about 90 feet wide; and that the macadamized surface covers a width of 18 feet, 9 feet on each side of the longitudinal center of the road, thus leaving about 35 feet between the macadam and the property line.

Congress by Act of July 21, 1914, said:

"Hereafter whenever under appropriations made by Congress, the roadway of any street, avenue, or road in the District of Columbia is improved by laying a new pavement thereon or completely resurfacing the same, not less than one square in extent, from curb to curb, or from gutter to gutter where no curb exists, where the material used is * * * asphaltic or bituminous macadam, concrete, or other fixed roadway pavement, such proportion of the total cost of the work * * * shall be levied pro rata according to the linear frontage of said property on the street, avenue, or road, or portion thereof upon the roadway of which said new pavement or resurfacing is laid." 38 Stat. 517, 524.

The agreed statement of facts admits that the Board of Commissioners and the District construed this act as not authorizing the levy of an assessment for laying common or water-bound macadam pavements. In 1916 Congress passed another act (39 Stat. 676, 716), which provides in section 8:

"That hereafter the half cost of the paving or repaving of a roadway between the side thereof and the center thereof with sheet asphalt, * * * macadam, or other form of pavement shall be assessed against the property abutting the side of the street so improved," and that "there shall be included in the area the cost of which is assessable hereunder only the roadway area abutting the property between lines normally projected from the building line of the street being improved at the points of intersection with the building lines of intersecting streets."

The question for our consideration is whether or not these acts, or either of them, authorized the levy of the assessment assailed.

[1] It will be noticed that the first act dealt with a "fixed" pavement, and that the pavement for which the assessment was levied is a common or water-bound macadam, which, it seems to be conceded, is not such a pavement. This, we infer, is the reason why the District and the commissioners felt that the act of 1914 did not authorize the laying of such a macadam. Besides, the act says the pavement shall be laid "not less than one square in extent from curb to curb or from gutter to gutter." This language applies to a city or village street, not to a country road, for it is unusual to speak of squares or curbs when referring to a road of that character.

[2] The act of 1916 does not have the word "road"; it authorizes "the paving or repaving of a roadway between the side thereof and the center thereof" with certain kinds of paving material, and provides that one-half the cost of doing the work "shall be assessed against the property abutting the side of the street so improved." When further speaking of the property to be assessed, the act mentions "lines normally projected from the building line of the street being improved at the points of intersection with the building lines of intersecting streets."

Generally, building lines and intersecting streets have nothing to do with rural roads.

We are convinced that, when Congress employed the words and phrases we have quoted, it was thinking of streets in a city or village. A street is defined as a "public way, with buildings on one or both sides, in a city, town, or village" (Standard Dictionary); as "a public thoroughfare or highway in a city or village" (Bouvier); and it has been adjudged that the words "streets" and "alleys" relate exclusively to ways or thoroughfares of towns and cities (Debolt v. Carter, 31 Ind. 355, 367). Consult, also, State v. Stevens, 36 N. H. 59, 62; United States v. Bain, 24 Fed. Cas. 940, No. 14496.

[3] It is a familiar principle that statutes levying taxes are to be strictly construed. The Supreme Court of the United States has said:

"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, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53 (62 L. Ed. 211), in which several cases are cited.

To the same effect, see Allman v. District of Columbia, 3 App. D. C. 8, and 25 R. C. L. 94.

Applying the doctrine of the Gould Case to the two acts before us, we are convinced that the assessment in question was levied without authority. This renders it unnecessary to consider any of the other questions raised.

The decree is affirmed, with costs.

Affirmed.

REED v. REED.

(Court of Appeals of District of Columbia. Submitted April 10, 1922. Decided May 1, 1922.)

No. 3744.

1. **Divorce ⟹211, 286—Temporary alimony rests in trial court's discretion.**
   The granting or refusing of temporary alimony is committed to the sound discretion of the trial court, and that discretion will not be disturbed by the reviewing court, unless the latter is thoroughly satisfied it has been abused.
2. **Appeal and error ⟹1074(3)—Denial of supersedeas held harmless, where order was affirmed.**
   Error in denying a right to supersedeas on appeal from an order is harmless to appellant, where the order was affirmed on the appeal.
3. **Mandamus ⟹57(1)—Proper remedy on denial of supersedeas.**
   The remedy of an appellant to test his right to a supersedeas is by application for mandamus.
4. **Mandamus ⟹172—On mandamus to compel supersedeas court will examine propriety of order.**
   Since mandamus does not issue to further a wrong, but only to protect a right, the Court of Appeals, on an application for mandamus to compel the lower court to grant a supersedeas on appeal from an order fixing temporary alimony, would ascertain whether the order was proper, and, if so, would refuse the writ.

Appeal from the Supreme Court of the District of Columbia.

Suit for separate maintenance by Clara C. Reed against Daniel M. Reed. From an order overruling defendant's motion to reduce the award of temporary alimony, defendant appeals. Affirmed.

T. M. Wampler, of Washington, D. C., for appellant.

C. T. Clayton and Clinton R. Colvin, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. This suit by Clara C. Reed, wife of the appellant, was for separate maintenance under section 980 of the Code. In her bill she charged, among other things, that her husband was earning in the neighborhood of $250 a month; that he had been contributing to the support of their house $150 each month, but suddenly reduced the allowance to $50 each half month, and then to $40, informing her at the same time that she should have no more; and that this was not enough to meet the usual family expenses. She asked for an order requiring him to pay her reasonable alimony pending the disposition of the suit. A rule to show cause was laid upon him, and he answered, denying that his wages were more than $190 per month, admitting the reduction of his wife's allowance as alleged by her, and stating that $80 per month was ample for her support and maintenance. The court accepted his view, and ordered that he pay that amount in semimonthly installments of $40. Later he moved to reduce the amount, and filed his affidavit in support of the motion. He asserted therein that his earnings had been reduced to $165 per month. The wife in a counter affidavit denied this, and alleged that he was earning in the neighborhood of $216 per month. The court overruled the motion to reduce, directed that he pay alimony which was in arrears, and repeated the provisions of the prior order with respect to the payment of $40 semimonthly. Defendant excepted to the ruling and asked that the amount of a supersedeas be fixed. The request was denied.

[1] It is well settled that the matter of granting or refusing temporary alimony is committed to the sound discretion of the trial court, and that this discretion will not be disturbed by the reviewing court, unless it is thoroughly satisfied that it has been abused. Tolman v. Tolman, 1 App. D. C. 299; Shaw v. Shaw, 2 App. D. C. 204; Lesh v. Lesh, 21 App. D. C. 475; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698. Appellant admits this principle of law, but asserts that his wife has a sufficient income from her separate estate to provide for her maintenance, and hence was not entitled to alimony. She denied that she had, and set forth facts which, if true, were quite sufficient to justify the conclusion that her statement was correct. There was, then, a conflict in testimony on this point. Whether or not her version was true was for the determination of the court of first instance, and we approve its action in that respect. In passing, however, we remark that we do not hold that if it was established that her income was sufficient to maintain her pendente lite, it would be a good reason to deny her application for temporary alimony. That question is not ruled upon.

[2] With respect to the action of the court in denying the supersedeas, if erroneous, it was without prejudice to the appellant, in view of the conclusion we have reached upon the other phase of the case. Since the order to pay the alimony was proper, no injury resulted to the appellant by being compelled to pay it during the pendency of the appeal here.

[3, 4] If the appellant desired to test his right to a supersedeas, he should have applied to this court for a mandamus (Ex parte Railroad Co., 95 U. S. 221, 24 L. Ed. 355); but it does not follow that he would have obtained it. Mandamus does not issue to further a wrong, but only to protect a right. Lane v. Duncan Townsite Co., 44 App. D. C. 63, 67; Id., 245 U. S. 311, 38 Sup. Ct. 99, 62 L. Ed. 309. We would have looked into the record for the purpose of ascertaining whether or not the order was proper, and, if we found that it was, we would have refused the writ. What our conclusion would have been is very definitely indicated by the disposition which we now make of the order.

The order is affirmed, with costs.

Affirmed.

CAMPBELL v. RAWLINGS.

(Court of Appeals of District of Columbia. Submitted April 5, 1922. Decided May 1, 1922.)

No. 3728.

1. **Brokers ⟸52—Entitled to commission when lessee procured by broker exercises option to purchase.**

Where a broker, authorized to negotiate a sale of the property, procured a lessee thereof, and the lessee exercised the option to purchase given by the lease, the option was based on a valuable consideration, and its exercise completed a contract for sale between the parties, and the broker was as much entitled to his commission as if he had procured the sale direct or initially.

2. **Brokers ⟸43(1)—Oral broker's contract not invalid under statute, where purchaser might exercise option within the year.**

An oral contract with a broker for the sale of property is not invalid under Code, § 1117, requiring promises not performable within a year to be in writing, where the contract of sale procured by the broker was consummated by the exercise of an option in a lease negotiated by him after the expiration of a year, if the option might have been exercised within a year.

Appeal from the Supreme Court of the District of Columbia.

Action by Jesse W. Rawlings against Elena P. Campbell to recover a broker's commission on the sale of real estate. Judgment for plaintiff, and defendant appeals. Affirmed.

Chapin Brown, of Washington, D. C., for appellant.

C. R. Ahalt and George C. Shinn, both of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District for the plaintiff, appellee here, in an action for the recovery of a broker's commission on the sale of certain real estate.

The evidence for the plaintiff tended to show that he was employed by the defendant, appellant here, to represent her in the sale of premises No. 2101 G. Street, Northwest, in the District of Columbia, upon a 3 per cent. commission basis; that as a result of his efforts the property was leased to George Washington University for five years, with an option to purchase at a stated price within the term of the lease; and that this option was exercised a little more than a year after the execution of the lease. At the close of all the evidence the defendant sought a directed verdict and offered certain prayers, all of which were refused. Thereupon the court instructed the jury—

"to the effect that the plaintiff could not recover unless he had made out that the defendant understood that she was employing him as her agent to procure for her a purchaser, and that he did procure the University to make the lease containing the option which was afterwards exercised by the University, and that as far as the amount of his recovery was concerned he could recover only a reasonable compensation by way of commission, unless the jury found that a commission of 3 per cent. was agreed upon between the plaintiff and the defendant."

[1] It is insisted that the plaintiff was not entitled to recover because the exercise of the option by the University was not "a part of the original transaction to obtain a purchaser." An examination of the cases cited in support of this contention, however, discloses that all are inapposite for the reason that the options therein provided for were not exercised. The option here was upon sufficient consideration (House v. Jackson, 24 Or. 89, 32 Pac. 1027; Napier v. Darlington, 70 Pa. 64; Maughlin v. Perry, 35 Md. 352), and, inasmuch as it ran to the lessee and its assigns, was assignable (Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455; Hollander v. Central Metal, etc., Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; Gustin v. Union School District, 94 Mich. 502, 54 N. W. 156, 34 Am. St. Rep. 361). When accepted by the University, "a contract of sale between the parties was completed." Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501, 564; 39 Cyc. 1247. See, also, Block v. Ryan, 4 App. D. C. 283, 288. That the sale was attributable to the provisions of the lease is plain, and the plaintiff, having procured the lease which thus ripened into a contract of sale, was as much entitled to his commission as though he had procured the sale direct or initially. In other words, the court below correctly interpreted the law in the charge given.

[2] It is insisted further that plaintiff was precluded from bringing this action by our statute of frauds (Code, § 1117), denying the right to bring an action—

"upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing."

But, while plaintiff's contract with the defendant was in parol, the option might have been exercised within a year, and the statute therefore does not apply. Warner v. Texas & Pac. Rd. Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495.

Finding no error in the record we affirm the judgment, with costs.

Affirmed.

SNOW v. SNOW.

(Court of Appeals of District of Columbia. Submitted April 5, 1922. Decided May 1, 1922.)

No. 3726.

1. Divorce ⟸298(1)—Custody of child rests in court's discretion, to be exercised for its welfare.
   The disposition of the custody of the child of divorced parents rests in the sound discretion of the court, subject to the rule that the child's welfare is the paramount thing to be considered.
2. Divorce ⟸298(1')—Custody of child should not interfere with schooling or estrange from either parent.
   In awarding the custody of a child of divorced parents, it is important that the child's schooling should not be interfered with, if possible, and that nothing should be done which would have a tendency unnecessarily to estrange the child from either of its parents.
3. Divorce ⟸303(1)—Repeated efforts to change child's custody are regarded with disfavor.
   Repeated efforts by divorced parents to change the provisions for the custody of a child are very detrimental to the building of the child's character, and will be looked on with disfavor, unless the change is sought for grave reasons.

Appeal from the Supreme Court of the District of Columbia.

Suit for divorce from bed and board by Addis H. Snow against Chester A. Snow. From a decree modifying the previous order as to the custody of a minor child, defendant appeals. Modified and affirmed.

See, also, 50 App. D. C. 242, 270 Fed. 364.

George P. Hoover, of Washington, D. C., for appellant.

Henry E. Davis, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This appeal relates to a contest between parents, divorced a mensa et thoro, concerning the custody of their child, a boy 8 years of age. In the decree granting the divorce, which was entered in November, 1917, it was provided that the mother was to have custody of the child, with the right in the father to have it in his custody every Sunday from 10 o'clock in the forenoon until 4 in the afternoon. Later, July, 1920, the parents having been engaged in other litigation in the meantime, the decree was modified, so as to provide that the defendant should have the custody of the child every alternate month during the period of one year, and that during the month that the father had its custody it should be at the home of the mother on each Sunday from 10 in the forenoon until 4 in the afternoon, and during the month the mother had its custody it should be at the home of the father each Sunday between the same hours.

In February, 1921, a motion was made to change this order, and much testimony was received for and against the motion. The order was set aside, and the custody of the child given to the mother, with the right in the father to have its custody on each Sunday between the hours 9:30 a. m. and 7 p. m., until October 1, 1921, and thereafter on

Saturday of each week during the same hours. From this order the present appeal was taken.

We shall not review here the testimony, which took a wide range, on which the order was based, because we cannot conceive of any useful purpose which it would serve.

[1, 2] The disposition of the custody of the child rests in the sound discretion of the court, subject to the rule that its welfare is the paramount thing to be considered. Wells v. Wells, 11 App. D. C. 392; Stickel v. Stickel, 18 App. D. C. 149; Seeley v. Seeley, 30 App. D. C. 191, 12 Ann. Cas. 1058. The child's schooling is an important matter, and should not be interfered with, if possible; yet nothing should be done which would have a tendency to unnecessarily estrange the child from either of its parents, or either of its parents from the child. Care must be taken that the child is not tossed about like a ball between the contesting parties. Consciousness on its part that a struggle, with its inevitable bitterness, takes place at short intervals between its parents, must be very detrimental to the building of the child's character. In view of this we think that the order before us should be modified, so that the mother shall have the custody of the child during the public school year in Washington, and the father its custody on each Saturday during that period between the hours of 9:30 o'clock a. m. and 7 o'clock p. m., the father to provide for obtaining the child at the home of the mother and for returning him thereto at the hour last mentioned, and that the father shall have the custody of the child during the public school vacation period, the mother to have its custody on Sunday of each week during that period between 9:30 a. m. and 7 o'clock p. m., the father to provide for sending the child to the home of the mother and for conveying it back to his home.

[3] We think it proper to add that hereafter this court will, and the lower court, in our judgment, should, look with much disfavor upon any effort to change the order here provided for until the child has reached the age of 12, except where the change is sought for grave reasons.

The order appealed from is modified, as just indicated, and, as so modified, is affirmed; appellant to pay the costs of the appeal.

Affirmed, as modified.

PITTSBURGH & W. V. RY. CO. v. INTERSTATE COMMERCE COMMISSION.

(Court of Appeals of District of Columbia. Submitted April 3, 1922. Decided May 1, 1922.)

No. 3709.

1. Injunction ⇐28—Liability for costs does not authorize injunction to restrain Interstate Commerce Commission from proceeding with hearing before it.

The fact that the Interstate Commerce Commission has no authority to award costs, and that a party to a proceeding before the Commission under an unconstitutional statute would be liable for its costs, does not establish irreparable injury, entitling such party to restrain the proceedings.

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

2. Injunction ⟸28—Possibility of multiplicity of suits does not make statutory remedy against Commission's action inadequate.

The possibility that numerous proceedings may be instituted before the Interstate Commerce Commission under Transportation Act 1920, § 206f, does not make the statutory remedy by proceeding in court for the enforcement of the award, or to have the award set aside as inadequate, so as to authorize an injunction against such proceedings if the statute is unconstitutional, since a decision of that question could be obtained by a resort to the statutory remedy in a test case almost as speedily as through the injunction proceedings.

Appeal from the Supreme Court of the District of Columbia.

Suit by the Pittsburgh & West Virginia Railway Company against the Interstate Commerce Commission. From a decree dismissing the bill, complainant appeals. Affirmed.

F. M. Swacker, of Washington, D. C., and Marion B. Pierce, of New York City, for appellant.

P. J. Farrell, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District dismissing appellant's bill to restrain the Interstate Commerce Commission, appellee here, from proceeding to a hearing and determination of a complaint filed with the Commission on February 24, 1921, by the Wayne Coal Company against appellant railway company, seeking an award of reparation for damages growing out of alleged preferential treatment in the matter of car supply during the period from October 1, 1917, to December 31, 1917.

It is the contention of appellant that section 206f of the Transportation Act of 1920 (41 Stat. 462) is unconstitutional in so far, at least, as it attempts to revive reparation claims with the Commission which were more than two years old prior to its enactment. That section reads as follows:

"The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to federal control."

Appellant's position is that the provision in section 16 of the Act to Regulate Commerce (Comp. St. § 8584), that such complaints shall be filed within two years from the time the cause of action accrues and not after, is a condition of the liability and of the right of action, rather than a mere statute of limitations.

[1, 2] Under our view of the case it is unnecessary to inquire into the validity of the provision of the act of 1920 challenged by appellant, for appellant concedes that, under the Interstate Commerce Act, a complainant obtaining an award of damages must proceed in a court for the enforcement of that award, or a carrier must resort to a court to have the award set aside. Counsel say that "there is, therefore, of course, a legal remedy respecting an erroneous final award of the Commission," but contend, first, that because the Commission has no authority to award costs, and, second, because the Commission may take jurisdiction of many other similar cases, the remedy provided by statute is inadequate. But no case has been cited, nor have we knowledge

of any, in which a court has assumed jurisdiction in similar circumstances out of consideration merely of the element of costs. In other words, we know of no case in which liability to costs has been deemed an irreparable injury. And as to the possible multiplicity of suits, it is apparent that a decision in a test case could be obtained by a resort to the remedy admittedly provided by statute almost as speedily as through this extraordinary remedy.

We are of the view, therefore, that appellant should be remitted to its statutory remedy, and hence that the decree must be affirmed, with costs.

Affirmed.

STANDARD SAV. BANK v. STONE et al.

(Court of Appeals of District of Columbia. Submitted April 6, 1922. Decided May 1, 1922.)

No. 3735.

Covenants ⇐130(3)—Grantee cannot compromise with tenants by sufferance and recover amount paid thereunder from covenantor.

Where property, occupied by tenants under a parol agreement for a term of five years, which is made a tenancy by sufferance under Code, § 1116, and could be terminated upon 30 days' notice under section 1221, was conveyed by a special warranty, the grantee could not, ignoring the legal procedure to oust the tenants, compromise with them to secure possession of the property, and recover on the special warranty the amount paid under the compromise agreement.

Appeal from the Supreme Court of the District of Columbia.

Action by the Standard Savings Bank against Charles P. Stone and another. From a judgment for defendants, entered on a demurrer to the second amended declaration, plaintiff appeals. Affirmed.

William E. Richardson, of Washington, D. C., for appellant.

George E. Sullivan, of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This appeal is from the judgment of the Supreme Court of the District of Columbia, entered upon a demurrer to the plaintiff's second amended declaration.

The facts alleged in the first count are that defendants on June 24, 1920, executed a special warranty deed to plaintiff bank for certain real estate situated in this District; that defendants did not keep and perform the covenant of warranty, in that a portion of the premises was at the time leased to one Chakalakis, with whom it is alleged defendants had made a verbal agreement in November, 1919, giving Chakalakis a 5-year lease on the premises, in consideration that Chakalakis would pay an increased rent, which he paid on the 1st day of December, 1919. It is further alleged that plaintiff notified the defendants of the claim asserted by Chakalakis, but that defendants refused to settle or adjust the matter; that Chakalakis filed a suit in equity to prevent any interference with said property, as a result of which plain-

tiff was temporarily enjoined by the Supreme Court of the District of Columbia from interfering with the possession of said premises, as a result of which plaintiff was compelled to pay Chakalakis, to secure possession of the premises, the sum of $2,500.

It is also alleged that another portion of the premises was occupied by one Goodacre under similar circumstances and conditions, except that no suit was filed, and that plaintiff, to secure possession of this portion of the property, was required to pay Goodacre the sum of $3,000.

The second count of the declaration set forth the contract of sale between plaintiff and defendants, the existing tenancy at the time of making said sale, and that defendants knew that the property was purchased by the plaintiff for the purpose of remodeling the first floor for banking purposes, consisting principally of the two storerooms then occupied by Goodacre and Chakalakis. The remaining allegations are substantially the same as in the first count. Plaintiff prayed judgment for $5,500, with interest and costs.

The estates claimed by the tenants were created by parol, and come squarely within the provisions of section 1116, D. C. Code, which provides:

"Every estate in lands, tenements, or hereditaments for a greater term than one year attempted to be created by parol, or otherwise than by deed as provided in subchapter 1 of chapter 16, shall be an estate by sufferance."

It is clear that at the time of purchase of the property by plaintiff bank the tenants were holding by sufferance, a tenancy which could be terminated upon 30 days' notice. D. C. Code, § 1221. It may well be, though unnecessary to decide, that any damage sustained by plaintiff, through delay or expense in securing possession of the property in the way provided for dispossessing tenants holding by sufferance, could have been recovered in a proper action; but that was not the course pursued. It is not the cause of action set out in this case. Plaintiff could not ignore the legal procedure provided, and compromise with the tenants for a sum which it might elect to pay, and then recover back that sum from the defendants upon any basis of breach of warranty. The declaration, for this reason, fails to state a cause of action, and the demurrer was properly sustained.

The judgment is affirmed, with costs.

BRADY v. FALL, Secretary of the Interior, et al.

(Court of Appeals of District of Columbia. Submitted April 4, 1922. Decided May 1, 1922.)

No. 3721.

1. Public lands ⇐109—Successful applicant is indispensable party to suit to enjoin issuance of patent.

Where the Land Office had decided a contest in favor of one of the applicants, to whom a patent would ordinarily issue, the successful applicant was an indispensable party to a suit to restrain the Secretary of the Interior and the Commissioner of the General Land Office from issuing the patent.

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

2. Public lands ⟸106(1)—Decision of Land Department within jurisdiction cannot be controlled by injunction, unless arbitrary.

The decision of a land contest is within the jurisdiction of the Department of the Interior, and its decision may not be controlled by injunction, in the absence of a showing of capricious or arbitrary action.

Appeal from the Supreme Court of the District of Columbia.

Suit by Thomas N. Brady against Albert B. Fall, Secretary of the Interior, and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

S. M. Stockslager, of Washington, D. C., for appellant.

C. E. Wright and Edwin S. Booth, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a decree in the Supreme Court of the District, dismissing appellant's bill to enjoin appellees from issuing a patent for certain public land to Lillie S. Harner, and for other relief.

On October 27, 1915, according to the averments of the bill, Harry S. Harner instituted a contest proceeding against William Rattkamner, a homestead entryman of the land in controversy. On January 6, 1916, the entry was canceled, but Harner was not notified until December 27, 1918. Under the provisions of the Act of May 14, 1880 (21 Stat. 140 [Comp. St. §§ 4536–4538]), Harner had the preference right of entry within 30 days after receipt of the notice. On January 1, 1919, or within Harner's 30-day period, the appellant, Brady, made a homestead settlement on the land. On February 17, 1919, Rudolph L. Larson filed a homestead entry on the same land and on March 3d, following, Brady instituted a contest proceeding against Larson, alleging a prior settlement. On April 14th, following, Lillie S. Harner, as the deserted wife of Harry S. Harner, filed a petition to intervene, which was allowed on the next day. Hearing was had, at which "all parties appeared in person and by their attorneys." The register and receiver decided that Mrs. Harner's rights were paramount to those of "either the contestant or the contestee," and recommended the cancellation of the Larson entry and that Mrs. Harner be allowed to enter the land. Brady and Larson both appealed, and the Department canceled the Larson entry, dismissed the contest, and awarded the land to Mrs. Harner. The bill alleges that the Secretary was about to issue a patent to her when this suit was instituted.

[1, 2] It is apparent from the foregoing statement that Mrs. Harner is an indispensable party, for the bill seeks to deprive her of rights to which she has been found entitled. Foltz v. Payne, 50 App. D. C. 155, 269 Fed. 671. Having found that Mrs. Harner's rights were paramount, the Department did not determine the merits of appellant's contest with Larson, and yet we are asked to set aside its finding without the presence of Mrs. Harner and without knowledge of the facts upon which the Department acted. Moreover, the question decided was one within the jurisdiction of the Department and, there being no showing of capricious or arbitrary action, the decision may not be

controlled by injunction. Gaines v. Thompson, 7 Wall. 347, 19 L. Ed. 62; Hall v. Payne, 254 U. S. 343, 41 Sup. Ct. 131, 65 L. Ed. 295; O'Brien v. Lane, 40 App. D. C. 493.

Decree affirmed, with costs.

Affirmed.

SEYMOUR v. TERRELL, Municipal Court Justice, et al.

(Court of Appeals of District of Columbia. Submitted April 7, 1922. Decided May 1, 1922.)

No. 3742.

Landlord and tenant ⊂=278½, New, vol. 11A Key-No. Series—Possessory proceedings are maintainable, if no appeal is taken by tenant from dismissal by rent commission.

Where the tenant's complaint to the rent commission had been dismissed by that commission, and no appeal from the order of dismissal was taken within 10 days after it was rendered, the determination of the rent commission became final under the Ball Act, and the landlord could institute possessory proceedings against the tenant in the municipal court.

Appeal from the Supreme Court of the District of Columbia.

Petition for writ of prohibition by B. F. Seymour against R. H. Terrell, one of the Justices of the Municipal Court of the District of Columbia, and Margaret Murphy. From a judgment dismissing the petition, petitioner appeals. Affirmed.

Raymond M. Hudson, of Washington, D. C., for appellant.

Theodore W. Peyser and George E. Edelin, both of Washington, D. C., for appellees.

ROBB, Associate Justice. Appeal from a judgment in the Supreme Court of the District of Columbia dismissing appellant's petition for a writ of prohibition.

The material facts are as follows: The appellee, Margaret Murphy, purchased an apartment and served notice upon the tenant to vacate. Thereupon the appellant filed a complaint with the rent commission, challenging the owner's right to possession. This complaint was answered, the same came on for hearing, and on June 30, 1921, the commission dismissed the complaint. From this final order of dismissal no appeal was taken, but, after the expiration of the time within which an appeal might have been taken, appellant attempted an appeal and submitted a so-called "bill of exceptions" and "statement of case" to the commission, which the commission declined to entertain. Thereupon the owner instituted a suit for possession in the municipal court, and appellant filed his petition for this writ.

No appeal having been taken within 10 days after the final order of the rent commission dismissing appellant's complaint, the determination of the commission, under the provisions of the Ball Act, became "final and conclusive" (Killgore v. Zinkhan, 274 Fed. 140, 51 App. D. C. ——; Davis v. Cooksey, 274 Fed. 143, 51 App. D. C. ——), and the

owner, therefore, was within her rights in instituting possessory proceedings in the municipal court.

Judgment affirmed, with costs.

Affirmed.

HUTCHISON v. COLGATE & CO.

(Court of Appeals of District of Columbia. Submitted March 10, 1922. Decided May 1, 1922.)

No. 3708.

Pleading ⊂=155—Affidavit of defense on information and belief must allege ability to prove facts at trial.

Where the essential averment in an affidavit of defense is made on information and belief, it is incumbent on defendant to allege his ability to prove at the trial the facts on which he based his defense, or the affidavit is insufficient.

Appeal from the Supreme Court of the District of Columbia.

Action by Colgate & Co., a corporation, against Hugh B. Hutchison. From a judgment for plaintiff, because of the insufficiency of an affidavit of defense, defendant appeals. Affirmed.

E. Hilton Jackson, of Washington, D. C., for appellant.

E. C. Brandenberg and Louis M. Denit, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a judgment rendered upon the insufficiency of an affidavit of defense under the seventy-third rule.

The essential averment of the affidavit is made by appellant, defendant below, upon "information and belief," and the other averments are made with a disclaimer of knowledge of the facts relative thereto. It was therefore incumbent upon defendant to allege his ability to prove at the trial the facts upon which he based his defense, which was not done. The affidavit, in the last analysis, is made upon information and belief, without a tender of proof of the facts upon which defendant intends to rely. This is insufficient. Woodmen v. Davis, 48 App. D. C. 614; Hazen v. Van Senden, 43 App. D. C. 161.

The judgment is affirmed, with costs.

LAKE et al. v. FLETCHER.

(Court of Appeals of District of Columbia. Submitted April 4, 1922. Decided May 1, 1922.)

No. 3714.

Bills and notes ⊂=448—Common counts declaration authorizes recovery on notes.

An action on promissory notes may be maintained, where the declaration was on the common counts; it being unnecessary that plaintiffs specially declare on the notes.

Appeal from the Supreme Court of the District of Columbia.

Action by Rufus A. Fletcher against Felix Lake and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Le Roy Pumphrey and Charles N. Joyce, both of Washington, D. C., for appellants.

Andrew Wilson, of Washington, D. C., for appellee.

ROBB, Associate Justice. The plaintiff, appellee here, declared upon the common counts, and in his particulars of demand and affidavit of merit set out a series of overdue promissory notes aggregating, with interest and a reasonable attorney's fee provided for in the notes, $10,787.57. The defendant, appellant here, demurred; his contention below being that it is impossible to decide whether the suit is brought upon the promissory notes or under the original consideration. Here the contention, in substance, is that plaintiff should have specially declared on the notes.

The case is ruled by our decision in Holley v. Smalley, 50 App. D. C. 178, 269 Fed. 694, wherein we held that—

"A suit upon a promissory note may be sustained upon a declaration in assumpsit, either upon the common counts or upon a declaration upon the contract."

It follows that the judgment must be affirmed, with costs.

Affirmed.

MEMORANDUM DECISIONS

THE J. H. WILLIAMS. PENNSYLVANIA COAL CO. v. CORNELL STEAMBOAT CO. et al. CLEARY BROS. v. HINES, Director General of Railroads, et al. (Circuit Court of Appeals, Second Circuit. March 20, 1922.) No. 225–226. Appeals from the District Court of the United States for the Eastern District of New York. Separate libels by the Pennsylvania Coal Company and by Cleary Bros. against the steam tug J. H. Williams, of which the Cornell Steamboat Company was claimant, and against Walker D. Hines, as Director General of Railroads. From decrees in favor of libelants, the Cornell Steamboat Company appeals. Affirmed. Park & Mattison, of New York City, for Pennsylvania Coal Co. Thomas C. Byrns, of New York City (John L. Stoneham, of New York City, of counsel), for libelants Cleary Bros. Kirlin, Wcolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for claimant. Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for respondent. Before HOUGH, MANTON, and MAYER, Circuit Judges.

PER CURIAM. Decrees affirmed.

LASKI v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. May 4, 1922.) No. 319. In Error to the District Court of the United States for the Eastern District of New York. Joseph Laski was convicted of violation of the National Prohibition Act, and brings error. Affirmed. Arthur Goodstein, of Brooklyn, N. Y., for plaintiff in error. Ralph C. Greene, U. S. Atty., of Brooklyn, N. Y. (Henry J. Walsh, Asst. U. S. Atty., of Brooklyn, N.

Y., of counsel), for the United States. Before ROGERS, HOUGH, and MAYER, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

PEPPERELL, Collector of Internal Revenue, v. BELLE SPRINGS CREAMERY CO. (Circuit Court of Appeals, Eighth Circuit. June 1, 1921.) No. 5764. In Error to the District Court of the United States for the District of Kansas. Fred Robertson and L. S. Harvey, both of Kansas City, Kan., for plaintiff in error. Thomas F. Doran, of Topeka, Kan., and G. W. Hurd, Arthur Hurd, and Bruce C. Hurd, all of Abilene, Kan., for defendant in error.

PER CURIAM. Judgment affirmed, with costs, without filing of opinion.

PONZI v. FESSENDEN et al. (Circuit Court of Appeals, First Circuit. June 6, 1922.) No. 1525. Appeal from the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge. Petition by Charles Ponzi for writ of habeas corpus against Franklin G. Fessenden and others. Writ denied, and petitioner appeals. Affirmed, pursuant to opinion of Supreme Court (257 U. S. —, 42 Sup. Ct. 309, 66 L. Ed. —), in answer to certified question. See, also, 268 Fed. 997. The following question of law was certified by the United States Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States: The facts in this case are as follows: September 11, 1920, 22 indictments were returned against Charles Ponzi in the superior court for Suffolk county in the commonwealth of Massachusetts, charging him with certain larcenies, with being an accessory before the fact to certain larcenies, and with conspiracy to commit larceny. October 1, 1920, two indictments charging violation of section 215 of the Penal Code (Comp. St. § 10385) were returned against said Ponzi in the District Court of the United States for the District of Massachusetts. November 30, 1920, he was arraigned and pleaded guilty to the first count of one of these indictments, and was sentenced by said court to imprisonment for five years in the House of Correction at Plymouth, in the county of Plymouth and the commonwealth of Massachusetts. April 21, 1921, the superior court for Suffolk county issued a writ of habeas corpus, directing the master of the House of Correction, who, as federal agent, had custody of Ponzi by virtue of the mittimus issued by the United States District Court, to bring said Ponzi forthwith before said court and from day to day thereafter for trial upon the 22 indictments pending before it, but to hold Ponzi at all times in his custody as an officer of the United States, subject to the sentence imposed by the United States District Court. Blake, the master of the House of Correction, made a return to said writ to the effect that he held Ponzi pursuant to process of the United States and prayed that the writ be dismissed. After service of this writ upon Blake, the Assistant Attorney General of the United States, by direction of the United States Attorney General, stated in open court that the United States had no objection to the issuance of the writ, to the compliance with the writ by Blake, or to the production of Ponzi for trial in the superior court, and that the Attorney General directed Blake to comply with the writ. Upon Blake's refusal to produce Ponzi, the superior court adjudged him in contempt and committed him to the custody of a sheriff. Blake thereupon filed in the United States District Court a petition for a writ of habeas corpus, directed against the sheriff, which was dismissed April 27, 1921. From this order of dismissal no appeal was taken by Blake. Thereafter Blake produced Ponzi in the superior court pursuant to the writ of habeas corpus issued by said court. May 23, 1921, Ponzi filed in the said District Court a petition for a writ of habeas corpus, directed against the justice of the superior court who issued the writ in the state proceedings, and against Blake, the master of the House of Correction, alleging in substance that he was within the exclusive jurisdiction of the United States, and that the state court had no jurisdiction on habeas corpus proceedings directed against said Blake, holding him as a federal agent, to try him for said alleged crimes. If material, it further appears

in the record that Ponzi, having been produced under said state process before the state court, was arraigned and stood mute, and, a plea of not guilty having been entered at the direction of the court, thereupon requested to be admitted to bail, the offense for which he was indicted being bailable, and that said request was denied. Ponzi's petition for writ of habeas corpus was denied by said District Court on May 24, 1921, and an appeal was taken to this court. We desire the instruction of the Supreme Court upon the following question: May a prisoner, with the consent of the Attorney General, while serving a sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction, who, as federal agent, under a mittimus issued out of said District Court, has custody of such prisoner, into a state court, in the custody of said master and there put to trial upon indictments there pending against him? It is now, to wit, November 29, 1921, ordered that the foregoing statement of facts, and question of law arising thereon, be certified under the seal of this court and transmitted to the Supreme Court. William H. Lewis, of Boston, Mass. (Daniel H. Coakley, of Boston, Mass., on the brief), for appellant. J. Weston Allen, Atty. Gen. (Edwin H. Abbott, Jr., Asst. Atty. Gen., on the brief), for appellee Fessenden. Charles P. Curtis, Jr., Sp. Asst. U. S. Atty., of Boston, Mass., for the United States. Asa P. French, of Boston, Mass., for appellee Blake. Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. The facts in this case raised the question whether a prisoner might, with the consent of the Attorney General, while serving sentence imposed by a District Court of the United States, be lawfully taken on a writ of habeas corpus, directed to the master of the House of Correction who, as federal agent under a mittimus issued out of said District Court, had custody of such prisoner, into a state court in custody of such master and put to trial upon indictments there pending against him. On November 29, 1921, this question was certified to the Supreme Court under section 239 of the Judicial Code (Comp. St. § 1216). The Supreme Court answered this question in the affirmative in an opinion of March 27, 1922, Ponzi v. Fessenden et al., 257 U. S. ——, 42 Sup. Ct. 309, 66 L. Ed. ——, and by mandate dated May 12, 1922, directed this court to take further proceedings in conformity with said opinion. Pursuant thereto the decree of the District Court, dismissing the petition and denying the writ, is affirmed, with costs to the appellees.

UNITED STATES FIDELITY & GUARANTY CO. v. AMERICAN-HAWAIIAN STEAMSHIP CO. (Circuit Court of Appeals, Fourth Circuit. May 31, 1922.) No. 1957. Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, District Judge. Suit in admiralty by the American-Hawaiian Steamship Company against the United States Fidelity & Guaranty Company. Decree for libelant, and respondent appeals. Affirmed. For opinion below, see 274 Fed. 214. George W. P. Whip, of Baltimore, Md. (Lord & Whip, of Baltimore, Md., on the brief), for appellant. Charles R. Hickox, of New York City (Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, on the brief), for appellee. Before KNAPP, WOODS and WADDILL, Circuit Judges.

WOODS, Circuit Judge. The sole question in this appeal is whether American Fuel & Shipping Company actually chartered from the American-Hawaiian Steamship Company the steamship America. The contention of the former is that the transaction set out in the evidence amounted to only a general agreement for a charter, not to be binding until a formal charter was executed. The evidence was conflicting, but it affords abundant support for the finding of the District Judge that a charter was made. We can add nothing of value to the adequate and satisfactory discussion contained in the opinion of the District Judge. Affirmed.

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Transferring construction from wood-working art to metal-working art, and adding conveyor of stream of water, involves only mechanical skill.—Id.

Attaching of device for laterally adjusting support of rolls being ground does not involve invention.—Id.

⇐24 (U.S.C.C.A.Mo.) Ordinarily separation of parts is not invention.—Laclede-Christy Clay Products Co. v. City of St. Louis, 83.

⇐26(2) (U.S.C.C.A.Mo.) New combination of old elements, producing new result from new interaction, is invention.—Laclede-Christy Clay Products Co. v. City of St. Louis, 83.

⇐35 (U.S.C.C.A.N.J.) Commercial success not always indicative of invention.—Staso Laminated Slate Co. v. Stowell Mfg. Co., 107.

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⇐36 (U.S.C.C.A.N.Y.) Invention is question of fact, to be decided on evidence.—Kurtz v. Belle Hat Lining Co., 277.

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⇐91(3) (U. S. C. C. A. N. Y.) Uncorroborated testimony of inventor as to date of conception need not be rejected.—Armstrong v. De Forest Radio Telephone & Telegraph Co., 584.

⇐91(4) (D.C.) Facts *held* to show senior applicant had no right to make claim in issue.—Lindau v. Smulski, 463.

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⇐97 (U.S.C.C.A.N.Y.) Prior foreign patent does not invalidate, unless it claims same invention.—General Electric Co. v. Alexander, 852.

Foreign process patent prevents subsequent patent for product of process.—Id.

Foreign patent for inoperative process cannot defeat subsequent product patent.—Id.

⇐106(2) (D.C.) Whether public knowledge of invention prevents patent to party entitled to priority cannot be determined in interference proceedings.—Wahl v. Main, 974.

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⇐129 (U.S.C.C.A.Mass.) Licensee can assert invalidity in suit for royalties, after there has been equivalent of eviction from right to manufacture.—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 753.

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⇐191 (U.S.C.C.A.Mass.) Patentee may convey right to exclude given by patent, with his right to make article existing in him independent of patent.—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 753.

(C) Licenses and Contracts.

⇐210 (U.S.C.C.A.N.Y.) Evidence *held* not to show implied license of lamp patents by sale of bases.—General Electric Co. v. Continental Lamp Works, 846.

Sale of element does not give implied license to use combination.—Id.

⇐210 (U.S.D.C.R.I.) Defendant *held* entitled to use invention of foreman made on defendant's time.—Callahan v. Capron Co., 254.

⇐211(1) (U.S.C.C.A.Mass.) Contract *held* to convey right to make and sell.—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 753.

Grant impliedly includes that without which thing expressly granted would be useless.—Id.

⇐212(1) (U.S.C.C.A.Mass.) Evidence *held* to show eviction of licensee authorizing cancellation of royalty patent.—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 753.

⇐212(1) (U.S.C.C.A.N.Y.) Inventor can impose any terms on licensee which do not violate other laws.—General Electric Co. v. Continental Lamp Works, 846.

⇐218(1) (U.S.C.C.A.Mass.) Patentee *held* entitled to royalty on machines sold which infringed another patent.—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., 753.

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⇐226 (U.S.C.C.A.N.Y.) Substantial appropriation of function by substantially patented means is infringement.—General Electric Co. v. Alexander, 852.

⟸240 (U.S.D.C.Mich.) Improvement of patented device does not avoid infringement.—Jay v. Ireland & Matthews Mfg. Co., 166.

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⟸285 (U. S. C. C. A. N. Y.) Joining separate causes of action against partners and subsequent corporation *held* proper.—General Electric Co. v. Alexander, 852.

⟸287 (U.S.C.C.A.N.Y.) Infringing business by partnership and by corporation *held* continuing infringement.—General Electric Co. v. Alexander, 852.

⟸290 (U.S.C.C.A.N.Y.) Sole stockholder and manager of corporation may be enjoined.—General Electric Co. v. Alexander, 852.

⟸297(2) (U.S.D.C.N.J.) Showing infringement of patents sustained in other jurisdiction generally entitles patentee to preliminary injunction.—General Electric Co. v. Incandescent Products, 856.

⟸312(1) (U.S.C.C.A.Mo.) Presumed valid, and burden on plaintiff to show invalidity of defendant's patent claimed to infringe.—Fore Electrical Mfg. Co. v. St. Louis Electrical Works, 49.

⟸312(1) (U. S. C. C. A. N. Y.) Defendant has burden of proving license to use patent.—General Electric Co. v. Continental Lamp Works, 846.

⟸318(4) (U.S.D.C.Conn.) Where infringing part alone makes article marketable, infringer is liable for entire profit.—Armstrong v. Belding Bros. & Co., 895.

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881,561. Waxed candy wrappers, held void (C. C. A. Pa.) 280 F. 714.

907,770. Electric light switch, held void (C. C. A. Ill.) 280 F. 113.

932,965. Solid bifocal lens, held not infringed (C. C. A. N. Y.) 280 F. 382.

986,455. Furnace arch, claims 1 to 3, held void (C. C. A. Mo.) 280 F. 83.

1,007,146. Prepared roofing, held invalid (C. C. A. N. J.) 280 F. 107.

1,018,502. Tungsten lamp filament, held infringed (C. C. A. N. Y.) 280 F. 852.

1,054,677. Water cooler, held void (C. C. A. N. Y.) 280 F. 515.

1,112,609. Press-feeding mechanism, held valid, but not infringed (C. C. A. N. Y.) 280 F. 329.

1,113,149. Audion radio amplifier, held to disclose invention, and not anticipated; also held infringed (C. C. A. N. Y.) 280 F. 584.

1,132,273. Vacuum feed tank for automobiles, claims 9 and 14, held valid and infringed (D. C. Mich.) 280 F. 166.

1,172,344. Cushion structure, claim 3, held not infringed (C. C. A. Mich.) 280 F. 945.

1,180,159. Nitro-tungsten electric lamps, held not anticipated, and infringed (D. C. N. J.) 280 F. 856.

1,210,936. Roll-grinding machine, claims 2–6, inclusive, held not infringed (D. C. Conn.) 280 F. 415.

1,216,140. Hat lining, held to disclose invention (C. C. A. N. Y.) 280 F. 277.

1,239,249. Improvement in rectifiers of alternating electric currents, held not infringed (C. C. A. Mo.) 280 F. 49.

1,244,944. Cabinet for talking machines, held void (C. C. A. N. Y.) 280 F. 543.

1,246,081. Spring cushion or mattress, claims 6 and 7, held valid and infringed; claims 8 and 9, held void (C. C. A. Mich.) 280 F. 945.

1,264,930. Roll-grinding machine, claims 1 and 4, held invalid (D. C. Conn.) 280 F. 415.

1,304,951. Swing, held anticipated (C. C. A. Mo.) 280 F. 117.

1,307,070. Device for dissipating heat in underground conduits, held void (C. C. A. Md.) 280 F. 370.

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13,436. Glue from starch base, claims 28, 30, and 31, held limited (D. C. Wis.) 280 F. 728.

15,035. Roll-grinding machine, claims 1, 2, 4, 6–10, 12, 13, 15, 18–21 held invalid; remaining claims, excepting claim 3, held valid but not infringed (D. C. Conn.) 280 F. 415.

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⟸4(15) (U.S.C.C.A.Ind.) Charitable gift *held* to vest at once in capable trustee.—Long v. Union Trust Co., 686.

⟸7(1) (U.S.D.C.N.Y.) Provision that joint tenant should not have power to affect right of survivor *held* not restraint on transfer.—Kissam v. McElligott, 212.

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⟸8(3) (U.S.D.C.Del.) Conclusions of law, not supported by facts, will be disregarded.—Atlantic Refining Co. v. Port Lobos Petroleum Corporation, 934.

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⟸49 (U.S.D.C.N.Y.) Cause of action on quantum meruit *held* not changed to action on contract by allegations.—Dock Contractor Co. v. Niagara Falls Power Co., 122.

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⟸92 (U.S.C.C.A.S.C.) Defense of breach of warranty and counterclaim for deceit may be joined.—Murray Co. v. Morgan, 499.

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⇐155 (D.C.) Affidavit of defense, not alleging amount of depreciation and use value, in action by infant to recover payment on automobile, is insufficient.—Rice Auto Co. v. Spillman, 452.

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⇐155 (D.C.) Affidavit of defense on information and belief must allege ability to prove facts at trial.—Hutchison v. Colgate & Co., 1020.

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⇐2 (U.S.C.C.A.Mo.) Rule of Commissioner of Internal Revenue, defining when physician is in personal attendance upon patients, *held* void.—Hurwitz v. U. S., 109.

⇐9 (U.S.C.C.A.Fla.) Charge of possession of narcotics without registering must allege accused was required to register.—Swartz v. U. S., 115.

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⇐49 (U.S.C.C.A.Va.) Evidence *held* to support conviction for stealing mail matter.—Martin v. U. S., 513.

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⇐34 (U.S.D.C.Ark.) Pre-emptor of unsurveyed lands has no vested right therein.—Douglass v. Rhodes, 230.

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⇐109 (D.C.) Successful applicant is indispensable party to suit to enjoin issuance of patent.—Brady v. Fall, 1017.

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⇐285(4) (U.S.C.C.A.S.C.) Statement seller would do nothing more waives requirement of future notice of breach of warranty.—Murray Co. v. Ashley, 504.

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⇐445(5) (U.S.C.C.A.S.C.) Evidence *held* to take to the jury questions whether notice of breach was given or was waived.—Murray Co. v. Ashley, 504.

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